



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 219 OF 2016

PHOEBE NZALE KAZUNGU & ANOTHERPLAINTIFFS

=VERSUS=

PETER MBUGUA KIMANI & OTHERS.....DEFENDANTS

R U L I N G

1. On 25th August 2016, the Plaintiffs filed this suit against 3 Defendants named as Peter Mbugua Kimani, Moses Mathew Osoro and Karisa Kenga (sued as the Administrator of the estate of one Johnson Samuel Kenga).
2. At paragraph 4 of the Complaint, the Plaintiffs aver that at all material times, the three of them had respectively purchased 7, 3, and 1.5 acres of land from the late Johnson Samuel Kenga “who at that time owned all that parcel of land comprising 82 acres or thereabouts known as Plot No. 12, SR No. 2628 of land situated at Mtondia Mwenzang’ombe in Kilifi County.”
3. The Plaintiffs further aver that they have come to learn of a Judgement of this court delivered in Malindi ELC No. 132 of 2011 which Judgement grants the 1st Defendant herein 10.381 acres of the same land belonging to the late Johnson Samuel Kenga. It is the Plaintiffs’ contention that they have lived in their respective portions of the land since the year 1980 but the Defendants herein have pursuant to the aforementioned Judgment sought to evict them and dispossess them of their occupation and enjoyment of their respective portions. In the circumstances, they now pray among other things, for an injunction to restrain the defendants from trespassing upon, carrying out developments on, fencing, selling and/or in any other way dealing with their respective portions of the land.
4. The Defendants on their part contend that if the Plaintiffs purchased any portions of land within Plot No. 12 SR No. 2628 situated at Mwenzang’ombe in Kilifi and took possession as claimed, then the agreements for sale were null and void for the Land and Control Board for the area never gave its consent to the transaction. The Defendants further deny that the Plaintiffs were in possession at the time that the 1st Defendant purchased the said portion of land from the late Johnson Samuel Kenga.
5. While the 1st Defendant entered appearance in person, Ms J.K Mwarandu & Company Advocates filed a Memorandum of Appearance on 13th September 2016 and proceeded to file a Statement of Defence for the 2nd and 3rd Defendants on 29th September 2016.
6. Exactly one month after the Defence was filed, the Notice of Motion application before me, dated 28th October 2016 was filed by the Plaintiffs. The Motion, inter alia, seeks the following Orders: -

i. THAT the firm of Advocates on record M/s J.K. Mwarandu & Company Advocates be barred and/or disqualified from representing or appearing for the 2nd and 3rd Defendants/Respondents in this matter and in any other related proceedings in any manner whatsoever.

ii. THAT all pleadings drawn and filed by the firm of M/s J.K. Mwarandu & Company Advocates be hereby struck out of the Court record.

iii. THAT the file and all the records being held by the firm of M/s J.K. Mwarandu & Company Advocates on behalf of and/or belonging to David Joseph Muramba be released to the said David Joseph Muramba and/or his family.

7. The motion is supported by an Affidavit sworn by the 1st Plaintiff and is premised on the grounds inter alia, that:

i. Mr. J.K. Mwarandu was a partner in the firm of Hare Mwarandu & Company which (in the Plaintiff's words) "mutated" into Mushiri Wa Hare Advocates and now J.K. Mwarandu and Company Advocates.

ii. The firm of J.K. Mwarandu & Company had initially acted for Mr. David Joseph Muramba in a transaction touching the same subject matter with Mr. J.K. Mwarandu having personal conduct of the matter.

iii. The firm of J.K. Mwarandu & Company Advocates is privy to the information initially acquired by the firm of Hare Mwarandu & Company by virtue of the said Mr. J.K. Mwarandu having personal conduct of the matter on behalf of David Joseph Kazungu while a Partner at the said Law Firm.

iv. The Plaintiffs will be prejudiced as the said J.K. Mwarandu & Company Advocates is likely to use the information and knowledge acquired earlier to the Plaintiffs' disadvantage.

v. Having authored a demand letter to Johnson Samuel Kenga, on behalf of the 1st Plaintiff, Mr. J.K. Mwarandu Advocate is a potential witness in this suit.

