



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 87 OF 2012

KENYA COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

MUKESHKUMAR KANTILAL PATEL.....1ST DEFENDANT

SIMON SHIGALI MUTESHI.....2ND DEFENDANT

RULING

(Application to have counsel ordered to be disqualified from acting for a party; argument that counsel drew a sale agreement in issue and may be called as a witness; no indication that advocate would be called as a witness; mere fact that counsel drew a sale agreement which may be in issue not ground enough for disqualification; application dismissed)

The application before is that dated 20th July 2013 and principally seeks an order that the law firm of M/s Nyachoti & Company Advocates do cease acting in this matter for the plaintiff. The application is based on the following grounds :-

1. *That several documents on record herein which are in issue have been prepared by the firm of M/s Nyachoti & Company Advocates.*
2. *That the agreement dated 23/08/2011 intended to be produced by the plaintiff was prepared by the firm of M/s Nyachoti & Company Advocates.*
3. *That the transfer of lease herein dated 29/05/2012 was prepared by the firm of M/s Nyachoti & Company Advocates.*
4. *That those documents prepared by M/s Nyachoti & Company Advocates are at the core of the dispute herein.*
5. *That the firm of M/s Nyachoti & Company Advocates are expected to appear before this court as witnesses to shed light on the issues touching on the documents prepared by them.*
6. *That an advocate cannot be both an attorney and a witness in the same matter as he cannot leave his privileged position at the bar and move to the witness box in the same matter.*
7. *That it is imperative and in the interests of justice that the firm of M/s Nyachoti & Company Advocates be removed from record on behalf of the plaintiff herein.*

The application is supported by the affidavit of the applicant, Simon Muteshi Shigali, who is also the 2nd defendant in this matter. He has more or less reiterated the above grounds listed in support of his application.

No reply was filed by the law firm of M/s Nyachoti & Company Advocates or by the plaintiff. That does not however mean that I must allow the application, for I need to be satisfied that in the circumstances of this case, it is imperative that the said law firm be directed to cease acting in the matter. I will need to make this determination based on the assessment of the reasons given for the application. An appreciation of this case is therefore necessary and I will provide a little background to the suit.

The plaintiff is a bank and it filed this suit on 1st November 2012. The subject matter of the suit is the land parcel described as **Sotik Township/667** situated in Sotik Town. On the said property is developed a house which used to be utilized by the Branch Managers of the plaintiff company based in Sotik Town. It is pleaded that sometimes in November 2001, the 2nd defendant (applicant) was the Branch Manager at Sotik and was residing in the suit property. It is pleaded that without the knowledge of the plaintiff, the applicant entered into and executed an illegal sale agreement dated 24th November 2001, vide which he sold the suit property to the 1st defendant. The 1st defendant subsequently took possession of the property. It is pleaded that the plaintiff has entered into a sale agreement with one Charles Langat, not a party in this suit, and is in the process of transferring the property to the said Mr. Langat but the occupation of the property by the 1st defendant is hindering the entire process. It is averred that sometimes in July 2001, the plaintiff had an agreement with the applicant, for the applicant to purchase the property and subsequently in April 2010, the applicant assigned his rights to Mr. Langat. The main prayers in the suit are for a declaration that the suit property belongs to the plaintiff and for a permanent injunction to stop the 1st defendant from the property.

The applicant filed defence and counterclaim. Inter alia it is denied that he assigned his rights to Mr. Langat and it is averred that he signed a letter purporting to transfer his interest to Mr. Langat through coercion. He has admitted entering into a sale agreement of the property with the 1st defendant through which he sold the property to the 1st defendant. In the counterclaim, the applicant has sought orders of specific performance to compel the plaintiff to transfer the suit property to the applicant and a declaration that the plaintiff no longer has any proprietary interest capable of being transferred to any other person.

It will be observed that the reasons given for the disqualification of the law firm of M/s Nyachoti & Company Advocates (the law firm) are inter alia that the said law firm prepared several documents which are in issue in this case and that the said firm are expected to appear before this court as witnesses. Although it is said that the said law firm prepared several documents, the documents referred to are actually two, the first being an agreement for sale between the plaintiff and Mr. Langat, and the second, being a transfer instrument of the suit property from the plaintiff to Mr. Langat. The applicant is of opinion that because the law firm prepared these two documents, then they need to be disqualified, for the reason that they are expected to appear as witnesses to shed light on these documents. The question that arises is whether an advocate who has prepared a document which may be in issue in the proceedings must disqualify himself/herself.

The starting point is **Rule 9** of the **Advocates Practising Rules** which provides as follows :-

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 in formal or non-contentious matter of fact in any matter in which he acts or appears.

It will be seen from the above that an advocate may be prevented from appearing in a matter if he may be required as a witness. But this is not absolute, for an advocate can still appear for a party and still be a witness, so long as his evidence is confined to a formal or non-contentious matter of fact.

