



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L CASE NO. 126 OF 2014

ELIZABETH CHEBUNGEI KIMAIYO.....PLAINTIFF

VERSUS

ROSELINA JEPKETR KEMEL.....1ST RESPONDENT

KIPSIROR SITTIENI KOMEN.....2ND RESPONDENT

EMILY CHELAGAT SITIENEL.....3RD RESPONDENT

JACKSON KIPRUTO NGETICH.....4TH RESPONDENT

RULING

The Plaintiff has filed this Notice of Motion dated 5.10.2015 seeking for orders that the esteemed firm of M/s Angu Kitigin & Co. Advocate be pleased to disqualify itself from further representing the defendants in this matter due to conflict of interest. The application is based on grounds that the Plaintiff prior to instructing the firm of M/s Kigen and Co. Advocates to represent her in this matter had retained the firm of Kipnyekwei & Co. Advocates to act on her behalf. That when the Plaintiff instructed the firm of Kipnyekwei & Co. Advocates Advocate, Mr. Angu Kitigin who is the proprietor of Angu Kitigin & Co. Advocates was present. That the Plaintiff is apprehensive that since Mr. Angu Kitign Advocate is privy to the Plaintiff’s Client-Advocate communication with the Plaintiff’s former Advocates that she will greatly be prejudiced. That the application is made respectfully 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

The application is supported by the affidavit of Elizabeth Chebungei Kimaiyo who states that prior to appointing the firm of Merssers Kigen & Co. Advocates, her former Advocates were the esteemed law firm of Kipnyekwei & Co. Advocates. That at the time of instructing the firm of Kipnyekwei & Co. Advocates and Mr. Angu Kitigin the proprietor Angu Kitigin & Co. Advocates was present and was privy to all my communication with the firm of Kipnyekwei & Co. Advocates regarding the matter. That she is apprehensive she shall be greatly prejudiced if Advocate Angu Kitigin continues to represent the Defendants herein in light of glaring conflict of interest between the parties herein. That she is advised by Advocates on record, which advise she verily believes to be true and correct that no Advocate should appear before any court or tribunal to any matter in which he has a reason to believe that he may be required as a witness to give evidence whether verbally or by an affidavit h is pro habited to continue appearing. That she is also apprehensive that in the circumstances, Mr. Angu Kitigin Advocate will be biased to her detriment. This application is not an afterthought and is not motivated by any malice and/or ulterior motive. That she possesses real and genuine apprehension arising from the aforesaid circumstances.

That she verily believes that circumstances, aforesaid are reasonable grounds for assuming the possibility of bias likely to produce in the minds of the public at large a reasonable doubt about fairness of the administration of justice. That she verily believes that this real doubt should be received by Mr. Angu Kitigin Advocate disqualifying himself and cease from further acting for the defendants herein in this particular matter That she swears this affidavit in support of the instant application and state that it is in the best interest of Justice that this application be allowed. That the Respondents shall not suffer any harm or loss if this application is granted.

Mr. Angu Kitigin filed a replying affidavit stating that he is an Advocate of the High Court of Kenya having conduct in this matter hence competent to swear this affidavit That he is the proprietor of Angu Kitigin and Company Advocates a sole proprietorship operating at Patel House 1st floor, Off Uganda Road, previously operating at Kaplimo House 2nd Floor Oginga Odinga Street, Eldoret .That in 2013 they co-existed with Kipnyekwei and Company Advocates at Kenindia Plaza, 3rd Floor but as independent firms only sharing a reception with each having clients and files separately. That at no time did he actively take part or instruction from the Plaintiff herein nor deputize the M/s Kipnyekwei as the counsel for the applicant. That he may have given independent legal advice on any matter that came to his attention without any vested interests or having any specific interest in its substance or form. That he cannot recall actively or passively taking is instructions in this matter on behalf of Kipnyekwei and Company Advocates to constitute conflict of interest. That he could easily recuse himself from the case had he substantially drafted the agreements or pleadings to be used in the case. That he is not privy to the parties to the agreements nor are the litigants personally known to him or at all. That his presence in the same offices with M/s Kipnyekwei and Company Advocates as separate legal entities does not make him a party to witness to the suit to solicit recusing himself. That he seeks the application be dismissed and the matter do proceed for hearing accordingly.

The position in law in respect of such disputes is stated in rule 9 of the Advocates (practice) Rules. The said rule states 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 of Affidavit, and ft, 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.

The law regarding Advocate – client relationship as stated in **Halsburys Laws of England 3rd Edition Vol. 3 paragraph 67** is as follows: - **“Duty not to disclose or misuse information. The Employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel to his client’s detriment. This duty continues after the relation of counsel and client has ceased.”**

In **King Woolen Mills Ltd vs Kaplan & Stratton Advocates (1990-1994) EA 244** a dispute arose as to the validity of security documents prepared by the Defendants, the Court of Appeal rendered itself thus: **“The fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the Advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without the client’s consent. That fiduciary relationship exists even after conclusion of the matter of which the retainer was created.”** In that case the court restrained the firm of Advocates from continuing to act against its former client.

In **Uhuru Highway Development, Ltd vs Central Bank Ltd (2002) 2 EA 654**, whilst considering an application for injunction against a firm of Advocates that had prepared security documentation that was a subject of challenge, the Court of Appeal observed at page 661 thus: - **“We are satisfied that the real mischief or real prejudice were not rightly anticipated. (sic) We have no doubt whatsoever in our minds that in the particular circumstances of this case, mainly due to the role played by Counsel in bringing about the first and second Plaintiffs to agree to sign the charge, he may consciously or**

unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will no doubt be prejudice.”

In that case, the appellants had pleaded duress against the Advocate and had indicated that the advocate was a possible witness in the proceedings. The court restrained the Advocate from continuing to appear against his former client. Though every person has a constitutional right to have legal representation of their choice under the provisions of Article 50(2)(g) of the Constitution the advocate has a duty not to disclose or misuse information availed to him by a party.

I have considered the application and do find that the applicant has not demonstrated that Mr. Angu Kitigin was privy to any communication with the firm of Kipnyekwei & Co. Advocates regarding the matter. There is no single letter annexed indicating that the firm of Angu Kitigin or Angu Kitigin himself participated in the taking of instructions. No likelihood of prejudice to be suffered by the application has been demonstrated. The likelihood of bias is alleged but not proved. I do find that the firm of Angu Kitigin and Company Advocates and Kipnyekwei & Co. Advocates are two independent firms. I do find that the applicant has not demonstrated that Angu Kitigin is likely to be called as a witness in this matter. Application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY, 2017.

A. OMBWAYO

JUDGE