



**Kipchilat v Boit (Suing as the personal representative of the Late Samwel Kipler Arap Boit)
(Environment & Land Case E003 of 2023) [2024] KEELC 5654 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5654 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E003 OF 2023**

JM ONYANGO, J

JULY 16, 2024

BETWEEN

SILAS KIPCHILAT PLAINTIFF

AND

**SARAH CHELEL BOIT (SUING AS THE PERSONAL REPRESENTATIVE OF
THE LATE SAMWEL KIPLER ARAP BOIT) DEFENDANT**

RULING

1. The Plaintiff's filed a Notice of Motion application dated and filed on 9th May, 2023 was brought under the provisions of Rule 8 of the *Advocates (Practise) Rules, 1966* and sought the following orders:-
 - a. Spent
 - b. That the law firm of Manani, Lilan, Mwetich and Company Advocates be restrained from acting for the Defendant in this matter.
 - c. That the costs of this Application be provided for.
2. The application is premised on grounds on the face of it and those in the Supporting Affidavit of Silas Kipchilat, the Plaintiff herein. In summary, the Plaintiff deponed that among the exhibits relied on by the Defendant is a Lease attested to by Robert R. Mwetich Advocate, which renders the said advocate to be a witness in this matter. He deponed that it will be against the rules of professional engagement of Advocates for him to represent the Defendant and prayed that the said Advocate be barred from representing the Defendant. A copy of the Lease was annexed to the Supporting Affidavit and marked "A".
3. On 29th September, 2023 two Affidavits were filed opposing the Plaintiff's Application. The first was sworn on 26th September, 2023 by the Advocate, R.R. Mwetich, stating that the Plaintiff is a stranger to him and has never been his client. He deponed that the Lease in question was not prepared



and engrossed by their firm. He explained that the Lease was prepared by the Government of Kenya through the Commissioner of Lands, and they merely attested execution by the Defendant as required by the Commissioner. He deponed that he did not process any instruments resulting in the issuance of the Lease Document by the Commissioner.

4. Mr. Mwetich deponed that he had studied the pleadings and noted that the signature and attestation of execution is not in contention by any party. Further, that the Plaintiff acknowledged the authenticity of the Lease and the resultant Certificate of Lease hence his application to have the interest conveyed therein declared extinguished by operation of the law. He deponed that the instant Application was an attempt to divert attention from the real issues in the suit and the response thereto. He asserted that the Plaintiff, which I presume was a typo and counsel meant Defendant, had exercised her constitutional right to representation by a legal counsel of his choice, which right cannot be taken away lightly by a mere allegation of conflict of interest by an adverse party. He deponed that the Application is without merit, is incompetent, misconceived and frivolous and ought to be dismissed with costs.
5. The second Affidavit, sworn by the Defendant, Sarah Chelel Boit, is also dated 26th September, 2023. The Defendant deponed that the Lease was prepared and issued to her by the Commissioner of Lands and she was asked to execute on the part of the Lessee but required attestation by Mr. Mwetich. She averred that the Plaintiff had accepted the validity of her Lease and Certificate of Lease hence her suit in court seeking orders of adverse possession. She registered surprise at the change of course to challenging her advocate's participation in the suit. She asserted that she has a constitutional right to employ a lawyer of her choice, pointing out that she had not sought the services of the said law firm in any transaction touching on this suit, and that she had not listed Mr. Mwetich Advocate as a witness. That the application was frivolous and calculated to embarrass the trial, and reiterated that the Application is incompetent, misconceived and frivolous and asked that it be dismissed with costs.

