



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT ELDORET
E & L CASE NO. 94 OF 2016

JACKSON KIPROTICH KIBOR.....PLAINTIFF

VERSUS

KIPRUTO ARAP LELEI.....1ST DEFENDANT
SAMUEL KIPRONO SOMOEI.....2ND DEFENDANT
TANGUAR ARAP SUGE.....3RD DEFENDANT
SEREI ARAP LEL NENGIT.....4TH DEFENDANT
CHELULE KEINO.....5TH DEFENDANT
WESLEY KIMELI SAMBAI.....6TH DEFENDANT
WILSON KIPKERING KOGO.....7TH DEFENDANT
KIPROTICH ARAP KIBIWOTT.....8TH DEFENDANT
GEDION KIPRUTO CHEMIRON.....9TH DEFENDANT
THE ATTORNEY GENERAL.....10TH DEFENDANT
ELKANA KIPLETING KIBOR.....11TH DEFENDANT
EVANS KIPKOSGEI KIBOR.....12TH DEFENDANT
EZEKIEL KIPNG'ETICH KIBOR.....13TH DEFENDANT
ERICK KIPCHUMBA KIBOR.....14TH DEFENDANT
RAYMOND KIBITOK KIBOR.....15TH DEFENDANT
KESENCHÉ "B".....16TH DEFENDANT

KESENCHÉ “A”.....17TH DEFENDANT

EDWIN KIPKOECH KIROB.....18TH DEFENDANT

THE CHIEF LAND REGISTRAR.....19TH DEFENDANT

UASIN GISHU COUNTY.....20TH DEFENDANT

RULING

Ezekiel Kipng’etich Kibor and **Raymond Kibitok Kibor** have brought an application seeking orders that the advocate Katwa Kigen t/a Katwa Kigen and Company Advocates be barred or disqualified from representing the plaintiff herein. The application is based on grounds that Advocate Katwa Kigen is a potential witness in this matter having authored a contentious affidavit produced as an exhibit by the plaintiff which affidavit purported that the plaintiff had misplaced or lost his original certificates of lease in respect of the suit land parcels L. R. No. 8300 and 8301. The issue as to whether the original certificates of lease to the suit land parcels were lost or misplaced or were voluntarily surrendered by the plaintiff to facilitate conversion into the regime of the Registered Lands Act (repealed) and sub-division and transfers in favour of the defendants is a central issue for determination by this court and that Advocate Katwa Kigen is in possession of privileged information imparted to him by the 11th – 15th and 18th defendants and may use that information against the said defendants and thus prejudice advocate-client confidentiality. According to the applicants, an advocate should not accept instructions to act for one or more clients where there is a conflict of interest between those clients and that the right to legal representation is not absolute. There is real prejudice and mischief that may be visited on the defendants by the said counsel acting for the plaintiff. The obligation of the said counsel to maintain professional confidence is at risk. In the interest of justice, this application ought to be allowed.

In the supporting affidavit, it is stated that jointly with Ezekiel Kipng’etich Kibor’s brothers, the 11th, 12th, 14th and 15th and 18th defendants engaged Mr. Katwa Kigen Advocate to advise and represent them in transactions and cases involving their family Company Chelemei Limited in which the plaintiff, themselves and their mother Naomi Kibor are directors. He represented them in various court cases including the case of Chelemei Limited Vs Barclays Bank Ltd and acted for them in a sale transaction of their Karen home. That in respect of the suit land parcels L.R. No. 8300 and 8301 in November 2005, Mr. Katwa Kigen came to their home in Chepkoiel in the company of the plaintiff and all the four houses of the plaintiff were in attendance. Mr. Katwa had been engaged by their father to write a will in their presence once they agree on his proposal to have the suit land parcels sub-divided. In the meeting, the plaintiff proposed that the suit land parcel measuring 1,500 acres be sub-divided as follows:

- a. Naomi Kibor - 700 acres (3rd house)**
- b. Eunita Kibor - 700 acres (4th house)**
- c. Mary Kibor - 100 acres (1st house)**

