



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELCA NO. 87 OF 2014

MUNICIPAL COUNCIL OF NYERI APPELLANT

VERSUS

JOHN MAINGI KARIUKI 1ST RESPONDENT

ROBERT MAINGI KARIUKI 2ND RESPONDENT

JUDGMENT

1. This appeal is in respect of the ruling of **K. Cheruiyot, RM** delivered on 19th August, 2010 in Nyeri CMCCC No.116 of 2007. In the application which was the subject of the ruling, the 1st respondent had sought the disqualification of the appellant's advocate, **Charles Wahome Gikonyo** from acting for the appellant on the ground that the advocate was a potential witness in his case. The reason given by the 1st respondent for seeking disqualification of the advocate was that the advocate used to collect rent on his behalf from the property which is the subject matter of the suit before the lower court. In his ruling the trial magistrate (TM) stated:-

“I find that Mr. Charles Wahome Gikonyo acted as the plaintiff’s advocate in a situation that made the plaintiff Mr. Gikonyo’s client as defined under Section 2 of the Advocates Act in a matter directly related to this case. This case is about ownership of the suit premises. I am of the view that it is apparent that the advocate (Wahome Gikonyo) will be required as a witness. I hold, therefore, that it would not be in the interest of justice for Mr. Charles Wahome Gikonyo Advocate to continue to appear in this matter for the 1st defendant.

I find the application dated 23rd February, 2010 is meritorious. I allow it as prayed. Costs in cause.”

2. Being dissatisfied with the decision of the TM, the appellant appealed to this court on the grounds that the TM erred by disqualifying the firm of M/S Wahome Gikonyo & Company Advocates from representing it in the suit before the lower court; finding that Mr. Charles Wahome Gikonyo was a potential witness merely because he collected rent for the 1st respondent; holding that representation of the appellant by the firm of Wahome Gikonyo & Company Advocates would be prejudicial to the respondent and failing to find that the dispute before court is not about rent collection but transfer of the suit property.

3. Since the dispute before the lower court is about transfer of the suit property and not collection of rent, the decision of the TM is said to be without any basis in law or fact. The appellant contends that the TM's decision interfered with its right to be represented by an advocate of its choice.

4. For those reasons, the appellant prays that the ruling and orders of the lower court dated 19th August, 2010 in Nyeri CMCC No.116 of 2007 be set aside and substituted with an order dismissing the application and the matter remitted to the lower court for hearing on merit. The appellant also prays that the costs of the application be born by the 1st respondent.

5. The sole issue for determination in this appeal is whether the TM erred by holding that the appellant's advocate will be required as a witness for the 1st respondent. In determining this question, I will adopt the principles set in the case of **British-America Investments Company (K) Limited v. Njomaita Investments Limited & Another (2014) eKLR** where it was stated:-

“It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party. Rule 9 of the Advocates (Practise) Rules calls upon an advocate to be conscious of a possible conflict of interest at all times and not to continue acting in a matter if it becomes apparent that he will be called as a witness. He should only stop acting in a matter once the possibility of him being called as a witness becomes apparent and not at any other time. Indeed, the Court of Appeal did acknowledge this fact in the case of Delphis Bank Limited vs Chatthe & 6 Others (Supra) when it recognised that an advocate could act for one party and subsequently an opposing party unless it could be shown that one party was likely to suffer prejudice if he continued to act for one person. The court also observed that the advocate who the applicant therein had sought to disqualify from acting in that matter could appear in the application that was before it as there was no conflict of interest.” (Emphasis supplied).

6. Did the 1st respondent adduce any or sufficient evidence to demonstrate existence of conflict of interest if Charles Wahome Gikonyo or his firm continues acting for the appellant? In determining this question, I begin by pointing out that the only evidence adduced in support of the 1st respondent's contention that Mr. Charles Wahome Gikonyo was a potential witness in the 1st respondent's case are some letters attesting to the fact that the advocate was previously collecting rent on behalf of the 1st respondent from the suit properties.

7. It is noteworthy that whilst the 1st respondent's claim is for ownership of the properties in respect of which the advocate was appointed to collect rent, the 1st respondent's case is not about rent collection but about ownership of those properties. In the affidavit sworn in support of the application for disqualification of the advocate, I note that the 1st respondent did not allege that the advocate was involved in any dealings concerning the 1st respondent's ownership of the suit property or was privy to any information concerning the 1st respondent ownership of the suit property.

8. Going by what is deposed in the 1st respondent's affidavit in support of the application for the disqualification of the advocate, the only issue raised is that of the advocate having previously collected rent for him. That question is not in dispute. There is no nexus between the question of rent collection and the question of ownership of the suit property, which is the subject matter of the suit property.

9. Upon reading and considering the pleading filed in the case pending before the lower court, I am not convinced that the 1st respondent will suffer any prejudice if the appellant's advocate continues acting in the matter.

10. I therefore find that the TM erred by holding that the appellant's advocate will be required as a witness in the 1st respondent's case without any evidence that he had any privileged information regarding the 1st respondent's ownership of the properties he had been appointed to collect rent.

11. The upshot of the foregoing is that the appeal has merit and is allowed. Costs of the appeal shall be

costs in the main suit.

Dated, signed and delivered at Nyeri this 14th day of July, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Theuri h/b for Mr. Wahome for the appellant

Mr. muthomi h/b for Mr. Ng'ang'a for 1st respondent

N/A for 2nd respondent

Court assistant - Lydia