



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 22 OF 2012

SHARUQ AMIN SOKWALA.....PLAINTIFF/
RESPONDENT

-versus-

MAHENDRA BHANUPRASAD PANCHOLI.....1ST
DEFENDANT/APPLICANT

PRAVAN PANCHOLI 2ND
DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion dated 20th September 2012 and filed on 21st September 2012, the Defendants seek an order that the firm of **Gikandi & Company Advocates** and in particular **Gikandi Ngibuini Advocate** be restrained and/or barred from the conduct of this suit on behalf of the Plaintiff.
2. The Application is supported by the Affidavit of MAHENDRA BHANUPRASAD PANCHOLI sworn on 20th September 2012. In a nutshell, the Defendants contend that the firm of Gikandi & Company Advocates represented the 1st Defendant in an earlier suit being **Mombasa High Court Civil Suit No. 429 of 2010 (OS): Ismail Wachira Njeru and 4 Others vs. Mehendra Bhanuprasad Pancholi** in which the 1st Defendant had been sued for adverse possession in relation to the same land **Subdivision No. 392/II/Mainland North** the subject matter of this suit. That there is a possibility that the said firm may use information acquired during the conduct of the previous proceedings to the prejudice of the 1st or 2nd Defendant.
3. The Defendants further contend that there is a conflict of interest if the said firm of Gikandi & Company Advocates is allowed to continue acting for the Plaintiff in this suit that touches on the same subject matter, against the 1st Defendant who is a former client.
4. In response to the Application, MR. GIKANDI NGIBUINI, the Plaintiff's learned advocate, on 18th October 2012, filed an Affidavit sworn by him on the same day. The advocate admits that he acted for the 1st Defendant in HCCC No. 429 of 2012 (OS). He deposes that his instructing client in the said suit was the Plaintiff who paid his fees and made all the follow-ups of the case.
5. Mr. Gikandi stated that he has practised as an advocate for 26 years during which period he has maintained high level of professionalism and held in high esteem the principle of advocate-client confidentiality and privilege. He also stated that as an officer of this court, he has no other interest in the case apart from assisting the court to make a fair and just determination of the rights of the parties.
6. The learned counsel further stated that the Defendants cannot be heard to complain about his firm representing the Plaintiff because he is comfortable with being represented by the same advocates

- who represented the squatters who had sued him in HCCC no. 429 of 2010 (OS).
7. On 10th March 2015, the court ordered that the Application be disposed of by way of written submissions. The Defendants filed their written submissions on 27th March 2015 while the Plaintiff did so on 14th May 2015.
 8. The Defendants submitted that the question of whether there is a conflict of interest is a question of fact to be determined by the court. They cited **Rule 8** of the Advocates' Practice Rules to submit that advocates should not appear in matters where they are likely to be called as witnesses. The Defendants further submitted that while every individual has a constitutional right to legal representation, certain restrictions can be imposed where there would be a miscarriage of justice. The Defendants, in that regard, relied on the case of **JOSEPHINE JEROTICH CHEROP vs. JOHN CHERUIYOT SIRON & 2 OTHERS [2013] eKLR** where the High Court sitting in Kitale (E. Obaga, J.) held that:

“I am alive to the fact that a party has a constitutional right to be represented by an advocate of his/her choice. This right is however subject to accepted practices and norms. In the case of advocates, there are rules guiding the conduct of advocates when it comes to certain matters or situations...”

9. It was the Defendants' case that where a court is satisfied that real prejudice or real mischief will be anticipated, the court should bar the person who causes the mischief to occur from conduct of the proceedings. They submitted that where an advocate by acting for one party would cause real prejudice or real mischief to occur, he should be barred from having conduct in those proceedings. That having the firm of Gikandi & Company Advocates on record will cause real mischief and prejudice in this matter.
10. While relying on **section 2** of the Advocates Act, the Defendants submitted that there existed an advocate-client relationship between the 1st Defendant and the firm of Gikandi & Company Advocates. That the firm of Gikandi & Company Advocates have a fiduciary duty to the 1st Defendant which applies even after the matter the advocate was handling for the client is finalised. The Defendants relied on the case of **KING WOOLEN MILLS vs. KAPLAN & STRATTON ADVOCATES, NAIROBI CIVIL APPEAL NO. 55 OF 1993** where the Court of Appeal (Cockar, Muli & Akiwumi, JJ.A) held that:

“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 conclusion of the matter for which the retainer was created...”

