



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 279 OF 2013

MURIGU WANYOIKE.....PLAINTIFF

VS

DYNO HOLDINGS LIMITED.....DEFENDANT

(Application for orders to have a firm of advocates cease acting for defendant; principles to be applied; issue in the suit surrounding an agreement for sale of land; plaintiff claiming the agreement is a forgery; agreement having been drawn by defendant's firm of advocates; in the agreement counsel declaring that he was acting for both plaintiff and defendant; whether in the circumstances firm ought to continue acting for defendant; Rule 9 Advocates (Practice) Rules; whether it applies to an individual advocate or can be extended to a firm of advocates; application allowed).

RULING

1. The application before me is that dated 27 November 2013. It seeks orders to have the law firm of M/s Mohamed Madhani & Company Advocates, its partners and/or agents removed from representing the defendant. The grounds upon which this application is founded are :-

(a) That the said firm of M/s Mohamed Madhani & Co Advocates was involved in drawing of an alleged sale agreement dated 20th July 2008 and the subsequent transfers thereof in favour of the defendant.

(b) That the plaintiff contends that the said transfers are fraudulent having been obtained without his knowledge and consent.

(c) That the law firm of M/s Mohamed Madhani & Co Advocates is a potential witness likely to be called to give evidence by either party contrary to the rule of practice, professional ethics and conduct.

(d) That it is only fair and just to have the said law firm removed from the record and a neutral law firm to take up the matter.

2. The application is opposed by the defendant. But before I go to the gist of that objection, I think it is best that I lay down the background leading to this application.

3. This suit was commenced through a plaint filed on 9 May 2013 by the law firm of M/s Arap Mitei & Company Advocates . In the plaint the plaintiff pleaded that he purchased the land parcels Pioneer/Ngeria Block 1 (EATEC)/1102 and 1119 (the suit lands) sometimes in the year 2000 and in the year 2001 the properties were transferred to him and he became the registered proprietor. The plaintiff has pleaded that in the month of May 2012, he noticed some activity on the suit properties and on investigation, he discovered that the two properties had been transferred to the defendant. It is his case that this was done through fraud. Various particulars of fraud are pleaded, inter alia that the properties were transferred

without the knowledge and consent of the plaintiff, and without there being any privity of contract. It is also said that the transfers were actuated by forgery. In the suit, the plaintiff has sought orders to have the name of the defendant as proprietor cancelled; a declaration that the transfers of the suit properties from the plaintiff to the defendant was fraudulent; eviction of the defendant from the suit properties and costs.

4. The defendant entered appearance and filed defence through the law firm of M/s Mohamed Madhani & Company Advocates. In the Statement of Defence, the allegations that the suit properties were transferred to the defendant by way of fraud were denied. It was inter alia pleaded that through an agreement of sale of 20th July 2008 entered between the plaintiff and defendant, the plaintiff willfully agreed to sell the suit properties to the defendant at a consideration of Kshs. 11,000,000/=. It is pleaded that following the agreement, a sum of Kshs. 8,000,000/= was transferred to the plaintiff as deposit and in August 2008, the sum of Kshs. 3,000,000/= was paid to the plaintiff. Consent to transfer from the Land Consent Board had been obtained on 29th May 2008, and the transfer of the suit properties to the defendant was effected on 5 August 2008. It is said that the defendant is the lawful proprietor and that the plaintiff's suit ought to be dismissed.

5. On 10 July 2013, the plaintiff filed a Notice of Preliminary Objection through which it sought to have the pleadings filed by M/s Mohamed Madhani & Company Advocates struck out for the reason that the said law firm is incompetent to act for the defendant as they are potential witnesses. I heard the preliminary objection, and dismissed it, through the ruling of 7 November 2013. It was my view that the issues raised involved considerations of matters of fact which went outside the ambit of a Preliminary Objection. I directed the plaintiff to file an appropriate application for the disqualification of the law firm of M/s Mohamed Madhani, if he still wished to raise the issue of representation by the said law firm. That is how this application came to be filed.

6. In the supporting affidavit, the plaintiff has deponed that he has learnt that the defendant became registered as proprietor on the basis of the agreement of sale dated 20 July 2008 and the consent of the Land Control Board issued on 25 May 2008. The said agreement for sale was drawn by the law firm of M/s Mohamed Madhani & Company Advocates. He has denied ever signing the said sale agreement and has denied ever appearing before the Land Control Board. It is his view that the agreement of sale and the consent of the Land Control Board are forgeries. He has deponed that the law firm of M/s Mohamed Madhani & Company Advocates are potential witnesses, likely to be called either by himself or the defendant, and therefore, they ought not to represent the defendant as there is an apparent conflict of interest.

