



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO.69 OF 2016

[FORMERLY H.C.C.A NO.68 OF 2016]

EDWARD ONYANGO.....1ST APPELLANT

BRENDA AKWACHA.....2ND APPELLANT

VERSUS

MOHAMED ALI MOTHA.....1ST RESPONDENT

JEWO AUCTIONEERS.....2ND RESPONDENT

RULING

1. The counsel for **Mohamed Ali Motha** and **Jewo Auctioneers**, the Respondents, filed the notice to raise a preliminary objection dated 30th September 2016 against the appeal and notice of motion filed by **Edward Onyango** and **Brenda Akwacha**, the Appellants. The notice sets out the following one ground of law;

“The Appellants and the 1st Respondent are tenants and Landlord respectively and they had a tenancy agreement dated 14th May 2014 which agreement was drawn by the firm of Bruce Odeny & Co. Advocates and at that time, the said firm of Advocates was representing the interests of both the tenants and the Landlord hence the said firm of advocate should not represent either party in this suit or in any other suit in which the said agreement is in dispute.”

2. The preliminary objection came up for hearing on the 28th November 2016 when Mrs. Onyango and Mr. Odeny, learned counsel for the Respondents and Appellants respectively, tendered their oral rival submissions. The Respondents case is that Mr. Odeny advocate drew the agreement between the parties and under **Rule 9 of the Advocates (Practice) Rules**, he

should not act for either side as he is a potential witness. The counsel for the Respondents distinguished the case of **British –American Investment Company (K) Limited –V- Njomaitha Investments Limited & Another** [2014] eKLR from this case, pointing out that Mr. Odeny acted for both the Landlord and Tenants unlike in that case where the counsel had acted for only one party. She also pointed out that in the case of **Kenya Commercial Bank Ltd -V- Mukeshkumar Kantilal Patel & Another** [2015] eKLR, the parties were not in dispute as to the terms of the agreement while in the current case, the terms on the rent payable are in dispute and only the counsel who drew the agreement can confirm the position as a witness.

The Appellants counsel's position is that the agreement which is annexed does not specify for which party the counsel acted for. The learned counsel submitted that the issue of the counsel who drew the agreement not being suitable to act for one of the parties was not raised in the trial court and this being an appeal, the same should not arise. He further submitted that the contents of the agreement are not in dispute in these proceedings and there cannot be a conflict of interest as alleged. The counsel referred to the two decide case set out above filed with the Appellants list of authorities dated 10th October 2016 and asked the court to dismiss the preliminary objection.

3. The following are the issues for the courts determination;

- a) Whether the issue of the competence of the counsel on record for Appellants was raised before the trial court and if not, whether it can be raised before this court.
- b) Whether there is a likelihood of conflict of interest in having counsel who drew the agreement between the Appellants and 1st Respondent now appear for the Appellants.
- c) What orders to issue.
- d) Who pays the costs of the preliminary objection.

4. The court has after considering the submission by counsel for the Respondents and Appellants concluded as follows:

- a. That the Respondents had not filed their defence in the lower court matter and the issues of fact in the Appellants plaint are yet to be rebutted and or challenged.
- b. That a party should be at liberty to be represented by a counsel of his or her choice. That however, where it is apparent that a counsel had previously acted for the other party and is likely to be required as a witness, then such a counsel should stop appearing or stop the continue to appear for the rival party in such proceedings in compliance to **Rule 9 of the Advocates (Practices) Rules.**
- c. That the matter before this court is an appeal over the ruling of the Learned Trial Magistrate of 14th September 2016 in **Kisumu CMCC NO.183 OF 2006** and as no viva voce evidence is likely to be called, and noting that there is no indication in the pleadings filed before the trial court that Mr. Odeny advocate will be required as a witness by either of the parties, the court finds no likely conflict of interest has been established.
- d. That the issue of the suitability of Mr. Odeny advocate to appear as counsel for the appellants had not been raised in the lower court and is not a ground of appeal according to the memorandum of appeal filed herein
- e. That from the foregoing the court finds no merit in the Respondents preliminary objection and the same is rejected with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 29TH DAY OF MARCH 2017

In presence of;

Appellants Absent

Respondents Absent

Counsel M/S Okech for Odeny for Appellant

M /S Onyango for the Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/3/2017

29/3/2017

S.M. Kibunja Judge

Oyugi court Assistant

Parties absent

Mr Onyango for the Respondent

M/S Oketch for the Appellants

Court: Ruling dated and delivered in open court in presence of M/S Okech for Odeny for the Appellants and Mrs. Onyango for the Respondents.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/3/2017