



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 34 OF 2015

REV. CAROL ALOIS OSOS,

REV. DANIEL WANJAU NYAMBURA (Suing as officials of

Nakuru United Methodist Church).....PLAINTIFFS

VERSUS

DIANE QUATTLEBAUM HAMRICK1ST DEFENDANT

PARTNERS IN CHILDREN AND FAMILY

SUPPORT ORGANIZATION.....2ND DEFENDANT

RULING

(Application to have counsel disqualified; allegation that counsel acted for defendants and holds confidential information; no such evidence tendered; application dismissed)

1. The application before me is that dated 9 March 2015 filed by the defendants. The application seeks orders that Mr. Waiganjo Mwangi Advocate, who is on record for the plaintiff, be stopped from continuing any further participation in this suit, and that the pleadings filed by him be struck out. It is therefore essentially an application seeking the disqualification of Mr. Waiganjo from these proceedings. The application is based on grounds that no advocate ought to appear in a matter in which he may be called to give evidence; that Mr. Waiganjo has formerly represented the interests of the defendants herein, which interests conflict with his current client's instructions; and that Mr. Waiganjo is representing two clients who are adversaries in the same case which conduct is unethical. The application is opposed by the replying affidavit of Mr. Waiganjo. Before I go to the gist of the matter, I think it is important for me to set down a little background to this suit.

2. This suit was filed on 11 February 2015 by the plaintiffs through the law firm of M/s Waiganjo & Company Advocates. The proprietor of the said firm is Mr. Waiganjo Mwangi Advocate. The plaintiffs have sued as officials of the Nakuru United Methodist Church (The Church). The case of the plaintiffs is that they are the lawful owners of the land parcels LR No. 62295/15, 7 acres out of the land parcel L.R No. 11739 , Dundori/ Lanet Block 5/2090 (New Gakoe), Dundori/Lanet Block 5/2084 (New Gakoe) and Residential Plot No. 7 at Ngecha "A" Trading Centre (hereinafter referred to as the suit properties). It is pleaded that the Church had an arrangement for funding with Wesley Memorial United Methodist Church based in the USA, for the funding of the plaintiff Church projects in Kenya. It is stated that the 1st

defendant was sent by the American church as a volunteer to help the plaintiff church run and manage the projects. It is averred in the plaint that it was agreed that all properties purchased were to be titled and were to form part of the assets of the plaintiff church. On one of the properties, the church erected a school known as United Methodist Mission Schools, registered in favour of the plaintiff church. The School is run by a Board of Management of which the 1st defendant was appointed as chairperson. It is pleaded that the plaintiff has now discovered that the defendants have fraudulently caused the suit properties to be registered in the names of the 2nd defendant, which is a Non-Governmental Organisation (NGO). The plaintiff has averred that it has no relation with the 2nd defendant. It is their pleading that the action of the 1st defendant of transferring the Church assets to the 2nd defendant is fraudulent. In the suit, the plaintiff seeks orders to be declared the owner of the suit properties and the cancellation of the titles of the 2nd defendant.

3. In the supporting affidavit to this application, the 1st defendant has inter alia deposed that she is the chairperson of the 2nd defendant and the manager of the United Methodist Mission Schools. She has deposed that in the year 2010, she was responsible for selecting various persons to be part of the Board of Governors (BOG) of the School. Mr. Waiganjo was recommended to her and he eventually became a member of the BOG. He also served as Chair, of the Staffing Committee and member of the Finance and Fundraising Committee. A small executive committee comprising of Mr. Waiganjo, Ms. Hamrick and Mr. Wanjau, was also formed. It is averred that Mr. Waiganjo provided expertise on legal, administrative and financial matters. That in the course of their interaction, there was confidential communication exchanged. It is further stated that at the private meetings with Mr. Wanjau and Mr. Waiganjo, issues regarding titles to the properties now at issue were discussed, and that Mr. Waiganjo is now trying to use the same against the defendants.