7. The application is opposed by the Replying Affidavit of Mohan Galot, a director of the defendant company. He has deponed inter alia that the defendant obtained title to the suit properties above board. He has averred that the plaintiff was indebted to M/s London Distillers Company Ltd, a sister company of the defendant, to the tune of Kshs. 8 Million. To offset this debt, the plaintiff offered the two properties which were valued at Kshs. 11 Million. London Distillers Ltd opted to purchase the two properties through the defendant, with the debt of Kshs. 8 Million being offset, and an additional Kshs. 3 Million being paid by cheque, to get to the purchase price of Kshs. 11 Million. The defendant then appointed the law firm of M/s Mohamed Madhani to commence the conveyancing process. The said firm drew up the Agreement for Sale which was executed in the presence of Mr. Stephen Kamau Advocate, who is said to be the head of the Conveyancing Department in the subject law firm, and who it is said, does not handle any litigation in the said firm. Mr. Galot has deponed that this litigation is being handled by Mr. James Rimui, who is the head of litigation in the law firm. He has stated that he is aware that the law firm of M/s Mohamed Madhani is a medium to large sized law firm, currently with 13 Advocates. He has deponed that the law firm is divided into three key departments, namely, litigation and debt recovery; probate and trust administration; and commercial and conveyancing departments. He has deponed that due to this departmentalization, there is no danger of prejudice to the plaintiff. He has deponed that Stephen Kamau Advocate is not the law firm of M/s Mohamed Madhani and the said law firm should not be barred from representing the defendant. He has further deponed that parties have yet to comply with pre-trials and it is not yet clear whether any party intends to call any person from the law firm of M/s Mohammed Madhani as a witness. It has been stated that the defendant does not at this stage even wish to call Mr. Stephen Kamau Advocate as a witness. He has deponed that the defendant has a constitutional right to be

represented by counsel of his choice.

8. In his submissions, Mr. Arap Mitei for the plaintiff, submitted that Rule 9 of the Advocates (Practice) Rules, bars an advocate from appearing in a matter in which he may be called as a witness. He relied on the case of *Mwendwa v M'Mwendwa (2003) eKLR, Ogier v Jeffreys (Guernsey Law Reports, 2009-10 GLR 88)* and an article in The New York Professional Responsibility Report, May 2010 written by Roy Simons, titled "*A Flurry of Decisions Under the Advocate-Witness Rule 3.7.*"

9. On the other hand, the law firm of M/s Mohamed Madhani for the defendant, submitted inter alia that this application is res judicata as the matter was already decided in the ruling on the Preliminary Objection. They also submitted that Rule 9 of the Advocates (Practice) Rules, only apply to an individual advocate and not to a law firm. They argued that the plaintiff can only apply to restrain Mr. Stephen Kamau Advocate from appearing in the matter, and not the law firm of M/s Mohamed Madhani & Company Advocates. They also argued that the mere fact that an advocate drew an agreement does not necessarily mean that he cannot act in the matter, unless prejudice is demonstrated. It was further argued that it had not been demonstrated that any confidential information was passed between Mr. Kamau Advocate and the plaintiff which can be used to the plaintiff's prejudice. It was also submitted that the plaintiff himself has denied the existence of an Advocate-Client relationship. It was submitted that there was no evidence that the law firm of M/s Mohamed Madhani will be called as a witness and that even Mr. Stephen Kamau has not been informed that he will be a witness. It was also submitted that owing to the large size of the law firm of M/s Mohammed Madhani, and the different departments, there was no danger of prejudice as the roles and personnel of the Conveyancing Department and the Litigation Department were different. It was emphasized that the right of a litigant to choose counsel was a constitutional right. Counsel for the defendant relied on various authorities.

