



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 380 OF 2013

KIPTOGOM ARAP LAGAT.....1ST PLAINTIFF

STEPHEN KIPTUI KIBOWEN.....2ND PLAINTIFF

VERSUS

RAEL JEPKORIR LAGAT.....1ST DEFENDANT

LAWRANCE KIRWA.....2ND DEFENDANT

PAUL KOSGEL.....3RD DEFENDANT

JOSHUA KIPCHOGE.....4TH DEFENDANT

RULING

The application dated 31.7.2017 filed by defendants seeks orders that the esteemed firm of M/s Tarus & Company Advocates be pleased to disqualify itself from further representation for and on behalf of the 2nd plaintiff/respondent since the said counsel for the 2nd plaintiff/respondent is a potential witness thereby creating conflict of interest. It is being alleged that the said firm executed a sale agreement between the 1st and 2nd plaintiffs on 25.10.2013 over sale of land parcel in dispute being *Nandi/Mutwot/383*. In the supporting affidavit, the 2nd defendant states that he is aware that the esteemed firm of M/s Tarus & Company Advocates executed a sale agreement between the 1st and 2nd plaintiffs/respondents herein on 25.10.2013 over sale of land parcel in dispute herein being Land Parcel No. Nandi/Mutwot/383 and the said counsel on record is a potential witness thereby creating issues of conflict of interests.

He is advised by his Advocates on record which advice he verily believes to be true and correct that it is reasonable that to expect that the said Advocate for the 2nd plaintiff would be called as a witness to testify on the validity of the said agreement which direct conflict of interests would be greatly prejudicial to him.

The application is made respectively and objectively only with the interest of justice and fairness in mind. It is in the interest of justice and fairness that this application be allowed as prayed. According to the defendant, this application is not an afterthought and is not motivated by any malice and/or ulterior motive and the same has been brought promptly in the best interest of justice to all parties concerned.

In the replying affidavit, Mr. Kiptogom Arap Lagat states that the defendants intend to delay the hearing of the case and that the land in dispute is his and that he sold the same to the 2nd defendant. The firm of Tarus and company advocate represents him in so many matters and transactions and that the said firm is the firm of his choice.

The defendant/applicant submits that by virtue of the fact that the esteemed firm of Tarus & company Advocates executed a sale agreement between the 1st and 2nd plaintiffs on 25.10.2013 over the suit parcel of land and therefore, Mr. Tarus is a potential witness and therefore issues of conflict of interest and confidentiality arise.

Tarus for the plaintiffs submits that the sale agreement between the 1st plaintiff and the 2nd defendant cannot prejudice the defendants in any way and that there is no conflict of interest in the firm of Tarus representing the plaintiffs against the defendants.

I have considered the application, replying affidavit and rival submissions, and do note that the legal basis of the defendant's application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:

‘No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he

will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.’

Construing this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit.

The court must consider the fact that the right to a legal representative or advocate of his choice is the most valued constitutional right to a litigant. In some cases, however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.

It has been held severally that there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. In this case the advocate is acting for a seller and purchaser of property who have jointly sued the defendants in the same matter, who are sons of the 1st plaintiff. The test which has been laid down in authorities applied by various courts is whether real mischief or real prejudice will in all human probability result.

The decision of O’Kubasu, JA in William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) is also instructive with regard to Rule 9 of the Advocates Act. In declining to bar an advocate from acting for some of the parties in the matter, O’Kubasu J stated at page 3 of his ruling states as follows;

‘I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.’

The Learned Judge of Appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the Delphis Bank and King Woolen Mill cases, O’Kubasu J observed at page 7 of his decision as follows:

‘The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.’

The aforesaid rule attempts to guard against conflict of interest. An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren’t compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate’s may conflict with his client’s, such as where he may be a material witness in his client’s matter.

A conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways pick up different aspects of the three main ways in which the problem can arise. To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client. This is the basis of the conflict of interest problem. The four elements of the fiduciary duty are: -

a. The duty of loyalty to the client.

b. The duty of confidentiality.

c. The duty to disclose to the client or put at the client’s disposal all information within your knowledge that is relevant in order to act in the client’s best interests.

d. The duty not to put your own or anyone else’s interests before those of the client.

Rule 9 of the Advocates (Practice Rules) basically prevents an advocate appearing as advocate in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court.

The defendants have not demonstrated clearly that Mr. Tarus is a potential witness as he is not in the list of witnesses and the agreement between the plaintiffs is not challenged by the parties in the suit. The applicants do not demonstrate how Mr. Tarus will be called as witness and on whose behalf. It is not trite law that an advocate should be disqualified in matter where he has witnessed an agreement. It must be evident that there is likely to be a conflict of interest and breach of Advocate to client confidentiality. This does not arise in this case and that there is no demonstration of any mischief likely to happen. The said advocate, Tarus has never represented the defendants and therefore there

is no legal relationship between Tarus and the defendants. The upshot of the above is that the application is dismissed with costs.

Dated, signed and delivered at Eldoret this 27th day of July, 2018.

A. OMBWAYO

JUDGE