



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 352 OF 2016**

**YUNES BOERA NYAMWANGE.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**GEORGE NYAMWANGE.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**CHARLES B. NYAMWANGE.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**RHODA MONGINA ONDORO.....1<sup>ST</sup> DEFENDANT**

**JOHNSTONE N. O. OMBANGI.....2<sup>ND</sup> DEFENDANT**

**SAMUEL RAINI NYARUSA.....3<sup>RD</sup> DEFENDANT**

**JAMES ONGERA KEMONI.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**HELLEN ACHINGA MAKORI.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**THE LAND REGISTRAR NYAMIRA.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. On 23<sup>rd</sup> November 2016 the plaintiffs Notice of Motion dated 31<sup>st</sup> October 2016 was scheduled for hearing interpartes. On 11<sup>th</sup> November 2016 the firm of Bosire Gichana & Co. Advocates filed a memorandum of appearance for the 4<sup>th</sup> and 5<sup>th</sup> defendants. On 16<sup>th</sup> November 2016, the firm of Wacira Wambugu & Co. Advocates filed yet another memorandum of appearance for the 4<sup>th</sup> and 5<sup>th</sup> defendants. On 23<sup>rd</sup> November 2016 when the plaintiffs application was coming up for hearing, Mr. Bosire Gichana Advocate from the firm of Bosire Gichana & Co. Advocates was present in court for the 4<sup>th</sup> and 5<sup>th</sup> defendants as was Mr. Kimani Advocate from the firm of M/s Wacira Wambugu & Co. Advocates. The 4<sup>th</sup> defendant was personally present in court and he affirmed he and the 5<sup>th</sup> defendant had in fact instructed the firm of Wacira Wambugu & Co. Advocates to act for them in the matter. On that account the court ordered to be expunged from the record the Memorandum of Appearance filed by the firm of Bosire Gichana & Co. Advocates on behalf of the 4<sup>th</sup> and 5<sup>th</sup> defendants.

2. On 30<sup>th</sup> November 2016 the firm of Bosire Gichana & Co. Advocates filed a Notice of Appointment of Advocates dated 29<sup>th</sup> November 2016 indicating that they will act in the matter for the plaintiffs jointly with the firm of Kimanga & Co. Advocates. This prompted the 4<sup>th</sup> and 5<sup>th</sup> defendants to object to the

firm of Bosire Gichana & Co. Advocates appearing for the plaintiffs on the ground that there would be a conflict of interest since the 4<sup>th</sup> and 5<sup>th</sup> defendants had previously instructed the said firm to represent them in the matter.

3. The 4<sup>th</sup> and 5<sup>th</sup> defendants filed the Notice of Motion application dated 20<sup>th</sup> February 2017 on 23<sup>rd</sup> February 2017 seeking inter alia to have the firm of Bosire Gichana & Co. Advocates and in particular Mr. Gichana Kennedy Bosire, advocate restrained, barred and/or disqualified from the conduct of this suit on behalf of the plaintiffs. The application is based on the grounds set out on the face of the application and inter alia include:-

**(a) That the firm of Bosire Gichana & Co. Advocates had previously been restrained by the 4<sup>th</sup> and 5<sup>th</sup> defendants as their advocates on record.**

**(b) That there existed an advocate-client relationship between the firm of Bosire Gichana & Co. Advocates and the 4<sup>th</sup> and 5<sup>th</sup> defendants.**

**(c) That there is a real possibility that the firm of Bosire Gichana & Co. Advocates intends to use confidential information and documents in their possession acquired during the conduct of this matter and which would gravely prejudice the 4<sup>th</sup> and 5<sup>th</sup> defendants defence in this suit.**

**(d) That the said information is held in confidence and the 4<sup>th</sup> and 5<sup>th</sup> defendants have not consented at all to any disclosure whatsoever in their capacity as former clients of Bosire Gichana & Co. Advocates and as the 4<sup>th</sup> and 5<sup>th</sup> defendants herein.**