Plaintiff's Submissions

6. Pursuant to the Court's directions, the Application was canvassed by way of written submissions. The Plaintiff's Submissions filed through the firm of Duncan Tallam & Company Advocates are dated 17th January, 2024. Counsel submitted that Rule 8 of the *Advocates (Practice) Rules, 1966* provides the statutory basis upon which an advocate can be disqualified from acting in a case. Counsel submitted that allowing the said firm to represent the Defendant in this matter is in contravention of the said Rule. He deponed that in *Dorris Kanini Ndunda v Family Bank Limited* (2019) eKLR and *Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 7 Others* (2017) eKLR, the court distinguished issues that need to be answered before an advocate is barred from acting for a client. From the two cases, he submitted that the court needs to determine whether there is a contentious matter of fact that the advocate will provide evidence on as a witness, whether the advocate is a viable witness in the case, whether his testimony is relevant, material or necessary to the issues in controversy. He deponed that lastly, the court should inquire into whether real mischief will result unless the advocate is disqualified from acting for a party in a cause.
7. Counsel continued that the validity and existence of the Lease dated 9th September, 2022 was a contested issue which the advocate, being privy to information relating to the Lease instrument, would need to testify to. Counsel submitted that although the document was prepared by the government, Mr. Mwetich's stamp appearing on the certification of the Lease instrument proves his involvement in the document as he must have verified the contents therein and their validity. Counsel submitted that the Advocate was thus a viable witness in the case and his testimony will help distinguish the relevance of the Lease and its effect to the property in dispute. Counsel submitted that great prejudice will be occasioned to the Plaintiff should Mr. Mwetich continue representing the Defendant as his evidence



will touch on major issues in the instant suit. He relied on the *Serve in Love Africa (Sila) Trust Case* (Supra) to support his contention that Mr. Mwetich's involvement in the suit raises a conflict of interest likely to prejudice the progress of the matter, and will be a contravention of Rule 8 above. He prayed that the firm of Manani, Lilan, Mwetich & Company Advocates be barred from representation in the case.

Defendant's Submissions

8. The Defendant's Submissions are dated 18th January, 2024 where Counsel also relied on the case of *Serve in Love Africa (Sila) Trust* to submit that the right to be represented by counsel of choice is sacrosanct and can only be taken away in exceptional circumstances. Counsel however submitted that the facts in the said case are distinct from those in the instant suit. He submitted that the Plaintiff had not demonstrated how the signature and attestation of the Defendant's signature is in contention in the suit. Counsel opined that the Plaintiff had acknowledged the validity of the Lease but had only raised questions on the procedure of obtaining it in the amendment to the OS. Counsel wondered how the attesting witness's testimony was material and relevant to the suit if the execution is not an issue, arguing that, the Plaintiff had misapprehended the issues in the suit and misconceived the current application.
9. Counsel opined that not being the maker of a document, an attesting witness does not by mere attestation own the document. He argued that there was no evidence that the attesting witness knows anything about the Lease, he was not involved in processing it and that the contents of the Lease were of no interest to the attesting witness. Counsel added that this being a claim for adverse possession, the attesting witness's testimony is thus irrelevant and immaterial. That consequently, there would be no prejudice or mischief caused to any party, arguing that in fact no prejudice had been demonstrated.
10. Counsel submitted that the reasons given are feeble and without proper foundation and could not warrant taking away the Defendant's right to appoint an advocate of her choice. Counsel relied on *Tom Kusienya v Kenya Railways Corporation* (2013) eKLR and *David Mereka t/s Mereka & Co Advocates v County Government of Nairobi* (2021) eKLR. Counsel asserted that it is not the business of a litigant to choose counsel for the adversary as this would deny the adversary the right to fair hearing as required under the *Constitution*. Further, that the court is equally not in the business of choosing lawyers for parties. He prayed that the Application be dismissed with costs.

Analysis and Determination

11. I have considered the Application and Supporting Affidavit as well as the Affidavits filed in response, the submissions by the two advocates and I have also taken time to peruse the pleadings filed in this suit. From there, I am convinced that what is in issue here is whether the Plaintiff has demonstrated reasonable and sufficient grounds upon which the firm of Manani, Lilan, Mwetich & Company Advocates should be restrained from acting for the Defendant in this suit.
12. Article 50(2)(g) of the *Constitution* 2010 provides that any litigant has a right to choose and to be represented by an advocate and to be informed of this right promptly. The right to choose an advocate of one's choice has been upheld in a myriad of decisions in our superior courts. However, there are exceptions to this right, and one such exception is found at Rule 8 of the Advocate's Act upon which this application is based, and which states 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 on formal or non-contentious matter of fact in any matter in which he acts or appears.”

