REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 247 OF 2016

JAMES RWENYO NYAMACHE…….....……PLAINTIFF

VERSUS

JOSEPH BIRUNDU MOGENDI …….....……..1ST DEFENDANT

IRENE BONARERI MANYIBE …….....……....2ND DEFENDANT

AND

JANE KWAMBOKA JAMES…1ST INTENDED INTERESTED PARTY

MICAH LEWIS JAMES ……...2ND INTENDED INTERESTED PARTY

R U L I N G

1. The plaintiff initiated the instant suit vide a plaint dated 17th August 2016 against the 1st and 2nd defendants. The defendants upon being served with summons instructed the firm of Nyachae & Ashitiva Advocates who filed a Memorandum of Appearance and a defence and counterclaim on 23rd September 2016. The plaintiff filed a reply to defence and defence to counterclaim on 3rd October 2016 and the defendants reply to defence to counterclaim was filed on 11th October 2016.

2. On 17th November 2016 the intended interested parties, Jane Kwamboka James and Michael Lewis James, filed a Notice of Motion apparently dated 18th November 2016 seeking leave of the court to be joined as interested parties in the suit. The 1st and 2nd defendants on 20th December 2016 filed grounds of opposition to the joinder of the intended interested parties as parties to the suit inter alia on the grounds that the application by the intended interested parties was incurably incompetent and defective and further that the intended parties have no interest in the suit property and are not necessary parties to enable the issues in the suit to be effectually and completely adjudicated by the court. The joinder application was fixed for hearing on 6th February 2017 and on the date, the advocate for the intended interested parties brought to the court's attention the fact that he had on the same date filed a Notice of Preliminary Objection and Sought directions on the disposal of the preliminary objection.

3. The court directed that the preliminary objection by the intended interested parties be heard first and further directed that the preliminary objection be argued by way of written submissions. The preliminary objection dated 6th February 2017 was in the following terms:-

1. That the representation of the defendants/respondents is tasteless in this suit.

2. The advocates representing the respondents/defendants herein are key witnesses for the interested parties and the plaintiff/respondent in this suit.

3. The defendants/respondents grounds of opposition and statement of defence stand to be dismissed with costs.

4. The applicants submissions were filed on 24th February 2017 and the thrust of the submission is that the firm of Nyachae & Ashitiva Advocates drew the agreement for sale that is in contention in the suit and one Mbarak Ogaro Nyanchoga advocate of the said firm attested the agreement of the vendor and the purchaser and therefore would be a potential witness at the trial. The applicants rely on the case of **Kisya Investments Ltd & Another –vs- Kenya Finance Corporation Ltd & Others Nairobi HCC No. 3504 of 1993 [unreported]** where **Ringera, J.** (as he then was) stated that a party's advocate lacked the competence to depone to evidentiary facts at any stage of the proceedings as by doing so he virtually becomes a witness for the party and the other party would be entitled to seek to cross examine the advocate on his depositions. The judge stated:-

"By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case."

5. The defendants/respondents submitted that the intended interested parties having not as yet been admitted as parties in the suit cannot properly challenge the representation of the defendants by the firm of Nyachae & Ashitiva Advocates and further that the representation of the defendants cannot be opposed and/or raised by way of a preliminary objection.

6. The application by the intended interested parties to be enjoined as parties in the instant suit is still pending hearing and has not been determined. The intended interested parties are yet to become parties in the suit and hence they have no capacity to file any application other than an application to be enjoined or prosecute any application and/or take any part in the proceedings until they have been admitted as parties in the suit. Order 1 Rule 10 of the Civil Procedure Rules under which a party may be substituted and/or added in a pending suit envisages that the substitution and/or addition of a party is made with the leave and/or order of the court. In the instant case the court has not granted leave and/or ordered the enjoinment of the applicants as interested parties.

7. Mabeya, J. considered a similar issue as in the instant case in the case of **Sammy M. Makove**, **Commissioner of Insurance & Another –vs- Kiragu Holdings Ltd [2013] eKLR** and he succinctly stated thus:-

"Though appearing as an interested party, is the application by the 1st interested party competent in the absence of any leave to join the proceedings" I note from Order 1 of the Civil Procedure Rules that under Rule 10 thereof, a party can join or be joined in any proceedings at any stage of such proceedings. However, a closer look at the rule shows that an order of the court is required for such joinder. A court must be convinced either by way of an application or on its own motion that a party is necessary before making an order of joinder. It is only after a party has been joined in a proceeding that it can purport to participate and seek relief in such a proceeding. There is no dispute that the 1st interested party did not seek leave to be enjoined in these proceedings. No order of joinder was ever made. To that extent the 1st interested party is a stranger to these proceedings. It cannot properly agitate any cause before this court. Whilst I appreciate that the 1st interested party has a serious legal standing in this matter having raised very serious issues of law and fact, I am afraid it did not approach the court in accordance with the law. A party who approaches a court of law through a window or backdoor cannot expect to be entertained howsoever serious his interest may be. In this case there having been no leave sought and/or granted, the

1st interested party's application is incompetent."

8. Even if the interested parties had formally been enjoined in the suit, my view is, that the preliminary objection taken would have been unsuccessful. The preliminary objection was not on pure points of law and did not meet the criteria of what constitutes a preliminary objection as articulated in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] E.A 696** where Law, J. A stated thus:-

> **"So far as I am aware, a preliminary objection consists of a point of law which is pleaded, or which if argued as a preliminary point may dispose of the suit."**

In the same case **Sir Charles Newbold, P.** was even more emphatic and stated thus:-

> **"A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

9. The intended interested parties preliminary objection in my view does not pass the test of what constitutes a preliminary objection. No point of law is raised and/or discernable. The applicants have merely raised issues of fact which they claim constitute a basis to have the counsel appearing for the defendants disqualified from acting for the defendants in the suit. The manner in which the objection is taken precludes the defendants and/or the counsel who is sought to be barred from representing the defendants from responding to the allegations factually either by way of affidavit or otherwise. The appropriate route for the intended interested parties would have been to await their formal enjoinment to the proceedings, if at all, and then make a formal application to have the said advocates disqualified from representing the defendants.

10. See the case of **Samuel Waweru –vs- Geoffrey Muhoro Mwangi [2014] eKLR** and **National Bank of Kenya Ltd –vs- Peter Kipkoech Korat & Another [2005] eKLR** where the courts have held that it would be inappropriate to raise issues regarding conflict of interest as relates to the disqualification of counsel to act for a party by way of a preliminary objection. Such are issues that would require to be interrogated by the court to make a determination whether or not a situation of conflict of interest arises to justify the disqualification of counsel. It is not a pure point of law and is a finding to be made after evaluating factual evidence and attendant circumstances.

11. I accordingly find no merit in the preliminary objection taken by the intended interested parties. I dismiss the same with costs to the defendants.

Ruling dated, signed and **delivered** at **Kisii** this **21st day** of **July, 2017**.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Godia for the 1st and 2nd defendants

N/A for the 1st and 2nd intended interested parties

Ruth court assistant

J. M. MUTUNGI

JUDGE