REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 110 OF 2015

NILS STAFFAN WIRELL.....PLAINTIFF/APPLICANT

VERSUS

EMILY CHEPKOSGEY.....DEFENDANT/RESPONDENT

RULING

Nils Staffan Wirell ***(hereinafter referred to as the applicant)*** has brought this application seeking orders that the firm of Nyairo and Company Advocates and in particular, Mr. Alfred Nyairo Advocate be disqualified and or banned from the conduct of this matter on behalf of the defendant. The application is based on grounds that the sale agreement which is the contention in this suit was prepared by the firm of M/s Nyairo & Company Advocates, which has previously acted for plaintiff as their legal advisors in transactions relating to the suit parcel of land and received confidential information from time when information relates to facts that are at the care of the dispute herein. The plaintiff intends to call Alfred Nyairo before this court as a witness to shed light on the issues touching on the documents prepared by them. The applicant states that an advocate cannot be both an Attorney and a witness in the same matter as he cannot leave his privileged position at the bar and more to the witness box in the same matter. That it is imperative and in the interest of justice that the firm of M/s Nyairo & Company Advocates be removed from record on behalf of the plaintiff.

The application is supported by the affidavit of Nils Staffan Wirell who states that the plaintiff and the defendant are the registered owners of the suit property known as Eldoret Municipality Block 14/360. He fully processed the purchase of the property from funds obtained from mortgaging his property in Sweden. The sale agreement as drafted and executed at the firm of M/s Nyairo & Company Advocates.

He states that in the court of his transactions and consultations with Mr. Nyairo, he opened up to him about confidential information relating to his engagements and personal associations including use, ownership and substantial financial transactions with the defendant that primarily caused him to purchase the suit property and as such, his knowledge of that information will be prejudicial to his case.

That Mr. Alfred Nyairo is a close lawyer to him and the defendant and has in the cause of their advocate client-relationship received private information in confidence which makes his representation of the defendant unfair to him. That he intends to call Mr. Alfred Nyairo as a witness in this suit and there is a real likelihood of bias against him by the firm of M/s Nyairo & Company Advocates should they remain on record for the defendant.

The applicant states that he is now retired and he is entirely reliant on the proceeds to be obtained from the sale of the suit property as per the memorandum of understanding executed between him and the defendant to redeem his mortgaged properties in Sweden hence it is imperative that this application is dispensed with in the first instance and the hearing scheduled for 21st November, 2017 be maintained.

The respondent filed a replying affidavit stating that the application lacks merit, it is frivolous and ought to fail due to the fact that she knows of her own knowledge that the Plaintiff/Applicant and herself had no relationship with M/s Nyairo and Company Advocates or Mr. Alfred Nyairo prior to the sale agreement that is the subject of the suit.

Moreover, that Mr. Alfred Nyairo was first introduced to her and the Plaintiff by the Vendors to the sale agreement for the purchase of the subject property, Montague Forman and Elizabeth Asta Forman who had instructed M/s Nyairo and Company Advocates to facilitate the preparation and execution of the sale agreement.

That she is advised by Mr. A. K. Nyairo, Advocate which advice she verily believes to be true that the pleadings drawn and filed by M/s Nyairo and Company Advocates do not contravene the provisions of Rule 9 of the Advocates Practice Rules as there is no contention as regard the sale agreement that was executed by Mr. Alfred Nyairo who practices in the firm of M/s Nyairo and Company, Advocates.

According to the respondent, the agreement was witnessed by Mr. A. K. Nyairo, an Advocate in the firm of Nyairo and Company Advocates and not the entire personnel of M/s Nyairo and Company, Advocates. As such, nothing bars any other personnel from M/s Nyairo and Company Advocates from representing her. In any event, if at all Mr. A. K. Nyairo was to be called as a witness his role will only be limited to the production of the sale agreement and nothing else.

That in any event, Mr. Alfred Nyairo's role was only limited to facilitating the purchase of the subject property and none of the parties herein have disputed the sale agreement to warrant the need to call Mr. Alfred Nyairo or any other personnel from M/s Nyairo and Company Advocates to testify in the matter.