8. In opposition to the Application, the 2nd and 3rd Respondents have filed a Replying Affidavit sworn on 14th November 2016 by Mr. Patrick Shujaa Wara, an Advocate of the High Court practicing with M/s J.K. Mwarandu & Company Advocates. It is the Respondents position that the firm of J.K. Mwarandu & Company Advocates has never acted for the Plaintiffs in this case or in any matter between the Plaintiffs and the defendants in respect of the same subject matter. It is further the 2nd and 3rd Respondents position that the firm of Hare Mwarandu & Company Advocates was dissolved in 1986 and it is not the same one as J.K. Mwarandu & Company Advocates.

9. The 2nd and 3rd Respondents however admit that Mr. J.K. Mwarandu Advocate at one time practiced under the firm name Hare Mwarandu & Company Advocates and indeed wrote a demand letter on behalf of the 1st Plaintiff and registered a Caveat on Plot No 12 SR No. 2628. They however deny that Mr. Mwarandu received any other information relating to the land which could be considered confidential and privileged and/or that could assist the Plaintiffs in furtherance of their case or prejudice them in whichever way.

10. I have considered the Application before me dated 28th October 2016 and the Replying Affidavit sworn by Mr. Shujaa Advocate for the Respondents. I have also considered the rival arguments contained in the written submissions filed both in support of and, in opposition to the application. From the parties' submissions, the issues for determination are only two, and these are the issues that I will determine in this application.

a. What are the Issues that a court should consider in an application of this nature? And

b. Whether the Applicants have met the test for grant of an order to disqualify the firm of J.K. Mwarandu & Company Advocates from continuing to represent the 2nd and 3rd Defendants in this matter.

11. On the first issue, it is trite that the fiduciary relationship created by the retainer between a client and an 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 that client's consent. That fiduciary relationship exists even after conclusion of the matter for which the retainer was created. In this regard, Section 134 of the Evidence Act stipulates that:

i. No advocate shall at any time be permitted, unless with his Client's consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his Client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Provided that nothing in this section shall protect from disclosure-

a. Any communication made in furtherance of any illegal purpose

b. Any fact observed by any advocate in the course of his employment as such, showing that any Crime or Fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his Client.

12. In circumstances such as in this case where there are third parties involved the duty of confidentiality bestowed upon counsel must also be weighed against the rights of a party to instruct an advocate of his choice. In *Delphis Bank Limited -vs- Chatthe & 6 others (2005) 1 KLR 766* however, the court of Appeal observed that in as much as it was a Constitutional right of a party to be represented by an advocate of his choice, that right could be put to a serious test if there was a conflict of interest, which could endanger the principle of confidentiality in an advocate/client fiduciary relationship or where an advocate could also double up as a witness.

13. As was stated by Justice E.K. Ogola in *Shalimar Ltd & 2 others vs Sadrudin Kurji & Another(2015) eKLR*, the principle upon which the court may restrain an advocate from acting against a former client is the prevention of abuse of confidence reposed in the advocate by the former client. Before such an order can be made the court must be convinced that there exists such confidence and the probability of it being abused. There is however no absolute rule that an advocate may not act in litigation against a former Client where there is no breach of the duty of confidentiality (see *Rukusen vs Ellis, Munday & Clerke (1912) 1 Ch. 831*).

14. In *Re-A firm of Solicitors* (1992) 1 All ER 353, the court considered the issues regarding when an Advocate can be restrained from acting against a former Client. It was held (Parker, LJ P 354)

i. There was no general rule that a firm of solicitors who had acted for a former Client could never thereafter act for another Client against the former Client, but a firm of solicitors would not be permitted to act for an existing client against a former client if (per Parker LJ and Sir David Croon-Johnson) a reasonable man with knowledge of the facts would reasonably anticipate that there was a danger that information gained while acting for the former client would be used against him or (per Stanghton LJ) there was some degree of likelihood of mischief, ie of the confidential information imparted by the former client being used for the benefit of the new client.

ii. (Stranghton LJ dissenting) On the facts, a reasonable man with knowledge of all the

facts.....would, still consider that if the firm was allowed to continue to act for the defendant, there would be a risk that some of the confidential information provided to the firm of solicitors when it was acting for the former Client might inadvertently be revealed to the firm's team who were to act for the defendant.

15. The facts in this particular case are rather clear. The Applicants contend that Mr. J.K. Mwarandu Advocate previously acted for the 1st Plaintiff herein by virtue of which he acquired privileged information likely to prejudice the Plaintiffs. In the course of so acting, Mr. Mwarandu who was then practicing in the name and style of Hare Mwarandu & Company Advocates authored a letter dated 13th September 1993 to the father of the 3rd defendant on the instructions of the 1st Plaintiff. It is indeed admitted by the Respondents that Mr. J.K. Mwarandu practiced as such and that he authored the letter and made efforts to place a Caveat on the land which is the subject matter of this suit.

