

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 65 OF 2015

ANNA JEBWAMBOK ROTICH.....PLAINTIFF

VERSUS

JOHN K. TOROITICH.....1ST DEFENDANT

KIBIWOTT ARAP ROTICH.....2ND DEFENDANT

RULING

On the 23.4.2015, the plaintiff raised a preliminary objection that the firm of M/s Chemwok & Company Advocates who are on record for both defendants is the same firm that drew up and filed the alleged sale agreement dated 4.4.2014 concerning the disputed parcel of land namely ***Moi's Bridge/Ziwa Block 10/(Lemoru)/134*** between the two defendants. The gist of the preliminary objection is that due to the above facts, this creates a conflict of interest contrary to Rule 9 of the Advocates (Practice) Rules, Cap. 16, Laws of Kenya on the said firm since by drawing up the alleged sale agreement, the said firm is privy to information on the disputed parcel of land in question and in essence to a potential witness.

I have considered the preliminary objection and the rival submissions and do find that the materials placed before me are not sufficient to enable the court determine whether there is a likelihood of the defendants' counsel being called as a witness. The court finds that the application of this nature should be brought by way of formal application supported by affidavits. The issue raised cannot be raised as a preliminary objection as it is not a general rule that an advocate cannot act for a party in a matter where he drew up and filed a sale agreement concerning the disputed parcel of land and where by drawing up the sale agreement, the said firm was privy to information on the disputed parcel of land and in essence a potential witness.

The person seeking to debar an advocate from appearing in a matter ought to avail sufficient evidence to that effect by a formal application but not by way of a preliminary objection.

The definition of a preliminary objection was well set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

I do find that this preliminary objection does not fall in the bracket of preliminary objection's

contemplated by Sir Charles Newbold and should have been brought by way of a formal application. The upshot of this is that the preliminary objection is dismissed with costs.

DATED AND DELIVERED AT ELDORET ON 28TH DAY OF OCTOBER, 2016.

ANTONY OMBWAYO

JUDGE