



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 826 OF 2017**

**(Formerly Milimani HCCC No. 83 of 2011)**

**EPHRAIM WAMBU MIANO.....PLAINTIFF**

**VERSUS**

**GEORGE GITAU WAINAINA.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO NORTH.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's application dated the 4<sup>th</sup> May, 2017 brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act as well as the enabling provisions of the law. The Plaintiff prays that Ms. Mary Wanjuhi Muigai, Ms. Caroline Kemei and the firm of messrs Muigai Kemei & Associates all appearing for the 1<sup>st</sup> Defendant be barred from doing so.

The application is based on the grounds which in summary is that the suit herein arises from the sale of land parcels numbers Kajiado/ Kapatiei – North/ 4302 and 4303 respectively, which were charged to Kenya Commercial Bank that refused to release the title for Kajiado/ Kapatiei North/ 4302 to the 1<sup>st</sup> Defendant after he paid Kshs. 1, 400, 000/=. The 1<sup>st</sup> Defendant filed a suit in Machakos ELC No. 113 of 2009 (Milimani ELC 940 of 2015) against the Plaintiff, the Bank and AM Macharia Advocate who drew the Sale Agreement. In the said suit and an Appeal filed thereafter, the advocates who appeared for the Bank were Ms. Caroline Kemei and Ms. Mary Wanjuhi Muigai duly instructed by the firm of Cheptumo & Company Advocates. Ms. Mary Wanjuhi Muigai Advocate filed a witness statement on 8<sup>th</sup> May, 2013 in the HCCC No. 113 of 2009 and she is effectively a witness for the 1<sup>st</sup> Defendant. Ms. Caroline Kemei and Ms Mary Wanjuhi teamed up to form the firm of messrs Muigai, Kemei & Associates who are on record for the 1<sup>st</sup> Defendant. Further, by virtue of acting for the bank, the said Ms. Caroline Kemei and Ms Mary Wanjuhi and by extension messrs Muigai, Kemei & Associates acquired confidential information when they were still working in the firm of Cheptumo & Co. Advocates. The Plaintiff will be greatly prejudiced if the said Ms. Caroline Kemei and Ms Mary Wanjuhi and by extension messrs Muigai, Kemei & Associates are allowed to continue acting for the 1<sup>st</sup> Defendant in the proceedings herein.

The application is supported by the affidavit of the Plaintiff EPHRAIM WAMBU MIANO where he reiterates his claim above and deposes that the abovementioned anomaly was pointed out to the said messrs Muigai, Kemei & Associates but they refused and/ or neglected to withdraw from the suit.

The application is opposed by Mary Wanjuhi Mungai Advocate who filed a replying affidavit where she deposes that she is the sole partner in the firm of messrs Muigai, Kemei & Associates as Caroline Kemei joined the bench in 2012 and is a Magistrate. She explains that before registering her firm, she worked as an independent advocate/ contractor with Cheptumo and Company Advocates being paid a share of the fees for any accounts/ clients she brought to the firm. She denies being on the payroll of Cheptumo and Company Advocates and that Kenya Commercial Bank which was the firm's client was never her account. She insists the matter in Court does not include Kenya Commercial Bank and contends that she only held brief for Caroline Kemei during a mention of the matter and never conducted it. She confirms that Mr. Kamonde (deceased) was at one point acting in this matter representing the 1<sup>st</sup> Defendant, during which period he penned a statement by her where she stated that she witnessed the Plaintiff append his signature upon a transfer form. She reiterates that she was not in any way involved as an advocate in the transaction that is pertinent in this case and she will not be the 1<sup>st</sup> Defendant's witness nor the statement of Kamande used as evidence.

Both parties filed their submissions that I have considered.

**Analysis and Determination**

Upon considering the materials presented in respect of the Notice of Motion dated the 4<sup>th</sup> May, 2017 including the submissions filed herein, the only issue for determination is whether Mary Wanjuhi Mungai from the firm of messrs Muigai, Kemei & Associates should be barred for acting for the 1<sup>st</sup> Defendant herein as she is a potential witness.

The Plaintiff submitted that the firm of messrs Muigai, Kemei & Associates should be barred from acting for the 1<sup>st</sup> Defendant as she is a potential witness and hence Rule 9 of the Advocates Practice Rules should be invoked. He relied on various authorities including **Delphis Bank Ltd versus Channan Singh Chattee & 6 others (2006) eKLR; John Waithaka Chege Vs James Chege Maina & 2 others (2017) eKLR and Serve in Love Africa (Sila) Trust V David Kipsang Kipyego & 7 others (2017) eKLR** to buttress his arguments.

The 1<sup>st</sup> Defendant's advocate submitted that she is not a potential witness in this matter.

Rule 9 of the Advocates (Practice) Rules provides that: **' No advocate may appear as such before a court or tribunal in any matter in which he has reason to believe he may be required as a witness to give evidence whether verbally or affidavit; and if appearing in any matter, it may become apparent that he will be required to act as a witness and give evidence whether verbally or by declaration or by affidavit he shall not continue to appear.'**

I note the suit herein raises allegations of fraud in respect of how the suit lands were acquired by the 1<sup>st</sup> Defendant. Insofar as Ms Mungai denies undertaking any transaction relating to the dispute herein, I note she admits witnessing the Plaintiff signing a Transfer form which is an issue that will be in contention as it transferred the interest in one of the suit lands to the 1<sup>st</sup> Defendant. She further admits that the late Mr. Kamende penned off a witness statement in her name admitting witnessing the Plaintiff signing the Transfer Form. She also admits that she held brief for Ms. Kemei in a related matter during a mention. My opinion is that since she held brief and witnessed the transfer form, I have reason to believe she might be a potential witness. Since the process of acquisition of land by the 1<sup>st</sup> Defendant is an issue which has to be determined, I hold that she is indeed a potential witness and concur with the Plaintiff. I further find that the Plaintiff can be indeed prejudiced if Ms. Mary Wanjuhi Muigai continued to represent the 1<sup>st</sup> Defendant in this suit.

In relying on **Rule 9 of the Advocates (Practice) Rules** and the case of **Delphis Bank Ltd versus Channan Singh Chattee & 6 others (2006) eKLR as well as being persuaded by the case of John Waithaka Chege v James Chege Maina & 2 others (2017) eKLR**, I find the application merited and will allow it.

Costs will be in the cause.

**Dated, Signed and Delivered in Kajiado this 14<sup>th</sup> day of November 2018.**

**CHRISTINE OCHIENG**

**JUDGE**