



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 124 OF 2015**

**BEATRICE WATHANU MWANGI.....PLAINTIFF/APPLICANT**

**VERSUS**

**FAITH JEPKEMBOI BETT.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff has come to court with application dated 26<sup>th</sup> April, 2018 praying that the firm of Anassi Momanyi & Company Advocates, its partners and/or Associates be ordered to cease acting or be removed from representing the defendant.

The application is based on grounds that the firm of M/s Anassi Momanyi & Company Advocates was involved in drawing of the acknowledgement of indebtedness dated 08.03.2012 for a sum of Kenya Shillings Five Million One Hundred and Thirty Only (Kshs.5,130,000) on behalf of the plaintiff. The said acknowledgement is fraudulent having been obtained under duress, intimidation and undue influence.

It is stated that by dint of M/s Momanyi's signature being on the said acknowledgment of indebtedness makes him a potential witness likely to be called to give evidence by either party contrary to the rule of practice, professional ethics and conduct.

The application is supported by the affidavit of Beatrice Wathanu Mwangi who states that on or about the 26<sup>th</sup> of August 2013, she entered into a sale agreement with the defendant/respondent who was purchasing the whole of that parcel of land known as ELDORET MUNICIPALITY/BLOCK 12/418 measuring 0.4 hectares at a total consideration of Kenya Shillings Twelve Million Eight Hundred and Eighteen Thousand Five Hundred and Fifty-Two Decimal Fourteen Only. (Kshs.12,818.14).

The said sale agreement resulted into irregular acknowledgements of indebtedness dated 08.03.2012 which is the subject of the dispute herein. The firm of M/s Anassi Momanyi & Company Advocates was involved in the drawing of acknowledgment of indebtedness dated 08.03.2012 and witnessing the same by the fact that one of acknowledgment of indebtedness contains the signature of M/s Momanyi.

She is informed by her Advocate on record, which information she believes to be true that the firm of M/s Anassi Momanyi & Company Advocates is a potential witness likely to be called to give evidence by either party which is contrary to the rule of practice, professional ethics and conduct. That the firm of Anassi Momanyi & Company Advocate was aware of the circumstances surrounding the said acknowledgement when they undertook to represent the respondent herein.

That the said acknowledgements are fraudulent having been obtained under duress, intimidation and undue influence. The acknowledgement forms part of the list of documents of both parties hence making Mr. Momanyi a potential witness. She believes to be true that it is only fair and just that the firm be removed from the record.

Mr. Elijah Momanyi Mogona on his part in the replying affidavit states that the plaintiff does not deny executing the acknowledgment of receipt of payment dated 8.3.2012 in the firm of Anassi Momanyi and Company Advocates.

That nowhere in the pleadings does the plaintiff aver that she signed the acknowledgment on account of any duress, intimidation or undue influence from the firm of Anassi Momanyi and Company Advocates. That both the plaintiff and the defendant will seek reliance on the acknowledgment and it will be produced by consent of the parties. That in the plaintiff's list of documents, the acknowledgment dated 8.3.2012 appears therein as Item number 11.

Counsel states that the plaintiff's list of documents was filed even before the appearance and defence were filed and that the acknowledgment of indebtedness dated 8.3.2012 preceded the agreement dated 26.8.2013. The execution of the acknowledgment is not disputed, what is in issue is the alleged undue influence or duress or intimidation on the part of the defendant. That his firm of advocates cannot be a potential witness.

I have considered the application and do find that in the supporting affidavit, it is alleged that the acknowledgment of indebtedness was signed under duress.

This court finds that the acknowledgment to indebtedness though not drafted by the firm of Anassi Momanyi & Company Advocates but by Boinett & Bett Company Advocates, the same was witnessed by Mr. Momanyi on behalf of both parties.

It is claimed by the plaintiff that there were several acknowledgments of indebtedness which she was made to sign under duress coercion.

Looking at the above facts, there is a likelihood of Mr. Momanyi being called as a witness in the acknowledgement of indebtedness since the plaintiff alleges that the same was obtained under duress and coercion. Rule 9 of the Advocates (Practise) Rules which provides as follows: -

**“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 whether verbally or by declaration of 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 and non-contentious matter of fact in any matter in which he acts or appears.”**

**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 purpose of the rule is to pre-empt an advocate appearing in a case where it is apparent that the practitioner shall be required to give evidence material to the determination of the contested issues.

This court is convinced that Mr. Momanyi is a likely witness to assist to court in determining whether the acknowledgment of indebtedness was made under duress.

The upshot of the above is that the application is allowed in terms that Mr. Elijah Momanyi Mogona is hereby ordered to cease acting, and is hereby debarred from acting for the defendant due to the fact that he witnessed the acknowledgment of indebtedness dated 8<sup>th</sup> March 2012, however there are no good reasons for debarring the whole firm of M/s Anassi Momanyi & Company Advocates. I do award half costs to the plaintiff. Orders accordingly.

**Dated and delivered at Eldoret this 7<sup>th</sup> day of December, 2018.**

**A. OMBWAYO**

**JUDGE**