The corollary to this cardinal principle is that the advocate having so acted for two or more clients should be wary to act for one client against the other client or clients in a subsequent action or litigation concerning the original transaction or the subject matter for which he acted for the clients as their common advocate. The reason for this is not farfetched. The information or knowledge so acquired and which is confidential by reason of the fiduciary relationship between the opponent client and the common advocates will place the other client or clients at a disadvantage occasioning prejudice if that knowledge or information is used against them by the common advocate in a subsequent litigation arising from the original transaction or subject matter for which he acted for the clients as their common advocate.”

11. The Defendants submitted that by virtue of the fiduciary duty that Mr. Gikandi Advocate owes the 1st Defendant, he has a duty not to act against his client, or divulge any information that was given to him during his conduct of the previous matters. Further, that there is a real chance that Mr. Gikandi Advocate could be a potential witness in these proceedings, which would mean that he would be giving evidence against his former client, which directly affect the fair hearing of this case.
12. The Plaintiff on his part submitted that the cause of action arising from the previous suit is

- substantially different from the cause of action herein despite there being the same subject matter. That the issue in this matter is not a battle of rightful ownership as between the Plaintiff and the 1st Defendant but a claim for a share that arose from constructive trust between the Plaintiff and the Defendant. That it is not a question of whether the 1st Defendant is the rightful owner of the suit property as the Plaintiff is not disputing that the 1st Defendant is the rightful owner.
13. The Plaintiff further submitted that the 1st Defendant has not availed any material to demonstrate that while Gikandi & Company Advocates were acting for him, he discussed any confidential matter relating to the issue of ownership of the suit property with the said firm, save that the 1st Defendant clearly indicated to the Plaintiff in the presence of Gikandi Advocate that in consideration of the Plaintiff investing his resources on the issue of removal of the squatters, the Plaintiff would be entitled to 50% share of the property.
 14. It is the Plaintiff's contention that his advocate has no conflict of interest as he has never acted for the Defendants on a claim arising from breach of contract in connection with the suit property. Further, that the advocate who represented the 1st Defendant is obliged to follow the provisions of **Section 134** of the Evidence Act which prohibits an advocate from disclosing confidential information unless the client waves the right.
 15. The Plaintiff submitted that, just as the Defendants, he has a right to freely choose who he prefers as his advocate as per **Article 50 (2) (g)** of the Constitution. The Plaintiff further submitted that the 1st Defendant is a former client of the firm of Gikandi & Company Advocates. That the Plaintiff was neither an existing client of the firm of Gikandi & Company Advocates so as creating an estoppel as against the firm from acting for the Plaintiff. Further that the Plaintiff was not enjoined as a Plaintiff nor as an interested party to the previous suit.
 16. The Plaintiff reiterated that his advocate, Mr. Gikandi, has never acted for the Defendants in a claim of breach of contract particularly in relation to the subject matter and against the Plaintiff and has never gained information that may prejudice the Defendants. That had it been so, then a conflict of interest would definitely arise.
 17. The claim in this suit as contained in the plaint includes inter alia; **“(a) A declaration that the Plaintiff is entitled to 50% of the current open market value of the suit property.”** The basis of this claim is *“an arrangement”* or contract entered into during the subsistence of HCCC no 429 of 2010 (O.S) between the 1st Defendant and the current plaintiff. This is revealed by paragraphs 6-10 of the plaint. The Plaintiff's advocate on record was aware of the terms of this arrangement.
 18. The plaintiff in their own submissions admit that the 1st defendant told the plaintiff in the presence of Mr Gikandi advocate that in the plaintiff investing his resources in removing his resources would be entitled to 50% share of the property. This statement itself is the core of this dispute and it would be necessary for Mr Gikandi to be called as a witness. Mr Gikandi appearing in the matter for the plaintiff thus is prejudicial to the 1st defendant.
 19. Further in my view and I so hold that although the firm of Gikandi & Co advocates did not represent the current Plaintiff as he was not made a party in HCC No 429 of 2010 but the said firm represented the 1st defendant and in the course of those proceedings became aware of some vital information which is the core of the claim before Court now. Consequently, there would be a direct breach of fiduciary duty owed by the Respondent especially as against the 1st Defendant if they are allowed to continue acting for the Plaintiff. The fact that the plaintiff is the one who paid the firm of Gikandi legal fees does not take away the advocate – client relationship between them and 1st defendant.
 20. It is my finding that the defendants' fears are thus not farfetched as the information held by the current Plaintiff's advocate may be used to his detriment given that ours is an adversarial system during the trial of this case by giving the Plaintiff undue advantage. Therefore, I find merit in the motion dated and allow it with an order that each party bears their costs of the application.

Ruling dated and delivered at Mombasa this 11th day of March 2016

A. OMOLLO

JUDGE