That in the said proposal, the plaintiff proposed that the 2nd house Josephine Kibor was also to inherit 700 acres from Kipkabus. That they rejected the proposal as the suit land parcel had already been voluntarily sub-divided and transferred to the 1st – 9th, 11th -18th defendants by the plaintiff with himself and his four siblings getting 200 acres while Raymond Kibor was given 250 acres and titles obtained in their favour way back in 1996. When they flatly rejected the proposal, the meeting collapsed and Mr. Katwa Kigen left the meeting as the intended assignment to redistribute the suit land parcel had collapsed. The plaintiff was incensed by their refusal to accede to his proposal and demand to redistribute their land parcel and briefed Mr. Katwa Kigen to prepare an affidavit claiming that the original grant had been misplaced. The said affidavit was produced as an Exhibit in court.

The plaintiff concocted the allegations that the original title was lost after they rejected his proposal to redistribute their land parcel. It was an afterthought prompted by their action of declining to have him carve out 700 acres from the suit land to settle his 4th wife Eunita Kibor whom he married in the year 2003. Mr. Katwa is likely to defend the said affidavit and thus descend into the arena of the dispute as a witness.

That it is therefore apparent that Mr. Katwa Kigen is a potential witness and is likely to be adversely mentioned by the defendants in their evidence. That Mr. Katwa Advocate is in the custody of privileged information obtained while trying to execute instructions given to him by the plaintiff and he may be tempted to descend into the arena of the dispute in a bid to assist his client and is thus likely to disclose information imparted to him and thus endanger or breach the principle of advocate-client confidentiality. At the time, Mr. Katwa came to their home in November, 2005, he was doing so in his capacity as their family lawyer and he is privy to information disclosed to him which they now fear he may prejudicially use against them.

That he is informed by his advocate Mr. Z. K. Yego which information he believes to be true that Rule 9 of the Advocates (Practice) Rules prohibits an advocate from acting in a matter where there is likelihood of him being called upon to give evidence either verbally or orally. That he is further informed that the plaintiff will not suffer any prejudice should Mr. Katwa Kigen be barred from representing him as he is already ably represented by Nyaundi Tuiyott & Company Advocates and the plaintiff's case is almost concluded. They are apprehensive that Mr. Katwa Kigen may use the confidential information imparted to him consciously, unconsciously or even inadvertently to their detriment. There is a likelihood of mischief or read prejudice against them should the plaintiff be represented by Mr. Katwa Kigen Advocate. That in the interest of justice, it is therefore fair that Mr. Katwa Kigen Advocate be barred or disqualified from representing the plaintiff.

In the replying affidavit, Mr. Katua Kigen states that the plaintiff is over 80 years old and is barely literate. He has acted for him for over 10 years and he is interested in securing his fundamental rights to choose an advocate of his choice in this regard he has right to be represented by an Advocate of his choice. That in this case, the applicants have not shown any particulars to warrant the debarment or disqualification of him as his advocate on account of being either a witness or the alleged privileged information. The 20 defendants have never been his clients. There is no retainer and/or fiduciary relationship between himself and them. They have never paid him any fees and there is no fee he is currently expecting from them. That the defendants have never passed over to him any confidential information.

The affidavit he made was an activity that is **“formal”** and **“non-contentious”** wherein, if deemed necessary, he can give evidence “verbally” or by declaration or “affidavit” in a **“matter in which he acts or appears”** as intended by Rule 9 and as was held in the case of ***Serve in Love Africa (SILA) Trust Vs David Kipsang Kipyego & 7 Others [2017] eKLR***. That he has not been listed as a witness by any of the defendants. That the cross-examination already made by all the defendants except the 10th, 19th and 20th defendants did not show any question in relation to the affidavit he made. That the purpose and object of the cross-examination is not stated. No impropriety as to his drafting of the affidavit is alleged. The affidavit does not exceed what the plaintiff/Mr. Jackson Kibor instructed him. That as admitted by the applicants/defendants, he acted for the plaintiff/respondent only. Any information he obtained was while he acted for the plaintiff not for the defendants. In fact, as explained by the defence as to 2005 family meeting the event was adversarial meaning the advocate was not being treated as a friend/advocate for the defence, but for the plaintiff against the defendants. That he otherwise acted for Chelemoi Ltd, not the defendant in unrelated case of a loan discharge. The defendant does not pretend to have ever paid him or to be obliged to pay him to crystallize existence of advocate-client relationship.