**(e) That there is a real likelihood of conflict of interest as the firm of Bosire Gichana & Co. Advocates have a continuing duty to preserve the confidentiality of information and/or any informative documents imparted and/or deposited during the subsistence of the advocate-client relationship even after the said relationship was terminated.**

4. The 4<sup>th</sup> defendant filed a supporting affidavit sworn on 20<sup>th</sup> February 2017 in support of the application and depones that he and the 5<sup>th</sup> defendant retained the firm of Bosire Gichana & Co. Advocates to act for them in the instant matter and paid the advocates attendance fees of kshs. 5,000/= on 6<sup>th</sup> November 2016 as per receipt annexed as “JOK1”. The 4<sup>th</sup> defendant states the advocate Gichana Kennedy Bosire prior to the court attendance on 23<sup>rd</sup> November 2016 failed to keep them abreast of and updated as regards the matter inspite of repeated calls to him which went unanswered necessitating the 4<sup>th</sup> and 5<sup>th</sup> defendants to instruct the current advocates on record for the said defendants. The applicants aver that the firm had a continuing duty not to utilize any information furnished in confidence by the applicants to their prejudice. The applicants state that the said firm of Bosire Gichana & Co. Advocates has accepted instructions to act for the plaintiffs and has filed a notice of appointment of advocate “JOK2” and avers that that constitutes a breach of confidentiality and is likely to result in a conflict of interest on the part of the said firm which the court ought not to allow. The applicants pray that the firm of Bosire Gichana & Co. Advocates should be barred and disqualified from acting for the plaintiffs in this matter as they are conflicted having initially been retained by the applicants in the same matter.

5. Kennedy Bosire Gichana advocate filed a replying affidavit sworn on 15<sup>th</sup> March 2017 in opposition to the applicants’ application. He stated that the 4<sup>th</sup> defendant on 6<sup>th</sup> November 2016 called at his office and that he had with him the original summons and the documents filed together with plaint and intended to instruct him. The 4<sup>th</sup> defendant however did not have the documents that would have enabled the firm to prepare the replying affidavit and defence and it was mutually agreed between the advocate and the 4<sup>th</sup> defendant that the 4<sup>th</sup> defendant would furnish the same to the advocate later. However, following a subsequent telephone discussion with the 4<sup>th</sup> defendant, the advocate states he agreed he would collect the document from the 4<sup>th</sup> defendant on 8<sup>th</sup> November 2016 in Nairobi as he had a matter in the Court of

Appeal in Nairobi which he was to attend then. The advocate states he did not owing to his tight schedule manage to meet the defendant in Nairobi as agreed. The advocate states under paragraph 8 of the replying affidavit that as he did not have any documents to enable him to prepare a replying affidavit and the response and the 4<sup>th</sup> defendant had not communicated to the firm, he decided to file a Memorandum of Appearance so as to have locus to appear in court on 23<sup>rd</sup> November 2016.

6. The advocate states he appeared in court on 23<sup>rd</sup> November 2016 and the 4<sup>th</sup> defendant was also in court whereat the 4<sup>th</sup> defendant confirmed that he and the 5<sup>th</sup> defendant had instructed the firm of M/s Wacira Wambugu & Co. Advocates to represent them resulting in the Memorandum of Appearance and grounds of objection filed by M/s Bosire Gichana & Co. Advocates being expunged from the record. The advocate states that after the court attendance on 23<sup>rd</sup> November 2016 the plaintiffs approached him and requested him to appear together with the firm of M/s Kimanga & Co. Advocates for them. The advocate states he contacted the 4<sup>th</sup> defendant on his cell phone and informed him about the request by the plaintiffs and the 4<sup>th</sup> defendant indicated he had no objection to his acting for the plaintiffs in the matter. The advocate avers that he had no information from the 4<sup>th</sup> and 5<sup>th</sup> defendants which would lead to a position of prejudice to the said defendants if he was to act for the plaintiffs in the matter.

7. The court directed the application to be argued by way of written submissions. The applicants filed their submissions on 21<sup>st</sup> April 2017 while the respondents had filed theirs a day earlier on 20<sup>th</sup> April 2017.