She is further informed by Mr. A. K. Nyairo Advocate which information she verily believes to be true that he is a stranger to the emails alluded to in the affidavit in support of the application as the email address is not of M/s Nyairo and Company Advocates. He states that no basis has been laid as to the nature of evidence that will be required to be given by M/s Nyairo and Company Advocates to warrant the court to consider the Plaintiff/Applicant's application given that the main issue is whether or not she held the property in trust for the Plaintiff/Applicant which issue was not covered in the sale agreement and which issue Mr. Alfred Nyairo and by extension M/s Nyairo and Company Advocates was not instructed to deal with.

It is argued that the Plaintiff/Applicant has not demonstrated any real prejudice that he will suffer given that they were both advancing the same interest as purchasers of the suit property and that she has a constitutionally enshrined right to be represented by an advocate of her choice and that she stands to be greatly prejudiced should the application be allowed.

Mr. Langat for Applicant submits that the plaintiff was Mr. Nyairo's client and therefore, he is apprehensive that the information given to Mr. Nyairo will be used against him. There was a personal relationship between him and the defendant and that the issue of ownership and usage will be discussed. The defendant claims to be the wife of the plaintiff and therefore, the marital issue was with Mr. Nyairo's during the transaction. Mr. Nyairo also tried to arbitrate between the parties. He submits that in the case of ***Delphis Bank Limited Vs Channan Singh Chatthe & 6 Others,*** the case revolved on a charge and therefore, the facts are different.

M/s Yebei on her part submits that the plaintiff does not disclose any conflict of interest and that there is no evidence that Mr. Nyairo will be called to give evidence as a witness. He further submits that every person in litigation has the right to be represented by a lawyer of his choice. The issue of confidentiality has not been demonstrated well by the applicant. The agreement was executed by Mr. Nyairo but not drawn by Nyairo.

I have considered the application, the replying affidavit and rival submission of the parties. To begin with, it is a treasured constitution right for every litigant to be represented by an advocate of his own choice. However, the right can be curtailed where there exists a conflict of interest that might affect the principle of confidentiality.

There is no general rule that an advocate cannot act for a party in a matter and then act for another party in the subsequent matter. The test to be applied is whether real mischief will result. In such matters, each case turns on its own facts to establish whether real mischief and real prejudice will result.

In ***King Woolen Mills Ltd & Another Vs M/s Kaplan & Strattan (1993) LLR 2170***, a party in the firm of Kaplan & Strattan, Mr. Keith participated in negotiation for offshore loan facilities between a bank and the borrowers and went ahead and drew up the loan agreement, the guarantee, the debenture and the legal charge on behalf of the bank and the borrowers as their common advocate. When litigation arose between the bank and borrowers, the firm chose to represent the bank but the borrowers objected and sued the firm to stop it from appearing for the bank on the basis of breach of client/advocate confidentiality and conflict of interest. The court agreed with the argument of the borrowers Muli J. A. with whom the other Judges agreed held:

> ***"I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the appellant under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit."***

This matter turns on purchase of property by the plaintiff and defendant and registration of the same under their joint names due to undisclosed relationship and friendship and construction of houses on the first property. The plaintiff intends to sell the said property in order to repay the mortgage in Sweden but the defendant is not willing and therefore, the plaintiff has come to court to ***secure*** the joint ownership among other prayers. The defendant claims to have purchased the property jointly with the plaintiff using their funds and that they developed the property jointly.

The defendant is being represented by Nyairo & Company Advocates whom the plaintiff claims to have divulged a lot of information and therefore, should not be allowed to represent the defendant as it would breach the advocate/client confidentiality and amounts to conflict of interest.

