



**Wardy Communications Limited & 2 others v Chase Bank (Kenya)  
Limited (in Liquidation); Weya (Interested Party) (Civil Case 373 of 2016)  
[2023] KEHC 991 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 991 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 373 OF 2016  
DAS MAJANJA, J  
FEBRUARY 17, 2023**

**BETWEEN**

**WARDY COMMUNICATIONS LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ABDIFATAH ADAN GEDI ..... 2<sup>ND</sup> PLAINTIFF**

**MOHAMMED ADAN GEDI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**CHASE BANK (KENYA) LIMITED (IN LIQUIDATION) ..... DEFENDANT**

**AND**

**SAMWEL ARTHUR WEYA ..... INTERESTED PARTY**

**RULING**

1. The interested party has moved the court by way of the Notice of Motion dated November 23, 2022 seeking an order that that Acorn Law Advocates LLP formally trading as Ojiambo & Company Advocates (“Acorn Law”) be disqualified from acting for or further representing the plaintiffs in this matter. The application is supported by the interested party’s affidavit sworn on November 23, 2022. It is opposed by the plaintiffs through the replying affidavit of the 2<sup>nd</sup> plaintiff sworn on December 2, 2022 and by the Defendant through the Grounds of Opposition dated December 5, 2022.

**The application**

2. The interested party contends that the plaintiffs’ advocates, Acorn Law have previously acted for and/or advised him in connection with the matters raised in these proceedings and that they have now taken a position highly prejudicial to the interests of the interested party and directly contrary to the advice



they had offered to the interested party, prior to the filing of the suit. That the plaintiffs' advocates are currently acting for both the interested party and the plaintiffs in a sale transaction over L R no 7785/215 ("the property"), a property owned by the plaintiffs and the interested party as tenants in common in equal shares, whose charge to the bank, the interested party contends was fraudulently procured, by conspiracy between the plaintiffs and the defendant.

3. The interested party avers that the plaintiffs' advocates had advised him before the commencement of these proceedings that the charge was fraudulently procured and that contrary to their past advice and to the detriment of the interested party, have now purported to sign a consent with the defendant to the exclusion of the interested party, purporting to settle the suit without the consent of the interested party. The interested party believes that the proceeds of the sale of the property are partly being used, without his knowledge to discharge the security that he contends was fraudulently procured and that the plaintiffs' Advocates are the ones acting for both the plaintiffs and the interested party in the sale transaction.
4. The interested party states that the plaintiffs' advocates, despite repeated requests and pleas and in gross breach of the professional code of conduct and ethics, have refused to furnish the interested party with a copy of the executed agreement for sale, yet it is suspected that the proceeds from the sale are being used to settle the impugned debt owed to the defendant. That there is every danger that the plaintiffs' advocates are using the information previously given to them in confidence by the interested party to damnify him and that the antagonistic view that the plaintiffs' advocates have taken in these proceedings, including, ostensibly seeking to exclude the interested party from a consent to settle this matter, reveals serious matters of conflict of interest.
5. The interested party urges that the validity of the charge created over the property is in dispute in these proceedings and that it is curious that the plaintiffs' advocates are seeking to discharge the charge with proceeds of sale of a property co-owned by the interested party and the plaintiffs without his consent. That in the totality of the circumstances, the unlawful attempt by the plaintiffs and the defendant to settle this dispute to his exclusion is mischievous and only fortifies his position that the charge on the property was fraudulently obtained by conspiracy between the plaintiffs and the defendant, and it would now appear with the full knowledge and/or blessings of the advocates acting for the plaintiffs in this matter.