4. In his rejoinder, Mr. Waiganjo has not contested being a member of the BOG but has denied ever giving them legal advice as an advocate. He has further stated that the issue of his representation of the plaintiffs has been raised in another case in the Chief Magistrate's Court and the court ruled that there was no conflict of interest. He submitted that the issue is therefore res judicata. He has deposed that as member of the BOG, he was serving the interests of the plaintiff. He has agreed being a signatory of the School account but has stated that the said account is not under the control of the defendants. He has deposed that he has been unaware of the existence of the 2nd defendant until the dispute herein arose. He has denied having any confidential information against the defendant. He resigned as member of the BOG on 17 October 2013.

5. Mr. Kabita for the applicants argued that Mr. Waiganjo has acted for the defendants before in a forum connected to this suit. He pointed at Rule 9 of the Advocates Practicing Rules and averred that an advocate is barred from appearing in a matter in which he may be a witness. He stated that Mr. Waiganjo is privy to information that he may use against the defendants. He relied on some authorities, none of which were availed to court and I have not had the benefit of perusing them.

6. Mr. Waiganjo on his part reiterated that he has never acted for the defendants and neither has he given any advice to the defendants. He stated that during his tenure at the BOG, no issues of the suit properties was discussed, and that until he retired, there had been no dispute. It was his view that there is no conflict of interest.

7. I have considered the matter. The application seeks the disqualification of Mr. Waiganjo from representing the plaintiffs in this matter. Let me start with the argument that the application herein is res judicata. I am aware that the same issue, regarding representation of Mr. Waiganjo was brought up in Nakuru CMCC No. 682 of 2014 and a decision made that Mr. Waiganjo can continue in the matter. But I hesitate to hold that this application is res judicata for I do not know the context within which that application was argued, for the reason that, I do not have the benefit of the pleadings in that case.

8. On the merits, the starting point has to be the appreciation that a person is entitled to counsel of his choice. There are of course instances where counsel appointed may be ordered to refrain from the matter for various reasons. Each case has to be decided on its own special facts. Rule 9 of the Advocates Practicing Rules is however categorical that an advocate ought not to appear where he may be called as a

witness in a contentious matter. It is drawn 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.

9. It has not been suggested that Mr. Waiganjo may be a witness in this case and therefore Rule 9 above does not apply.

10. The main reason why the defendants seek the disqualification of Mr. Waiganjo is their argument that he has acted for the defendants before, and that he is in possession of confidential material, which he may use against the defendants. Mr. Waiganjo has of course denied ever acting for the defendants or being in possession of any confidential material.

11. I have assessed the material before me and nowhere have I found that Mr. Waiganjo acted for the defendants. True, Mr. Waiganjo was a member of the BOG for the Schools run by the plaintiff church, but he was never affiliated with the 2nd defendant. The only relationship he had with the 1st defendant is that they sat together in the BOG of the School. The School, which is said to be run by the Church, is certainly different from the NGO named as the 2nd defendant. Mr. Waiganjo never sat in the Board of the 2nd defendant and was never involved in its activities. His involvement was only with the plaintiff and never with the defendant. He has never acted for the defendant and never come into contact with them on any professional basis. The fact that Mr. Waiganjo sat in the same BOG with the 1st defendant does disqualify him from acting in a matter against the 1st and/or 2nd defendant.

12. The 2nd defendant argued that confidential information passed between herself and Mr. Waiganjo and some of the deliberations involved issues regarding the titles which are the subject matter of this case. But I have not been given the specifics of this "confidential information" and neither have I seen any proof of any meeting where the issue of the titles herein was discussed between Mr. Waiganjo and the 1st defendant. I find it difficult to hold that Mr. Waiganjo possesses any information confidentially passed by him by the defendants and which he may use against them in this matter.

13. I really do not see the need of saying more.

14. The upshot of the above is that I find no merit in this application. It is hereby dismissed with costs.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th Day of July 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Mr Waiganjo for the plaintiffs

Mr Kabita for the defendants

Janet : Court Assistant

MUNYAO SILA

JUDGE

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