16. The demand letter dated 13th September 1993 addressed to Johnson Samuel Kenga reads in part as follows: -

“Duly instructed by our Client -above- named we write to you as follows:

That on 7th December 1978 full particulars whereof are within your knowledge, you sold to our client a portion of seven (7) acres of plot No 12 SR No. 2628 situated at Mtondia/Mwenzango'ombe Kilifi and the said transaction was reduced into writing.

Our Client contends that he has fully developed this portion, and now demand a survey to (be)carried out for the sake of obtaining a transfer of his said portion.

Please make arrangements to obtain the Land Control Board consent to sub-divide the plot and subsequently to transfer our client's share to him. Our Client is ready and willing to co-operate until all the transactions are completed.

TAKE NOTICE that unless you comply with our client's instructions within 15 days from the date hereof, our instructions are to institute legal proceedings against you at your own costs without any further reference to you.

Signed: J.K. Mwarandu

17. Also attached to the Supporting Affidavit are two receipts issued to the 1st Plaintiff by the said firm of Hare Mwarandu & Company Advocates. The first receipt dated 13th September 1993 (the date of the demand letter) is for Kshs 1,100/ while the second one dated 27th October 1993 is for Kshs 1,500/

18. In regard to the letter and instructions received, the respondents contend in their submissions that the 2nd and 3rd respondents are not in any way mentioned in that letter. They further submit that they are not connected to it and its import and execution is not a fact in issue or a contentious matter in this case and the said letter can therefore be produced by the Plaintiffs if need be without calling the maker.

19. I think with respect that the Respondents' submissions are misleading in this material aspect. As outlined at Paragraph 2 herein above, the Plaintiffs case is that they bought various portions of land from the late Johnson Karisa Kenga. The first Plaintiff case is that they bought 7 acres of the land and in September 1993 approached J.K. Mwarandu Advocate then practicing in the name and style of Hare Mwarandu & Company Advocates to demand for a Survey to be carried out and the necessary consent of the Land Control Board to be pursued. It cannot be lost on any reasonable bystander that in their Statement of Defence, the 2nd and 3rd Defendants main bone of contention at paragraph 3 of the Defence is the fact that even if the Plaintiffs are in possession of their respective portions of land, they never obtained consent to sell from the Land Control Board.

20. In my view, (as was stated in Re-A Firm of solicitors(Supra) a reasonable man with Knowledge of all the facts regarding this transaction would be left with very little doubt that some information (even if not confidential) may have reached the respondents from the 1st Plaintiff's former Advocates.

21. Unlike in the cases cited by the Respondents, I find that Mr. J. K. Mwarandu was personally involved in handling the 1st Plaintiff's earlier claim. When Messrs Hare Mwarandu & Company Advocates was dissolved, it cannot be said that Mr. Mwarandu ceased to hold the information earlier provided to him by the 1st Plaintiff. That he is now acting in this matter for a son to the person to whom he had authored the demand letter in 1993 regarding the same subject matter would leave the 1st Plaintiff especially with a sour taste in his mouth. The fiduciary relationship between him and the 1st Plaintiff is protected in law and I think it is only fair and just that Messrs J.K. Mwarandu & Company Advocates be restrained from continuing to act for the 2nd and 3rd respondents.

22. The Respondents have raised the issue of the amendments to the Plaint in which the 2nd and 3rd Defendants have now been substituted. While that may be so, I do not think the application before me is overtaken by events. The subject matter on which Mr. J.K. Mwarandu was given instructions in 1993 remains the same.

23. I do not however think that striking out the pleadings filed by the law firm J.K. Mwarandu Advocates as requested for by the Plaintiffs would serve any useful purpose other than delaying the matter and increasing the costs to the litigants. At the same time, the Plaintiffs have not demonstrated that there were files and/or records belonging to the late David Joseph Muramba which are still being kept by J.K. Mwarandu & Company Advocates on behalf of the family. It is now about 23 years since the instructions were given and it is not realistic to expect the Advocate and/or concerned law firm to have kept those records until now. Accordingly, I grant the application only in terms of prayer 1 thereof, with costs to the Plaintiffs.

Dated, signed and delivered in Malindi this 7th day of April 2017.

J. LOLA

Judge