### **The plaintiffs' reply**

6. The plaintiffs oppose the application on the ground that the interested party has not made out a case for disqualification of their advocates. They point out that the dispute between the plaintiffs and the defendant has through reconciliation of accounts already been settled and there is nothing left to get to trial, thus reasons advanced by the interested party for seeking disqualification of their advocate are not merited. Moreover, disqualification of their advocates at this stage would force them to incur substantial expense.
7. The plaintiffs do not deny that sometime in 2016, the plaintiffs and the interested party became aware of the attempt by the defendant to auction the property when the plaintiffs and the interested party met to prepare and frame their respective suits against the defendant. That the interested party had contemplated suing the defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs by denying that he never signed the charge documents and that the securities were a forgery. That their advocates advised against mounting a false claim since the burden of proof in cases of fraud is much higher and court may not have taken them seriously since the charge was signed before a lawyer who was available to give evidence and the borrowers had already taken commercial benefit of the said charge documents.



8. The 2<sup>nd</sup> plaintiff depones that he was the one who took the interested party to their advocate where at the meetings were the interested party, the 2<sup>nd</sup> and the 3<sup>rd</sup> plaintiffs. The plaintiffs assert that the interested party had nothing confidential that he told their advocate as he just thought that denying the loans would be a good ground to obtain an injunction. That what the 2<sup>nd</sup> plaintiff found dishonest was the interested party's quest to sue the plaintiffs for the forgery when they had all signed the said charge at the same sitting before the same advocate.
9. The plaintiffs further explain that their advocate asked the interested party to seek a second opinion from another lawyer when the interested party instructed his present advocate to review his purported claim against the defendant, the 2<sup>nd</sup> and the 3<sup>rd</sup> plaintiffs. That the advocate for the interested party requested for and was given the draft Affidavit through email now exhibited by the interested party as annexures SW3 and SW4 and that whereas the interested party did not disclose to the 2<sup>nd</sup> plaintiff the actual opinion given by his new advocates, he knew as a matter of fact that the interested party did not file the purported claim in any court in Kenya, now six years later.
10. The plaintiffs aver that their advocate was of the opinion that their claim was serious and disclosed a *prima facie* case and they then filed this suit to challenge the decision by the defendant to exercise a statutory power of sale over the properties; Title Nairobi Block 104/358, Title Nairobi Block 104/347 and Title 7785/215 and that sometime in 2018, the interested party joined these proceedings to support the plaintiffs' claim against the defendant.
11. The plaintiffs contend that the present suit does not seek any relief against the interested party or allege any wrongdoing on his part and that he is not mentioned by either the plaintiffs in their Plaint or by the defendant in its counter-claim and there is no decision likely to be by this court against him. Thus, his claim that he will suffer prejudice is unfounded.
12. The plaintiffs state that during the subsistence of this suit, the interested party, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs met and agreed to sell their joint property, Title 7785/215, and settle accounts with the defendant. That the 2<sup>nd</sup> plaintiff was tasked to market the property for sale while the interested party was to help negotiate terms of the settlement with the defendant and the parties also agreed that the firm of Acorn Law will act for the interested party, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and that this is confirmed by the advocate for the interested party in his letter dated April 26, 2021. The plaintiffs contend that the interested party managed to negotiate the final terms of the settlement with the defendant that they pay a reduced sum of kshs 50,000,000.00 in full discharge of all the suit properties and that this sum was to be paid from the sale proceeds and has since been paid to the satisfaction of the defendant and evidenced by the consent letter dated November 15, 2022.
13. The plaintiffs state that the interested party declined to sign the consent sent to him and he offered no alternative terms and insists on a full trial for the dispute between the plaintiffs and the defendant and yet there is nothing left in the present suit to go to trial as desired by the interested party. The plaintiffs allege that the interested party wanted to be paid certain monies from the purchase price which the plaintiffs state are being discussed before a mediator and is yet to be resolved. That the issues of the sale agreement are not before this court for determination and the advocates have not been called to give evidence and that all documents sought by the interested party were provided.
14. The plaintiffs urge that the present accusations are made in bad faith and that the application is unfounded and deliberately brought to delay the recording of the consent on December 6, 2022.



