

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L. CASE NO. 131 OF 2014

JACKSON KIPRUTO KATAM PLAINTIFF

VERSUS

STEPHANUS PETRUS KRUGER DEFENDANT

RULING

On 19.8.2014, the plaintiff raised a preliminary objection that all pleadings filed by the firm of Nyairo & Co. Advocates be struck out of record as the said firm has no capacity to plead and appear on behalf of the defendant and that the firm of Nyairo & Co. Advocates be disqualified forthwith from acting for the defendant as they are potential witnesses by virtue of having drawn a sale agreement dated 25th January 2011.

The plaintiff submits that the pleadings drawn by Nyairo & Co. Advocates in particular the defence dated 10th July, 2014, witness statement dated 30th May 2014 and list of documents dated 10th July, 2014 by the said firm of Advocates contravenes rule 9 of the Practice Rules. The agreement dated 20th January, 2011, forming the subject of these proceedings, has been drawn by Nyairo & Co. Advocates, the potential witnesses and cannot purport to represent the defendant because of apparent conflict of interest in matters where they may be called as witnesses. The plaintiff is seeking for specific performance and issues therein can only be fully canvassed by calling all potential witnesses including the maker of the agreement. The impugned agreement is contained in both defendant's and plaintiff's list of documents dated 10th July, 2014 and 17th May, 2014 and it is prima facie that both parties intend to rely upon the same whereas the maker is the defendant's advocate on record in contravention of Rule 9 of the Advocate's Practice Rules prohibiting advocates in making representations in matters where they may be called as witnesses.

The defendant submits that the preliminary objection is misconceived and is an abuse of the process of court as it raises no point of law capable of determining the dispute and that the issues raised by the plaintiff are issues of fact that can only be raised by way of evidence through an affidavit. There is no evidence or material facts that this court can base on to make a decision as to representation being a constitutional right for a party to be represented by an advocate of his choice.

I have considered the preliminary objection which is based on Rule 9 of the Advocates Practice Rules which states that

“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 of Affidavit, and it, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration on affidavit, he shall not continue to appear.”

The proviso to this rule is that it does not prevent an advocate from giving evidence whether verbally or by declaration, or affidavit on formal or non-contentious matters of fact in any matter in which he acts or appears.

This court is of the view that the preliminary objection has not raised a pure point of law capable of disposing off this matter. The preliminary objection and the submissions are supported by facts which are

not in affidavits.

A preliminary objection, as was held in the case of **MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A. 696,**

“..... is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

It was also held in the same **MUKHISA** case (supra) that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued, may dispose of the suit.

It was necessary for the plaintiff to file an application supported by an affidavit clearly giving reasons to debar M/S Nyairo and Company Advocates from representing the defendant. The preliminary objection is dismissed with costs.

DATED AND DELIVERED AT ELDORET ON 25th OF JANUARY 2017.

ANTONY OMBWAYO

JUDGE