That the relationship between this case and any previous transactions and suits has not been shown so as to enable the court make an informed judgment if to bar or disqualify him as the plaintiff's advocate. This has not been availed because there doesn't exist any relationship. The type, nature and content of the alleged privileged information has not been made because no privileged information exists. That in any event, the mere fact that an advocate acted for a party, if he did, does not disqualify an advocate unless

the privileged information is identified, and the court given an opportunity to gauge its utility.

On his part, Mr. Jackson Kibor has sworn an affidavit stating that the role played by Mr. Katwa in the preparation of the affidavit was formal and non-contentious and that all questions should be addressed to Mr. Kibor. According to Mr. Kibor, the particulars of the privileged information impelling the applications are not made out as no details of the cases have been given.

Mr. Yego learned counsel for the applicant submits that protection of advocate-client communication is comprised at the doctrine of legal professional privilege and advocate-client confidentiality. That legal professional privilege is evidential privilege that protects an advocate from being compelled to disclose certain communication between the advocate and client in judicial and other proceedings. Counsel further submits that it is not in doubt that Mr. Katwa previously acted for the plaintiff and the said defendants jointly and that Katwa does not deny having represented Chelemei Limited of whom the defendants and the plaintiffs were joint directors. It is strongly submitted by Mr. Yego that having been an advocate for the defendants in the aforesaid instructions, Mr. Katwa is under a duty not to disclose information received from his client. There is real mischief and real prejudice that will be occasioned upon the defendants by the said counsel acting for the plaintiff.

Mr. Katwa Kigen argues that the plaintiff retains the right to be represented by an advocate of his choice. There must be strong reasons to take away his right which should entail a high standard of proof. According to Mr. Katwa, the applicants have not shown any particulars either to the standard of probabilities or even the lesser standard of prima facie to warrant the debarment and/or disqualification of the advocate on account of being either a witness or alleged privileged information.

On Rule 9 of the Advocates (Practice Rules), Mr. Katwa Kigen argues that the making of the affidavit was an activity that is formal and non-contentious, where the advocate can give evidence, verbally or by declaration or by affidavit.

The first issue raised by the applicants is that advocate, Katwa Kigen is a potential witness in this matter having drawn a contentious affidavit produced by the plaintiff and the plaintiff was subjected to intensive cross examination on the contentions, therefore, in the affidavit, the plaintiff purported that he lost the original certificate of lease in respect of land parcel number L. R. 8300 and 8301.

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.'

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.

On this issue, I do find that the applicants have not demonstrated that Katwa Kigen will be called to give evidence on the contentious matters in the affidavit other than the fact that the plaintiff appeared before him for purposes of taking oath on facts known by himself. Mr. Katwa Kigen is not the deponent of the affidavit but the Commissioner for oath and therefore, it is not envisaged that he will be called to give evidence even if called to give evidence the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony. On the allegation that Mr. Katwa Kigen previously acted for both plaintiff and the defendant and therefore, there is real prejudice and mischief that may be occasioned by Katwa Kigen acting for the plaintiff, I do find that there is no material evidence before court to make an informed decision that there is real prejudice

likely to occur. The privileged information relevant to this case has not been disclosed. Nothing has been given by the defendants to demonstrate that Mr. Katwa Kigen was engaged by the plaintiff to prepare a Will. *In Serve In Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others [2017] eKLR* this court held that 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. There is no evidence that Mr Katwa Kigen is trying to serve any such conflicting interests.

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. Again, the applicants have not demonstrated that Mr Katwa Kigen was instructed to act for them in the matters complained.

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.

The right of a party to be represented by an advocate of his own choice is so sacrosanct that it cannot be taken away unless it can be proved by evidence that the advocate's presence in the case will prejudice the other party. *In Delphis Bank Limited v chatthe and 6 Others (2005) 1KLR* , Justices Okubasu, Deverell and Waki found 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 relationships or where the advocate would double up as a witness. 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.”

The upshot of the above is that I do find that the application herein is not merited and the same is dismissed with no orders as to cost this being a family dispute.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF MARCH, 2017.

A. OMBWAYO

JUDGE