10. I have considered the material before me and the rival submissions. Before I go into whether or not on the facts, it would be prejudicial for the law firm of M/s Mohamed Madhani to remain on record in this matter, I think it is necessary that I dispense with one preliminary matter that was raised by counsel for the defendant, that is, whether this application is res judicata. The reason given for this argument is that I had already decided the issue when addressing the preliminary objection that had been raised by counsel for the plaintiff. What I held in the preliminary objection was that the matter ought to be raised by way of application, so that the defendant is given opportunity to table facts, to either support or oppose the application, to have the law firm of M/s Mohamed Madhani disqualified. I never delved into the issue whether the law firm ought to be disqualified or not. Res judicata only applies where the matter at hand has been decided before. The issue of whether or not the law firm of M/s Mohamed Madhani ought to continue being on record was never decided in the preliminary objection. It cannot therefore be argued that the application before me is res judicata. That objection is dismissed.

11. Let me now get to the substance of the matter. The issue before this court is whether or not the law firm of M/s Mohamed Madhani & Company Advocates ought to continue being on record in this matter. It is apparent to me that the reason why this issue has been raised is because the said law firm were active in facilitating the transfer of the suit properties to the defendant. It is the said law firm which drew the Agreement for Sale of 20 July 2008, and also acted for the defendant in having the property conveyed to her. The question is whether by their said involvement, and considering the size of the law firm, the law firm ought to be disqualified from representing the defendant.

12. The starting point has to be Rule 9 of the Advocates (Practice) Rules which the applicant has relied on. The same 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.

13. This rule has been the subject of various decisions some of which were relied upon by the counsels in this suit. In the case of **King Woolen Mills vs Kaplan & Stratton (1993) LLR 2170** the law firm of M/s Kaplan & Stratton had prepared various instruments which were the subject of litigation in which the law firm appeared for one of the parties. The application seeking to have the said law firm disqualified was upheld. So too in the case of **Uhuru Highway Development Ltd & Others vs Central Bank Kenya Ltd & Others (2) (2002) 2 EA 654**.

14. However, it is not in all instances that an advocate cannot appear for a party simply because he drew the instrument that may be the subject of litigation. In the case of **Delphis Bank Ltd vs Channan Singh Chatthe & 6 Others (2005) e KLR**, an issue was raised that a counsel, Mr. Menezes, ought not to appear in the matter for the reason that he had drawn various Charge instruments which were in issue in the matter. The Court of Appeal held that there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. It held that the test which has been laid down is whether real mischief or real prejudice will in all human probability result. It further held that each case must turn on its own facts to establish whether real mischief and real prejudice will result. In the case, the court did not think that ample evidence had been tabled that the appearance of Mr. Menezes in the matter would at all be prejudicial to any party and dismissed the objection.

15. As stated in the case of **Delphis Bank**, each case must turn on its own facts. It is therefore the duty of each court, faced with an application of this nature, to determine whether on the facts of the particular case, it would be prejudicial for a particular advocate or law firm to appear in the matter.

16. What are the facts in this case? The core issues in this case are whether there was ever an agreement for sale, and whether the consent of the Land Control Board and the Transfer instruments, which conveyed the suit properties to the defendant, are valid or not. It is the contention of the plaintiff that the said documents are forgeries. It is not denied that the agreement for sale was drawn by the law firm of M/s Mohamed Madhani & Company Advocates, the same law firm that appears for the defendant in this case. I have had a careful look at the agreement for sale. Clause 9 thereof states that the Vendor's, as well as the Purchaser's Advocates, are Mohamed Madhani & Company. The position of the law firm therefore has to be that they acted for both plaintiff and defendant in the agreement. That agreement is now hotly disputed by the plaintiff, and as I have said before, it is the plaintiff's contention that the same is a forgery. The law firm of M/s Mohamed Madhani also actively participated in the conveyance. They are the ones who pursued the Consent of the Land Control Board, they drew up the Transfer instrument and proceeded to undertake the conveyance of the property to the defendant. All along, they were not acting only as counsels for the defendant, but also as counsels for the plaintiff as laid out in Clause 9 of the Agreement. Given that they say that they acted for the plaintiff as well, can they now act against him in this suit? I think not. Although it has been argued that the plaintiff has denied that there was any privity between him and the law firm of M/s Mohamed Madhani & Company Advocates, the position of the law firm is now cast in stone in Clause 9 of the Agreement, and I am certain that that is one of the issues that will arise in the suit, while determining whether or not that agreement is a valid agreement.

