



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L CASE NO. 21 OF 2017

SERVE IN LOVE AFRICA (SILA) TRUST.....PLAINTIFF/APPLICANT

VERSUS

DAVID KIPSANG KIPYEGO.....1ST DEFENDANT

ABRAHAM KIPTARUS KI PTOO.....2ND DEFENDANT

PATRICK KIPKOGEI KIBET.....3RD DEFENDANT

AND

AMBROSE KIPROP, DAVID CHEMOREM

MOSES KIPNGETUNY KIPKULEI,

SAMSON KIPNGETICH KIBII & ERICK KIPTUM TEIMUGE.....3RD PARTIES

RULING:

Before me is the application dated 26.1.2017 filed by the Plaintiff, seeking orders that the firm of Bundotich Korir & Co. Advocates be disallowed from representing the defendants or any party in the matter. The application is grounded on the allegation that the firm prepared the sale agreement dated 19.1.2017 and therefore it is a potential party and is involved in the fraud and or illegal sale.

The application is supported by the affidavit of David Chemorem one of the trustees of Serve in Love Africa Trust who states that the sale agreement which is the subject to his matter was drawn and witnessed by Korir advocate trading as Bundotich Korir and Company Advocates and that Mr. Korir is a potential witness and a potential defendant. The advocate knows that the trustees who presented before himself as sellers of the Plaintiffs land ceased being trustees on 5.5.2015. The firm of Bundotich by dint of professional ethics ought not to have allowed people who had ceased being trustees to transact on behalf of the Trust.

Mr. Jonah K. Korir filed a replying affidavit whose gist is that the issues before court revolve around who is the legitimate and bonafide trustees of the Plaintiff organization as such the agreement dated 19.1.2017. He states that he does understand how he will be called as a witness. He states that to the best of his knowledge the defendants are recognized trustees. The law applicable to the issues raised in the application was aptly stated in the case of Tom Kusienya & Others v Kenya Railways Corporation &

others [2013] eKLR, where Mumbi Ngugi J., thus: -

“...19. The legal basis of the petitioner’s application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:

‘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 evidence whether verbally or by declaration or 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 or non-contentious matter of fact in any matter in which he acts or appears.’

20. From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others (supra) observed as follows:

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.

21. The court noted, however, that:

‘There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result.’

22. The court referred to these authorities as comprising King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd –vs- Kaplan and Stratton Advocates (supra). In this case, in restraining Mr. Keith and any partner of the firm of Kaplan and Stratton Advocates from acting for the defendant in the matter or in any litigation arising from the loan transactions in question, the court applied the test established in England in the case of Supasave Retail Ltd vs. Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER where the court had observed that

"The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rakusen vs. Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 -1913) ALL ER Rep 813... The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself. Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act....As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated." (Emphasis added)

23. The decision of O’Kubasu, JA in William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) is also instructive with regard to Rule 9 of the Advocates Act. In declining to bar an advocate from acting for some of the parties in the matter, O’Kubasu J stated at page 3 of his ruling states as follows;

'I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.' (Emphasis added)

24. The Learned Judge of Appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the *Delphis Bank and King Woolen Mill* cases, O'Kubasu J observed at page 7 of his decision as follows:

'The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.' (Emphasis added)

25. I wholly agree with the sentiments expressed by the Honourable Judge in the above matter. Like the provisions of Section 77 of the former constitution, the words used in Article 50(2)(g) of the Constitution make it clear that the provision relates to criminal matters:

'(2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;'

26. However, I believe that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2) (a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away."

17. Concerning the same issue, in the case of *Dorothy Seyanoi Moschioni v. Andrew Stuart & another* (2014) e KLR, **Gikonyo J.**, stated:-

"[12] I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that "these advocates participated in the drawing and attestation of the Deeds in dispute"; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say " I intend to call them as witnesses". What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be "their counsel" in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be

removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

[23] In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1st Respondent by the said firm of advocates. And I so hold fully aware of the Applicant's desire to call them as witnesses- and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious."

The aforesaid rule attempts to guard against conflict of interest. An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren't compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he may be a material witness in his client's matter.

A conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways pick up different aspects of the three main ways in which the problem can arise. To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client. This is the basis of the conflict of interest problem. The four elements of the fiduciary duty are

- a. **The duty of loyalty to the client.**
- b. **The duty of confidentiality.**
- c. **The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests.**
- d. **The duty not to put your own or anyone else's interests before those of the client.**

This Courts adds that an advocate should not act where justice must not only be done but must be seen to be done. This often makes it easier to decide whether there is or is not a conflict. The public perception of the profession and the damage that might be done to that important perception if an advocate acts having a conflict of interest should be considered. There have been attempts to categorize conflicts of interest as **actual, potential or perceived**. A conflict of interest is such whether or not it actually involves a breach of the fiduciary duty of confidentiality or the duty of loyalty; there is an implied suggestion that all "perceived" conflicts of interest should lead to an advocate withdrawing which is fraught with problems

because many assertions of conflict of interest are misguided and many are made for tactical reasons and have no basis.

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. I have considered the application and the reply by Mr. Korir where he admits transacting the sale on behalf of the defendants and do find that though Mr. Korir has admitted that the dispute revolves on who is the legitimate and bonafide trustees and has also stated that to the best of his knowledge, the defendants are bonafide trustees it has not been demonstrated that he will be called to testify as a material witness as to who is the bonafide trustee. The defendants have a right that is sacrosanct to be represented by an advocate of their choice, **of Mr Jonar Korir's vigour**, that can only be taken away in exceptional circumstances thus if the same becomes prejudicial to the other parties and to enable the ends of justice being met a fact that has not been demonstrated by the plaintiffs. The application is not merited and is therefore dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 7TH DAY OF FEBRUARY 2017

A. OMBWAYO

JUDGE