13. In the instant application, the Plaintiff has averred that the firm of Manani, Lilan, Mwetich & Company Advocates should be restrained from acting for the Defendant on grounds that the Lease that is sought to be relied on in this case was attested to by one R.R. Mwetich Advocate who works for the said firm. The Plaintiff alleges that the Advocate holds information which is material and necessary for the determination of this dispute and thus he intends to call the said advocate as a witness in the suit. The Defendant and the said Advocate on the other hand deny that the Advocate holds any necessary or material information that will result in him being summoned to testify. They averred that he did not prepare the document, but only attested to the upending of the Defendant’s signature as required by the Commissioner of Lands. Further, that since this is an adverse possession claim, the issue of attestation of the Lease does not arise. I have perused the pleadings filed herein, and at paragraph (g) of the Amended Originating Summons dated 9th May, 2023 the Plaintiff seeks a determination on:

“Whether the Lease was duly executed, attested to and verification of execution done.”

14. No other averment was made whether on the face of the OS or in the Affidavit in Support thereof to further this query. Notably, no prayer was made arising out of or premised on this question. As correctly pointed out by the Defendant, the Plaintiff has indeed not alleged that the signature of the Lessee on the Lease is not genuine. The Application for amendment and the instant application were made on the same date, and one wonders whether the introduction of this question was intended only to lend support to the current application to bar the Defendant’s Advocate from representing her. But whether that be the case or not, since it is the Commissioner of Lands who required the Defendant’s signature to be attested to, it is only the Commissioner who can verify whether the said attestation was up to its required standard so as to answer the said question on execution and attestation posed in the OS.
15. It follows then, that the only testimony the Advocate could give on this issue, is whether it is indeed the Defendant who appeared before him and signed the document. But as will become clear later on in this decision, this information is not sufficient to curtail the Defendant’s choice in legal representation. In the case of *Dorothy Seyanoi Moschioni v Andrew Stuart & another* (2014) eKLR, Gikonyo J., relying on the stated:-

“The following rendition of the Court in *Guardian Bank Limited v Sonal Holdings (K) Limited* is apt elucidation of that point:

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... 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; ... 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’.”

16. The Plaintiff has also claimed that if the firm of Manani, Lilan, Mwetich & Company Advocates were to be allowed to continue acting for the Defendant there will be a conflict of interest. The *Black’s Law Dictionary* 10th Edition defines conflict of interest as:

- “ 1. A real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.
2. A real or seeming incompatibility between the interests of two of a lawyer’s clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent”.

17. The term conflict of interest is also defined at Rule 6 paragraph 96 of The *LSK Code of Standards of Professional Practice and Ethical Conduct, 2016* as follows: -

“A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interests or by the Advocate’s duties to another current client, former client or a third person.”

18. The said Plaintiff’s Notice of Motion and the Affidavit thereto do not say much about the alleged conflict of interest. The Advocate deponed that he has never acted for the Plaintiff in any matter which allegation the Plaintiff did not deny or counter. One wonders then how the alleged conflict of interest would arise by him representing the Defendant. It is for this reason that I find that the Plaintiff has failed to demonstrate that there is any impropriety or apprehended conflict of interest on the part of the advocate in representing the Defendant herein. In *British-American Investments Company (K) Limited v Njomaittha Investments Limited & another* [2014] eKLR, the court held that:-

“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.”