The first question to ask is whether the proprietor or any personnel from the law firm are expected to be witnesses in this matter. I have gone through the plaintiff's list of witnesses and nowhere does the law firm or any personnel from the said law firm appear as a proposed witness. I inquired from Ms.

Mumalasi, counsel for the the applicant, whether Mr. Nyachoti would be a witness for the applicant and she responded that he would not be, since he is counsel for KCB, the plaintiff.

It will therefore be seen that neither Mr. Nyachoti nor personnel from the law firm of M/s Nyachoti & Company Advocates are expected to be witnesses in this matter. But even if they were expected to be witnesses, their role would probably only be confined to producing the agreement and transfer, executed by the plaintiff and Mr. Langat. The agreement between the plaintiff and Mr. Langat is not in issue in this case, meaning that this would at most be evidence of a formal or non-contentious matter of fact. **Rule 9** of the **Advocates Practising Rules** therefore does not operate to disqualify the said firm from acting for the plaintiff.

It has not been alleged that Mr. Nyachoti or his firm hold any confidential information that may have come into their hands by any interaction with the applicant. In fact it appears to me that the applicant has never had any contact with Mr. Nyachoti or his law firm over this matter. Neither has it been said that Mr. Nyachoti is in any conflict of interest. Indeed, as admitted by counsel for the applicant, Mr. Nyachoti has all along been advocate for KCB, the plaintiff. It is not alleged that he has ever been counsel for the applicant in any proceedings, leave alone this matter. The mere fact that Mr. Nyachoti drew an agreement in his capacity as counsel for the plaintiff, does not disqualify him from being counsel for the same party.

I would have stopped at that, but I feel compelled to address the widely preconceived notion that an advocate who has drawn an instrument for the disposition of property can never act for a party in litigation where the instrument is in issue. There is no general rule that holds that such advocate must never act for a party in such situation. This was indeed the core of the decision in the case of ***Delphis Bank vs Chatthe (2005) eKLR***. In the matter, counsel (Mr. Menezes), appeared for the respondent (as leading counsel) and it was argued that because he drew the charge instruments which were in issue in the suit, he could not appear in the matter. The Court of Appeal disallowed this argument and stated as follows in the course of the judgment :-

The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties.

I am aware of the Court of Appeal decision in the case of ***Uhuru Highway vs Central Bank (2002)2 EA 654***, where the court disqualified counsel who had prepared a charge instrument. The reasoning in that case was that counsel had acted for both parties in the transaction and the court was of the view that there would be prejudice to the other party if counsel continued to act for one party, given that he had acted for both in the preparation of the charge instrument. But in this case, it will be observed that the agreement between the plaintiff and Mr. Langat is not in issue in this suit. Even if it were, the applicant is not a party to it, and it has not been suggested, even remotely, that Mr. Nyachoti or his law firm, could be torn in a conflict of interest between the plaintiff and the applicant, for the said firm has never acted for the applicant, in this, or any other transaction.

This case is also distinguishable from that of ***Murigu Wanyoike vs Dyno Holdings Limited (2014) eKLR*** where an application to have counsel who had prepared a sale agreement in issue in the case was allowed. In the matter, the advocate had pronounced himself in the sale agreement as acting for both parties. The agreement was also hotly disputed, with the plaintiff alleging that the same is a forgery and that he never appeared before the advocate noted therein, who was from the same law firm on record for the plaintiff in the suit. The court was of the opinion that given that the agreement was hotly disputed, the law firm in issue was too closely connected to the litigation and it was proper for the said law firm to be disqualified from acting for the plaintiff in the matter.

My own view of the matter is where the content of the document is not really in issue, there would be no reason to bar the counsel who drew the instrument, especially where he is acting for the same party who instructed him to draw the instrument . I am not in any way suggesting that such counsel would be automatically disqualified if he is acting against the party who instructed him to draw the instrument, an issue that was also canvassed in the case of ***Delphis Bank vs Chatthe (supra)***, where it was inter alia

held, that an advocate who acted for one party in the transaction is not necessarily automatically disqualified from acting for the opposite matter in litigation. At the end of the day, the court needs to assess each application based on its own peculiar facts and circumstances. What is important is that the continued participation of the subject counsel ought not to cause any prejudice to any party or embarrass the trial.

On the facts of this case, I do not see how the continued participation of Mr. Nyachoti, or of his law firm in this matter, will prejudice the case of the applicant or embarrass this trial.

The end result is that I find no merit in this application. It is hereby dismissed. I however make no orders as to costs, as neither plaintiff nor his counsel, filed any document to oppose it.

It is so ordered.

Dated, Signed and delivered on this 24th day of July, 2015

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

No Appearance on the part of M/s Annet Mumalasi & Company Advocates for 2nd defendant/Applicant

No Appearance on the part of M/s Nyachoti & Company Advocates for Plaintiff/Respondent

No Appearance on the part of M/s Chelule & Company Advocates for 1st Defendant.

Court Assistant; Mr. Kenei