8. I have reviewed and considered the application together with the affidavit sworn in support and in opposition together with the submissions and the issues for the court to determine is whether on the basis of the material placed before the court the applicants have demonstrated that there is potential likelihood of conflict of interest and/or any real or perceived likelihood of the applicants suffering any prejudice in the event Mr. Bosire Kennedy Gichana advocate is allowed to continue to represent the plaintiffs in this suit.

9. Following my review of the applicants application and the response thereto by Mr. Bosire Kennedy Gichana, it is my understanding that the applicants object to Mr. Bosire's representation of the plaintiffs in this matter on the basis that they had earlier instructed him to represent them in the same matter and it is in that regard they paid a fee of kshs. 5,000/= and the firm proceeded to file a Memorandum of Appearance. For his part Mr. Bosire counters that the instructions from the applicants were never crystallized and it is for that reason he never filed a response to the plaintiffs application. Thus it is the advocates contention that though it was the applicants' intention to instruct him to represent them in the suit, that was never actualized and therefore there can be no basis for him to be barred and/or disqualified from representing the plaintiffs in the suit.

10. The applicants have submitted that they retained the services of the firm of Bosire Gichana & Co. Advocates and paid a fee of kshs. 5,000/= thereby establishing an advocate-client relationship and henceforth a fiduciary relationship existed whereby the said firm was obligated to maintain confidentiality of information acquired from the applicants as their clients during the subsistence of the advocate-client relationship and even after the relationship ceased to exist. The applicants in support of their submissions rely on the case of **King Woolen Mills –vs- Kaplan & Strathon Advocates CACA No. 55 of 1993** where the Court of Appeal stated thus:-

**“The fiduciary relationship created by the retainer between client and 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 the client’s consent. The fiduciary relationship exists even after the matter for which the retainer was created.”**

11. **Omollo, J.** cited the above passage with approval in the case of **Sharuq Amin –vs- Mahendra B. Pancholi –vs- Pravin Pancholi [2016] eKLR** where the defendants had objected to the firm of Gikandi & Co. Advocates on the basis that Mr. Gikandi Ngibuini Advocate of the said firm had acted for the 1<sup>st</sup> defendant in a previous suit involving the same subject matter. The judge in the case held that the

advocate may use information he acquired while acting for the 1<sup>st</sup> defendant in the previous suit to the prejudice of the defendants in the case and to the due advantage of the plaintiff. The judge allowed the application for the disqualification of the advocate.

12. An application for the disqualification of an advocate from acting for a particular client must be evaluated on the principle that a party is entitled to be represented by an advocate of his choice. Such an application ought to be weighted on the potential and/or probability of prejudice to the applicant on account of the advocate sought to be disqualified using such privileged and/or confidential information as may have come into his possession whilst acting for the applicant. I do not suppose there can be any firm and general rule of application and thus each matter must be evaluated on the basis of its own peculiar facts and circumstances with the test being whether on the facts and circumstances a situation of conflict of interest that may result in prejudice to the applicant arises.

13. In the case of **Kamahuha Limited –vs- Winnie Njeri Kariuki & Another [2016] eKLR** this court sitting in Nairobi while considering an application where it was sought to disqualify an advocate on the basis that he had acted for both parties in a sale transaction that generated the dispute the subject of the suit stated thus:-

**“In the present case, I am not satisfied the applicant has demonstrated the advocate is placed in a situation where conflict of interest could arise. He has not shown that the advocate personally handled the transaction and/or that the advocate had any confidential information that could be used to the applicant’s prejudice or detriment. I see no evidence or material that could lead me to hold a situation of conflict of interest arises.....**

**I see no basis of finding a situation of conflict of interest exists and I accordingly decline to grant the application by the 2<sup>nd</sup> defendant which I find to be devoid of any merit.”**

14. In the case of **Charles Gitonga Kariuki –vs- Akuisi Farmers Co. Ltd [2007] eKLR Kimaru, J.** while considering a preliminary objection where the defendant sought the disqualification of the plaintiffs’ advocate from acting observed thus:-

