REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT AND LAND COURT

E.L.C. NO.210 OF 2014

PAUL NDUATI MWANGI…….....……...PLAINTIFF

VERSUS

STEPHEN NGOTHO MWANGI & 9 OTHERS ....DEFENDANTS

RULING

Introduction

1. On **5th November, 2014** the plaintiff instituted the current suit against the defendants herein. The plaintiff contends that he is a bona fide purchaser for value of the 1st and the 2nd defendants' interest in the property known as **Plot No.1 Kahuro Market** also known as **Loc.8/Kandegenye/284/1** (hereinafter referred to as "the suit property"). The suit property is registered in the name of **Mwangi Gikungu** (deceased).

2. On **4th October, 2010** the defendants were granted equal shares of the suit property (vide Muranga Principal Magistrate Court's Succession Cause No.116 of 2007).

3. The plaintiff claims that vide agreements executed between himself and the 1st and 2nd defendants, it was mutually agreed between the 1st, 2nd defendants and himself that upon completion of the succession cause herein, the 1st and 2nd defendants would forthwith transfer to him two shares (one each) of the suit property. The plaintiff contends that pursuant to that agreement, he paid full purchase price in respect of the two shares he claims. Completion was to take place upon confirmation of grant of letters of administration to the defendants.

4. It is the plaintiff's case that upon completion of the succession cause herein, the 1st and the 2nd defendants developed cold feet concerning their obligations to him. The 3rd to 10th defendants are sued for being part of what the plaintiff has described as an "unholy partnership" among the defendants meant to deny him his rightful share of the suit property.

5. For the foregoing reasons the plaintiff, *inter alia*, seeks an order to restrain the defendants from transferring, charging or in any other manner interfering with the ownership of the suit property; a declaration that he is entitled to one fifth (1/5) share of the suit property and an order directed to the County Government of Murang'a in liaison with the Land Registrar to register him (the plaintiff) as owner of one fifth (1/5) of the suit property.

6. Simultaneously with the plaint, the plaintiff brought the notice of motion of even date seeking to inhibit dealings with the suit property pending hearing and determination of the application and the suit.

7. In reply, the defendants filed the statement of defence dated **8th December, 2014** in which they contend that the suit property is registered in the name of Mwangi Gikungu (deceased) as a family property; that none of the beneficiaries have sold their entitlements therein; that the plaintiff is in possession of the suit property as a tenant and that that none of them had power to sell the suit property without the consent and/or knowledge of the other beneficiaries.

8. In addition to denying the allegations that the 1st and 2nd defendant sold their share of the suit property to the plaintiff, the defendants contend that the plaintiff's claim is contradictory and full of falsehoods. In this regard they contend that the agreements allegedly executed between the 1st defendant and the 2nd defendant on **4th May, 2004, 11th June 2007** and **28th April, 2014** are forgeries. The payments effected by the plaintiff in respect thereof are said to have been in respect of tenancy and not purchase price of the suit property as alleged.

9. During the pendency of the suit and the application thereto, the defendants filed the notice of preliminary objection (P.O) dated **19th January, 2011** contending that counsel for the plaintiff is in conflict of interest as he acted for both the plaintiff and the 1st and the 2nd defendant and that he holds confidential information concerning the transactions herein which makes his continued acting for one of his former clients prejudicial to the others. His continued acting for the plaintiff, in the circumstances, is said to be in violation of **Rule 9** of the Advocates (Practice) Rules.

10. Despite an order to the effect that both the P.O and the notice of motion herein be disposed of together by way of written submissions, counsels for the parties submitted on the notice of preliminary objection alone.

Submissions

11. In the submissions filed on behalf of the defendants, it is pointed out that the defendants have challenged the sale agreements purportedly executed between the plaintiff and the 1st and the 2nd defendant. As those agreements appear to have been drawn and witnessed by the advocate acting for the plaintiff, the advocate is said to be a key witness in the case for purposes of confirming the propriety or otherwise of the impugned sale agreements. It is contended that it is not possible for the advocate to be an advocate for the plaintiff and at the same time a witness for the defendants. Since the advocate for the plaintiff acted for both the plaintiff and the 1st and the 2nd defendants in the impugned sale agreements, it is submitted that acting for one of the parties in those sale agreements is in contravention of the provisions of **Section 2** of the Advocates Act as read with **Rule 9** of the Advocates (practice) Rules.

