



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 35A OF 2018

(Before Hon. Justice Mathews N. Nduma)

RAJAB BARASA OLEMUTEKE.....CLAIMANT

VERSUS

SHAIWAZ S. JIWA.....RESPONDENT

RULING

1. The Respondent/Applicant filed a notice of motion application on 12th April 2019, praying for an order restraining counsel for the claimant from representing the claimant due to a conflict of interest.
2. The application is premised on grounds set out on the face of the application to wit:
 - (i) The counsel for the claimant has always acted/represented the respondent in respect of the respondent's properties situated within Malakisi Township in Bungoma County.
 - (ii) That conflict of interest will arise if counsel for the claimant is allowed to represent the claimant herein.
 - (iii) That the respondent has confided a lot of information to counsel for the claimant on his properties situated at Malakisi township where the claimant alleges to be working and thus the respondent will greatly be prejudiced if the orders sought are not granted.
3. The application is amplified by supporting affidavit of the respondent and has attached documents marked SS 1(a) to (g) showing that the advocate for the claimant has always acted for him.
4. The respondent further filed a statutory power of Attorney dated 3rd October 2018 in terms of which the claimant granted authority to the advocate for the claimant to act for him in business operation transactions, claims and litigation and to make whatever acts necessary to manage and man the respondent's property.
5. The advocate for the claimant, Mr. Simiyu Makokha filed a replying affidavit in which he deposes that he has never represented the respondent in Bungoma Land & Environment Case No. 216 of 2014. That he has never shared claimant- advocate relationship with the respondent. That he has never obtained any documents from the respondent. That it is the constitutional right of the claimant to choose advocate of choice.
6. That the respondent has never retained the firm of M/S Makokha Wahanga and Luyali Associates on a retainer basis nor has the firm ever represented the respondent in any case. That the application be dismissed with costs.

Determination

7. The court has carefully examined annexes SSI (a) to (g) and some of the documents show that Mr. Makokha has acted for the respondent in various transactions including as indicated in an email text sent to Mr. Makokha by the respondent on 17th May 2018, marked SSI (d), that the respondent had entrusted Mr. Makokha with the safe custody of his title deeds exhibit SSI(e) also shows that Mr. Makokha received a sum of Kshs. 50,000 from Malakisi Muslim High School on behalf of the respondent.
8. Prima facie, there is in existence an advocate/client relationship between the respondent and advocate Makokha personally. Mr. Makokha has not presented any tangible evidence that he has since severed the advocate client relationship with the respondent, including ceasing to be the custodian of the respondent's legal documents.

9. In the case of **King Woolen Mills Limited and Galot Industries vs M/S Kaplan and Stratton** Advocates, Court of Appeal at Nairobi Civil **Appeal No. 55 of 1993** cited the holding of the court at page 354 in **Rukusens vs Ellismundas and Clerke** thus

“There is no general rule that a firm of solicitors who had acted for a former client could never hereafter act for another client against the former client, but a firm of solicitors would not be permitted to act for an existing client against a former client if a reasonable man with knowledge of the facts would reasonably anticipate that there was a danger that information gained while acting for the former client would be used against him or there was some degree of likelihood of mischief, i.e. of the confidential information imported by the former client being used for the benefit of the new client”.

10. In the present case, the court is satisfied that Mr. Makokha advocate has an existing client/advocate relationship with the respondent. The respondent has not sufficiently rebutted the evidence adduced by the respondent of the persistence of this relationship including Mr. Makokha Advocate being a custodian of important legal documents of the respondent.

11. It is our considered view that a reasonable man with knowledge of these facts would reasonably anticipate a danger that Mr. Makokha would use the confidential information in his knowledge imparted by the respondent for the benefit of the claimant in this suit.

12. The application to have Mr. Makokha enjoined from acting for the claimant in this suit against the respondent has merit and is granted with costs against Mr. Makokha Advocate.

Ruling Dated, Signed and delivered at Nairobi this 13th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

M/S Omundi B.W Onchiri /Advocates for the Respondent/Applicant

Mr. Makokha Advocate/Respondent

Chrispo – Court Clerk