I have looked at the agreement of sale of Eldoret Municipality Block 14/360 and movables thereon and do find that the advocates for the parties are Nyairo & Company Advocates and the two agreements was witnessed by A. K. Nyairo on behalf of all parties. It is apparent that on the 20.2.2017, the parties herein were already having a problem as shown by annexture NSW2 which is communication between Wirell and Mr. Nyairo. Mr. Nyairo wrote to Wirell on 8.7.2011 stating ***"Good to know that you are on the way to resolving the matter. It is always the better way when an amicable solution is arrived at."***

The plaintiff replied by stating:

> ***"The negotiations between Emily and myself have come so far that we think we are near a common understanding. We would like to do this on our own which seems quite possible at the moment. The final step may then need a formal expression which we probably will have to return to you to put down in writing. Thus, I would ask to cancel today's meeting at 14.30. I regret the inconvenience this has caused and can only tell how well that appointment served its purpose, even if not being fulfilled as such."***

From the above conversation, the relationship between the plaintiff and Mr. Nyairo was not only execution of the agreement but there was an

advocate client relationship that could have led to the sharing of information that is confidential between Mr. Nyairo and the plaintiff. Though it is not clear that Mr. Nyairo participated in the negotiations between the plaintiff and the defendant, he was well informed by the plaintiff in respect of the progress in negotiations and the said information is likely to be used against the plaintiff.

Mr. A. K. Nyairo having been the Advocate for both parties in the agreement is likely to be called as witnesses.

The law applicable to the issues raised in the application was aptly stated in the case of ***Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR, where*** **Mumbi Ngugi J.,** ***thus: -***

> ***"…19. The legal basis of the petitioner's application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:***
>
> ***'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.'***
>
> ***20. From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others (supra) observed as follows:***
>
> ***"The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.***
>
> ***21. The court noted, however, that:***
>
> ***'There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result.'***
>
> ***22. The court referred to these authorities as comprising King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd –vs- Kaplan and Stratton Advocates (supra). In this case, in restraining Mr. Keith and any partner of the firm of Kaplan and Stratton Advocates from acting for the defendant in the matter or in any litigation arising from the loan transactions in question, the court applied the test established in England in the case of Supasave Retail Ltd vs. Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER where the court had observed that***
>
> ***"The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rakusen vs. Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 -1913) ALL ER Rep 813… The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself. Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act…..As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated."***
>
> *The decision of O'Kubasu, JA in William Audi Ododе & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) is also instructive with regard to Rule 9 of the Advocates Act. In declining to bar an advocate from acting for some of the parties in the matter, O'Kubasu J stated at page 3 of his ruling states as follows;*
>
> ***'I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.'***
>
> *The Learned Judge of Appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the Delphis Bank and King Woolen Mill cases, O'Kubasu J observed at page 7 of his decision as follows:*
>
> ***'The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.'***
>
> *The right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard*

to access to justice, particularly Articles 48, 50 (1) and 159(2) (a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away as held by Hon lady Justice Mumbi Ngugi in the aforementioned case.

Concerning the same issue, in the case of **Dorothy Seyanoi Moschioni v. Andrew Stuart & another** (2014) e KLR, Gikonyo **J.,** stated:-

> **"[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. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. 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; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; 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.**
>
> **[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."**

The aforesaid rule attempts to guard against conflict of interest. An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren't compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he may be a material witness in his client's matter. A conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways pick up different aspects of the three main ways in which the problem can arise.

This Courts adds that an advocate should not act where justice must not only be done but must be seen to be done. This often makes it easier to decide whether there is or is not a conflict. The public perception of the profession and the damage that might be done to that important perception if an advocate acts having a conflict of interest should be considered

As observed earlier, the relationship between the plaintiff and Mr. Nyairo was not only execution of the agreement but there was an advocate client relationship that could have led to the sharing of information that is confidential between Mr. Nyairo and the plaintiff. This is a highly contentious matter and therefore, I do find that it is necessary to bar the firm of A. K. Nyairo from representing the defendant. The application is merited and is allowed thus, the firm of A. K. Nyairo is hereby barred from appearing for the defendant having been involved in the transaction of sale and having been privy to the information relating to their negotiations to reach an amicable resolution.

Dated and delivered at Eldoret this 21st day of June, 2018.

A. OMBWAYO

JUDGE