12. In view of the foregoing, it is submitted that for justice to prevail between the parties in this suit, counsel for the plaintiff must disqualify himself.

13. In reply, counsel for the plaintiff has submitted that the documents annexed to the notice of preliminary objection to wit, the impugned sale agreements should be introduced by way of affidavit or during sworn evidence in court and not through submissions; that the documents filed in court in support of the defendants' case to wit, statement of defence, witness statements and replying affidavit of the 3rd defendant do not raise the issue of the plaintiff's advocate being called as a witness and that the plaintiff's advocate has not been informed of any prejudice that the defendants are likely to suffer if he continues acting for the plaintiff.

14. Further, that the defendants need to demonstrate by way of an affidavit or otherwise that they intend to call the plaintiff's advocate as a witness and that they will be prejudiced by his continuing to act for the plaintiff. In this regard counsel referred to the case of **Akber vs. Fidahussein & Co. and others (1971) E.A 167**.

15. Pointing out that the right for a party to be represented by an advocate of his choice is enshrined in the Constitution of Kenya, counsel for the plaintiff has submitted that the said right cannot be taken away lightly as the defendants are trying to do.

The law applicable to the issue(s) raised in the preliminary objection

16. The law applicable to the issues raised in the P.O was succinctly captured in the case of **Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR,** where **Mumbi Ngugi J**., stated as follows:-Top of Form

> **"…19. The legal basis of the petitioner's application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:**
>
> **'No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.'**
>
> **20. From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others (supra) observed as follows:**
>
> **"The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.**
>
> **21. The court noted, however, that:**
>
> **'There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result.'**
>
> **22. The court referred to these authorities as comprising King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd –vs- Kaplan and Stratton Advocates (supra). In this case, in restraining Mr. Keith and any partner of the firm of Kaplan and Stratton Advocates from acting for the defendant in the matter or in any litigation arising from the loan transactions in question, the court applied the test established in England in the case of Supasave Retail Ltd vs. Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER where the court had observed that**
>
> ***"The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rakusen vs. Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 -1913) ALL ER Rep 813… The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself. Cozens-Hardy MR laid down the test as being that a court***

must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act…..As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated." (Emphasis added)

23. The decision of O'Kubasu, JA in William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) is also instructive with regard to Rule 9 of the Advocates Act. In declining to bar an advocate from acting for some of the parties in the matter, O'Kubasu J stated at page 3 of his ruling states as follows;

'I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.' (Emphasis added)

24. The Learned Judge of Appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the Delphis Bank and King Woolen Mill cases, O'Kubasu J observed at page 7 of his decision as follows:

'The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.' (Emphasis added)

25. I wholly agree with the sentiments expressed by the Honourable Judge in the above matter. Like the provisions of Section 77 of the former constitution, the words used in Article 50(2)(g) of the Constitution make it clear that the provision relates to criminal matters:

'(2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;'

26. However, I believe that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2) (a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away."

17. Concerning the same issue, in the case of **Dorothy Seyanoi Moschioni v. Andrew Stuart & another** (2014) e KLR, **Gikonyo J.,** stated:-

"[12] I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that ''these advocates participated in the drawing and attestation of the Deeds in dispute''; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say '' I intend to call them as witnesses''. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel

who is supposedly should be "their counsel'' in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

[23] In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1st Respondent by the said firm of advocates. And I so hold fully aware of the Applicant's desire to call them as witnesses- and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious."

18. In applying the foregoing principles to the case at hand, whereas it is not in dispute that the plaintiff's advocate acted for both the plaintiff and some of the defendant's in this suit, I find as a fact that in the list of witnesses filed in this suit, the defendants have not listed the plaintiff's advocate as one of the witnesses they want to call. The defendants have also not demonstrated the nature of prejudice they are likely to suffer, if the plaintiff's advocate continues to act for the plaintiff.

19. The upshot of the foregoing is that the defendants have not made up a case for issuance of the orders sought. Consequently, the notice of preliminary objection is dismissed.

Costs in the cause.

Dated, signed and delivered in open Court at Nyeri this 6th day of March, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Njoroge holding brief for Mr. Mbuthia for plaintiff/respondent

Mr. Kinuthia for defendants/applicants

Lydiah – Court Assistant