17. The place of the law firm of M/s Mohamed Madhani is central to the determination of the issues in this case. In my opinion, I think it will not only be unwise, but also prejudicial to the plaintiff, for the said law firm to be entangled in this litigation. There is indeed potential for a member of the said firm to be called as a witness in this suit. True, the parties have not so far determined who their witnesses are going to be but it is not necessary for that to have been determined before an application of this nature can be made. The issue, as stated in Rule 9 of the Advocates (Practice) Rules is whether the advocate *may* be called as a witness. It is not whether the advocate *shall* be called as a witness. It is enough that the likelihood of the advocate being called as a witness exists, and that likelihood, in my opinion, will continue to exist until the suit itself is finalized.

18. It has been argued that Rule 9 only refers to an advocate and cannot apply to a law firm. Reliance was made on the case of **National Bank of Kenya Ltd vs Peter Kipkoeh Korat & Another (2005) eKLR**. In the matter, an objection was raised that the law firm of M/s Nyairo & Company Advocates ought not to appear for the plaintiff since they drew the charge instrument. The court held that it did not matter since the law firm had several advocates. The decision in the **National Bank of Kenya** case is only persuasive,

and with the utmost of respect, I am not persuaded by it, for that to me would be giving Rule 9 a very literal interpretation. Although the Rule does indeed state "advocate", that word needs to be given a purposeful interpretation and the mischief behind that rule has to be looked at. The mischief is to prevent a counsel whose actions are central to the litigation becoming too close to the litigation by acting as counsel in the matter. It is normal to find counsels having formed themselves into law firms. The fact that the particular counsel is in a law firm can end up making that law firm too close to the litigation so that it may be necessary for the said law firm not to act in the matter. This is because it is difficult to separate a law firm from the advocates in the law firm. It follows therefore that in appropriate circumstances, Rule 9 can also be interpreted as covering a law firm rather than a particular advocate. That is indeed what happened in the case of *Mwendwa v M'Mwendwa* cited by counsel for the plaintiff, which decision, I am in full agreement with.

19. It has also been argued that the law firm of Mohamed Madhani is a large law firm with various departments and that if any advocate is to be called as a witness, then it will be Mr. Stephen Kamau, who it is said is far removed from the litigation department. First, I think it was improper for Mr. Galot to depone to matters touching on how the law firm of M/s Mohamed Madhani operates. Although he has stated that he is making those depositions out of personal knowledge, since he is not an advocate or employee of the said law firm, there must have been a source that gave him this information, which source is not revealed. The appropriate person, in my view, to have made depositions on how the law firm operates, ought to have been the proprietor or partner in the said firm, or at the very least, an associate advocate in the said firm. But even if I am to take it that the deposition of Mr. Galot presents the proper picture of how the law firm of Mohamed Madhani & Company operates, to me it does not matter how large the law firm is, or how departmentalized it is. The law firm is no doubt under one management despite the different departments. The risk of undue influence still exists. Even if the risk did not exist, the perception that there will be influence will be at the back of the mind of the plaintiff. It is an old adage that justice also needs to be seen to have been done, which is really a question of perception. There is also the potential embarrassment which may be caused if an advocate from the law firm is called as a witness for the plaintiff, and he has to be cross-examined by a member of his own law firm. This will not be a pretty scenario and the same ought to be avoided where possible.

20. Although it is a cardinal rule that a litigant has a right to be represented by counsel of his choice, the court has an inherent duty of ensuring that a trial before it, is a fair trial. A fair trial must be a trial which is not only fair in substance, but one in which it is also seen to be fair. It was also argued that the defendant will be put to enormous costs in instructing a new counsel. I cannot equate costs to the need to do justice to parties. Costs must come secondary to the need to do justice. A story is told of a person who complained that education is too costly. The advise that he was given was as follows : "***If you think education is too expensive, then try ignorance.***" In the same vein, what I can advise the defendant is as follows : "***If you think justice is expensive, then try injustice.***"

21. In my view, on the surrounding circumstances of this case, I hold the opinion that the presence of the law firm of M/s Mohamed Madhani in this litigation will be prejudicial to a fair trial. I allow this application. I order the law firm of M/s Mohamed Madhani & Company Advocates to cease acting for the defendant forthwith. The defendant is at liberty to appoint another advocate within the next 30 days. If no advocate is appointed, then the defendant shall be deemed to be acting in person.

22. Costs of the application shall be to the plaintiff.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF OCTOBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Miss J.J. Kiptanui holding brief for Mr. Arap Mitei for plaintiff/applicant.

No appearance for M/s Mohamed Madhani & Co for defendant/applicant.