**“It is trite law that an advocate cannot act for and against a client in a suit or in subsequent suits where he could utilize the information that he acquired in the cause of his work as an advocate to the detriment of that client. In Uhuru Highway Development Ltd –vs- Central Bank of Kenya [2002] 2 E. A 654 at pg 661, the Court of Appeal held that an advocate would not be allowed to act against a client where he could consciously or unconsciously or even inadvertently use the confidential information acquired when he acted for such a client to his detriment. The court held, that where it was established that such a client would suffer prejudice then the court would have no alternative but to order that such an advocate ceases to act for the opposing party. An applicant who is seeking the disqualification of an advocate from acting for the opposing party in the circumstances contemplated above, must establish the existence of such advocate relationship that could lead to such an advocate to be in possession of confidential information which he could use to the detriment of the client seeking the disqualification of an advocate.”**

15. In the present case the 4<sup>th</sup> defendant on 6<sup>th</sup> November 2016 went to the office of Bosire Gichana & Co. Advocates with the intention of instructing Mr. Bosire Gichana advocate to act for him together with the 5<sup>th</sup> defendant. According to the advocate, the 4<sup>th</sup> defendant had carried with him the documents served upon him by the plaintiff relating to the suit. Although the 4<sup>th</sup> defendant paid a deposit of kshs. 5,000/= as fees to the firm there is no doubt the 4<sup>th</sup> and 5<sup>th</sup> defendants were yet to fully instruct the advocate to enable him to file a response to the plaintiffs application and suit. Apart from availing to the advocate the suit papers as filed by the plaintiffs, the 4<sup>th</sup> defendant does not state that he furnished the advocate with any additional information. For instance the 4<sup>th</sup> defendant does not allege that the advocate took a statement from him in response to the allegations contained in the plaint and the application. According to the advocate further instructions were to be furnished by the 4<sup>th</sup> defendant at a meeting they

had scheduled at Nairobi on 8<sup>th</sup> November 2016 when the 4<sup>th</sup> defendant would further have availed to the advocate the necessary documents to facilitate the filing of the response. The meeting did not take place and evidence from both the 4<sup>th</sup> defendant and the advocate as per their affidavits reveals that they in fact never got to speak on phone and consequently it cannot be said that the 4<sup>th</sup> defendant passed any additional information to the advocate other than what is contained in the plaint, the application and affidavit in support of the application as served by the plaintiff. In the premises, I am not persuaded that a client-advocate relationship between the 4<sup>th</sup> defendant and Bosire Gichana advocate was established where privileged and/or confidential information was passed to the advocate. There was no opportunity where such information could have been passed.

16. It is my view that an advocate-client relationship between the applicants and Bosire Gichana Advocate was never actualized as the advocate was yet to receive instructions. The applicants instructed their current advocates on record almost immediately who proceeded to file a Memorandum of Appearance and a response to the plaintiffs' application before the scheduled date of the plaintiffs application on 23<sup>rd</sup> November 2016. The mere fact that the applicants had contacted the firm of Bosire Gichana & Co. Advocates with a view to instructing them to act for them without proof that the applicants had passed information to them to enable them to act in my view is not sufficient and does not meet the threshold to call for disqualification of Mr. Bosire Gichana advocate from acting for the plaintiffs. An advocate cannot be barred from representing a party on flimsy grounds and/or on some unsubstantiated grounds. The applicants have failed to demonstrate that they passed to Mr. Bosire Gichana advocate any information on the subject matter which the advocate could use to their prejudice and/or detriment and for the benefit of the plaintiffs.

17. For the above reasons, I am not satisfied the applicants' application dated 20<sup>th</sup> February 2017 has any merit and I accordingly order the same dismissed but make no order for costs.

18. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 30<sup>th</sup> day of June, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs/respondents

Mr. Kimani for the 4<sup>th</sup> and 5<sup>th</sup> defendants/applicants

Milcent court assistant

**J. M. MUTUNGI**

**JUDGE**