



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L CASE NO. 759 OF 2012

JOHN WAITHAKA CHEGE.....PLAINTIFF

VERSUS

JAMES CHEGE MAINA1ST DEFENDANT

HARUN MWEGA MAINA.....2ND DEFENDANT

FRANCIS NJUGUNA MAINA.....3RD DEFENDANT

RULING

The plaintiff has filed the application dated 14.4.2016 praying for an order that the firm of M/s Magare & Co. Advocates, its partner and/or associations cease or be removed from representing the defendant. The application is based on grounds that the firm of M/s Magare & Company Advocates were involved in drawing of a sale agreement dated 27th February, 2012 on behalf of the Defendants/Respondents and that the said agreement and subsequent transfers are fraudulent having been obtained while this suit was subsisting and without the knowledge and consent of the Applicant. The law firm of M/s Magare & Company Advocates are potential witness likely to be called to give evidence by their party contrary to the rule of practice, professional ethics and conduct. It is only fair and just to have the said law firm be removed from the record and a neutral law firm to take up the matter.

The application is supported by the affidavit of John Waithaka Chege who states that on or about the 5th August, 2008, he entered into a sale agreement with the Defendants/Respondents where he purchased from the Defendants the whole of the land parcel known as ELDORET MUNICIPALITY BLOCK 1/28/1 at a total consideration of Kenya Shillings Nine Hundred Thousand (Kshs 900,000/= only. That on or about the 6th of July 2010, the Respondents issued him with an undertaking of transfer of land stating they have no claims whatsoever against him in respect of the said land parcel. That he filed a Complaint dated 28th September, 2011 following the Defendants forcefully taking possession of the parcel of land on or about the month of August 2011 and that on the 27th February 2012, the Defendants entered into another sale agreement with one Cyrus Gacuki Njau he purchased the said parcel of land ELDORET MUNICIPALITY BLOC 1/28/1 at a total of Kenya Shillings Four Million (Kshs.4,000,000.00) only. That he is informed by his counsel on record which information he verily believes to be true that the firm of M/s Magare & Co. Advocates was involved in drawing of the sale agreement dated 27th February, 2012 on behalf of the Defendants and that he believes to be true that firm of M/s Magare & Co. 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. The firm of M/s Magare & Company Advocates knew the existence of this suit and the circumstances surrounding it when drafting the sale agreement.

That he is further informed by his advocate on record, which information he believes to be true that the said agreement and subsequent transfers are fraudulent having been obtained without his knowledge and consent, and while this suit subsist. That he is being informed by his Advocate on record, whose information he believes to be true that the firm of Magare expressly stated they are the counsel for both parties in the agreement and it even made an undertaking to financial institution, while drafting the agreement and that it is only fair and just that the said firm be removed from the record.

The Defendant/Respondent filed a replying affidavit stating that there has never been an order of injunction dealing with the suit land.

That upon succession, the court in Eldoret HC P&A No. 4 of 1997 held as follows:

- a. That he had parcel number Eldoret Municipality Block 1/20/15 was theirs***
- b. That the said firm of M/s Magare & Co. Advocates to carry out the conveyance, see annexure marked JCM 1.***
- c. That original title be handed to the said firm.***
- d. That the Plaintiff herein has no claim.***

That they instructed the said firm to attest an agreement of sale but did not do any other conveyance. That they do not intend to call any advocates from the said firm and they do not have a list of witnesses where he is listed a witness. They have not lost confidence in his representation. That the agreement annexed as JCW 4 is not contestable. That the same does not deal with any issue raised in the suit. That he is aware of the agreement marked TMC 2 and there same must have been generated. That the signature of TMC 2 is not mine and as such it is of no relevance.

That he knows that the Plaintiff has been making all attempts to compromise the advocates acting for them and that he has been sending threats to their advocates in the succession matters. That M/s Magare & Company Advocates have been able to withstand all this threats, attempts on his life and other Shenanigans meant to remove them from record. That the said firm has been their bedrock and any attempts to remove them will severely prejudice their case.

Mr. Magare filed a replying affidavit stating that the application is in a series of threats and intimidation that the applicants has been doing since he stated handling this matter. That he has in the past threatened to kill him or even injure or expose his life to danger. That he knows that sometime in 2013 he almost knocked him down while he was near Ecobank Limited and has been sending messages to his clients advising them to leave his firm for the matter to be settled.

That the application is based on ulterior motives as it is meant to remove what he believes to be a final obstacle in dealing with the Defendants adversely. That it is in a grand scheme to make the Defendants who are his nephews fear him. That he will not testify in this matter as he is neither a witness nor a compellable one. That he carried out the transfers pursuant to a valid court order.

That the Plaintiff sought to stop the transfers but the court in Eldoret P&A 14 of 2007 repulsed him. That he has the firsthand knowledge, experience and wherewithal to defend this matter and nay other order will adversely affect eh Defendants. That the Plaintiff cannot decide who represents the Defendants.

The applicant has no locus to require that they withdraw from representing the Defendants. That it is only the Defendant who will be in a position to so request and thus have not done so. That there is no injunction in place stopping dealings on land parcel No. Eldoret Municipality Block 1/28/1. That in any case he did not witness the agreement of 5/8/2008 which is the subject matter of this suit at all. That there are no allegations for fraud in the Plaintiff hence the issue of fraudulent transfers cannot arise.

The Plaintiff submits that this application falls squarely within the ambit of rule 9 of the Advocate's

(practicing) rules which aims to have the profession uphold the highest standard of ethics. An advocate who is likely to be a witness must withdraw from representing a client in a particular case. The Plaintiff further submit that Mr. Magare is likely to be called as a witness in this matter. That the suit land was sold in 2012 when the matter was pending in court.

Mr. Magare submits that there is no intention to call any person from Magare & Co. Advocates or Magare Musundi & Co. Advocates as witnesses. Moreover that Mr. Magare has the firsthand knowledge, experience and thus, withdrawing from the defendant in the matter will adversely affect the defendant. Moreover, that there is no claim on fraud, in the plaint and that Magare & Company Advocates did not witness the agreement of 5.8.2008.

I have considered the application supporting affidavits, replying affidavit and the further affidavits, rival submissions and authorities and do find that though the firm of Magare Omusundi was not involved in the agreement entered into between the Plaintiff and the defendants on the 5.8.2008, they were involved in the drafting and certification of the agreement entered into on 27.2.2012 which is one of the documents listed in the Plaintiff's further list of documents filed on the 15.1.2016. I do find that the firm of Magare & Company Advocates acted for the defendants who were the vendors in the agreement dated 27.2.2012. From the foregoing, there is a likelihood that Mr. Magare will be called as a witness having prepared the agreement of 27/2/2012. Moreover the fact that the property was sold when the suit was pending makes it more plausible that Mr. Magare is likely to be called as a witness.

The law on removal from representing a party is very clear. Rule 9 of The Advocates (Practice) Rules provides **“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 affidavit; and if appearing in any matter it, it may become apparent that he will be required to as a witness to give evidence whether verbally or by declaration or by affidavit he shall not continue to appear”**

The application is ultimately allowed thus that the firm of M/s Magare & Co. Advocates, its partner and/or associate cease or be removed from representing the defendant. Costs to the applicant.

DATED AND DELIVERED AT ELDORET THIS 28 TH DAY OF FEBRUARY 2017.

A.OMBWAYO

JUDGE