19. In addition, the notion that the said R.R. Mwetich Advocate will be called to testify is merely speculative. I note also that the Lease Instrument indicates clearly that it was drawn by the Cabinet Secretary and not the firm of Manani, Lilan, Mwetich and Company Advocates. The Plaintiff has indeed not shown that aside from attesting the Lease document, the Defendant’s Advocates on record further acted for the Defendant in any way or form in the process of obtaining the Lease and Certificate of Lease appertaining thereto. Mr. R.R. Mwetich Advocate only attested that it was the Defendant who placed her signature on the Lease. Although the amendments indeed introduce a challenge to the process through which the title was acquired, the Plaintiff has not pleaded any fraud or other vitiating factor on the part of the advocate in the acquisition of the Lease. He has also not indicated how, in attesting the Lease instrument, the Advocate’s intended testimony will aid his claim on adverse possession or the quest for cancellation of the Lease.
20. In any event, under Rule 9 of the *Advocates (Practise) Rules* an advocate is required to at all times be conscious of any possible conflict of interest. An Advocate cannot continue acting in a matter if it becomes apparent that he will be called as a witness, and should only stop acting once it becomes apparent that he will actually be called as a witness and not at any other time. When this suit was commenced vide the original OS, the Plaintiff’s claim was purely a matter on adverse possession. The said Mr. Mengich only appeared thrice in this matter prior to the amendment that introduced a challenge as to the procedure used in acquiring the title.
21. Together with the Application for leave to amend, the Plaintiff also filed the instant application raising the issue of representation. Despite the fact that he believes that he has no meaningful, material or relevant information to warrant his being summoned as a witness in this suit, Mr. Mwetich seems to have removed himself from representing the Defendant either way. The record shows that once the issue of representation was raised, the matter was taken over by another advocate in the said firm. Indeed one Mr. Mengich Advocate has since been appearing on behalf of the Defendant.
22. Notably, the firm of M/S Manani, Lilan, Mwetich & Company Advocates seems to have more than one advocates employed or working for it, which has been made clear in this suit by the immediate change in Counsel having conduct over the matter. It is therefore unwarranted to bar the entire firm from representing the Defendant herein for reason that one of its advocates witnessed the execution of a Lease, which was not drawn by the said firm, but had been drawn by the Cabinet Secretary. In *British-American Investments Company (K) Limited (Supra)*, the court further held that:-

“It would therefore imposing a lot of hardship upon the firm of M/S Walker Kontos Advocates not to represent the Plaintiff herein just because one of its advocates witnessed an agreement which had been drawn by the 2nd Defendant herein. Indeed, it is not known whether or not that particular advocate was still in the firm of M/S Walker Kontos Advocates bearing in mind that the application herein had been pending hearing and determination for over two (2) years. The position of the court would, however, have been different if the firm had a single advocate who was representing the Plaintiff herein in court and who was also expected to be called to testify as a witness in a dispute that touched on the Plaintiff herein.”



23. In arriving at this conclusion, the court was guided by the decision in the case of *National Bank of Kenya Limited v Peter Kipkoech Korat* [2005] eKLR, where Gacheche J held as follows:-

“Granted he may be called as a witness, but as well put by Mr Kuloba, he is just one of the advocates in the firm and in my mind, though he can be called to give evidence in this suit, it would not require the disqualification of the whole firm of advocates. It is clear that it is Mr Kuloba who is handling this matter and I see no prejudice cause by the Defendants.”

24. See also the *Dorothy Seyanoi Moschioni Case* (*Supra*), where the court reached the following conclusion:-

“(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.”

25. On the element of mischief and/or prejudice, the law is that each case must be considered as a with regard to the special circumstances and the facts of each case. It also trite that the court will only intervene to bar an advocate from representing a litigant if satisfied that real prejudice will be occasioned to the other party. In the *British-American Investments Company (K) Limited Case* (*Supra*), the court held that:-

“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.”

26. The Plaintiff has only alluded to the fact that he will suffer real prejudice if the firm of Manani, Lilan, Mwetich & Company Advocates is to be allowed to continue acting for the Defendant. He has not specified what that prejudice specifically is. And even after going through the entire pleadings, the Application herein and submissions, I see no particular prejudice that the Plaintiff will suffer if his application is not allowed, or one that warrants the limitation of the Defendant’s Constitutional right to representation by Counsel of her choice.

27. For the reasons given above, this court finds that the Plaintiff’s Notice of Motion Application dated and filed on 9th May, 2023 is devoid of merit and the same is ripe for dismissal. The said Application is hereby dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JULY 2024.

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J.M ONYANGO

JUDGE

In the presence of;



Mr. Mengich for the Plaintiff
Miss Jeruto for the Defendant
Court Assistant: Brian