## The defendant's reply

15. The defendant states that the application is an afterthought and is designed to frustrate the adoption of consent and final conclusion of the matter for extraneous motives. That by the consent dated November 15, 2022, the matter has been marked as settled and the defendant and the plaintiff have no desire to continue litigating their respective counterclaim and Plaintiff and that the consent is unchallenged and there is nothing left for trial.
16. The defendant states that the issues raised by the interested party in the said application have not pleaded by the interested party or any party in the pleadings. For example, the issues on how the parties will share the money upon sale of one of the properties are not the subject of this suit and that the interested party did not plead those issues in his deposition neither has he filed a substantive suit by Plaintiff, Originating Summons or Petition or known pleadings known under the Civil Procedure Rules so as to originate his new cause of action as he wishes.
17. The defendant reiterates that the debt has been fully settled and the defendant has undertaken to release the title deeds Title Number Nairobi/Block 104/358, Ushirika Estate and Nairobi/ Block 104/347, Ushirika Estate registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs to the plaintiffs and Land Reference Number 7785/215, Ruaka Road, Runda Estate registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and interested party to them jointly, in line with the banking procedures.
18. The defendant contends that it is not aware of other extraneous internal disputes between the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs on one hand and the interested party on the other and is therefore not privy to the dispute. That the debt being the substratum of the suit having been settled, litigation must come to an end and that there is no known conflict of interests proved by the interested party.
19. The defendant urges that it is incomprehensible that the interested party has waited for over 6 years to raise the allegations of conflict of interest and thus prays that the application be dismissed with costs

## Analysis and determination

20. The court is being called to determine whether Acorn Law should be disqualified from acting for or further representing the plaintiffs in this matter.
21. Whether and under what circumstances an advocate should be barred from representing a party was discussed in detail by the Court of Appeal in *Delphis Bank Limited v Channan Singh Chattbe and 6 others* NRB CA Civil Appl no 136 of 2005 [2005] eKLR 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 relationships or where the advocate would double up as a witness. 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. The authorities we allude to are King Woolen Mills Ltd & Anor vs M/S Kaplan & Stratton [1993] LLR 2170 (CAK), (C A 55/93) and Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654.



22. In the earlier case of *King Woolen Mills Limited and Another v Kaplan and Stratton Advocates* [1990-1994] EA244 the Court of Appeal distilled the applicable principles as follows:
1. An advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients.
  2. A retainer creates contractual relationship between the advocate and the client irrespective of whether two or more clients are involved.
  3. An advocate cannot act in a manner prejudicial to his client or disclose any confidential information to anyone without the client's consent.
  4. An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients. Concerning the original transaction or the subject matter for which he acted for the clients as a common advocate (RE: *A firm of solicitors* [1992] 1 ALL ER 353 followed; *Rukeson versus Ellis Munday and clerk* [1912] KL831 distinguished).
  5. Acting for two or more common clients did not remove the necessity of confidentiality between the advocate and each of the clients separately.
  6. Conclusion of the transaction for which the retainer was made did not extinguish the duties and obligations of the common advocate.
  7. Delay in objecting, to an advocates continued representation of a certain client does not defeat or change the duty or obligations of the common advocate imposed on him under the retainer.
  8. There must be real anticipated prejudice and mischief if the advocate were to be permitted to continue acting for one of the parties.
23. In addition to the principles I have set out above, an advocate, is bound by the professional regulations issued from time to time by the Law Society of Kenya in the form of the *The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct*, 2016 ("the Code") which defines 'conflict of interest' in rule 6 para 96 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.

Rule 6 para 99 of the code enumerates instances in which a conflict of interest might arise. They include:

- (a) Where the interests of one client are directly adverse to those of another client being represented by the advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;
- (b) Where the nature or scope of representation of one client will be materially limited by the advocate's responsibilities to another client, a former client, a third person or by the personal interests of the advocate.
- (c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.



24. What is clear from the authorities and the code is that the rule against representing a former client is not absolute. It must be demonstrated that there is a risk that information obtained from one client may be used to the disadvantage of the other client. Ultimately and the courts have emphasized that each case must turn on its own facts in order to establish whether real mischief and prejudice would result.
25. Going through the facts, it is not in dispute that when the dispute between the plaintiffs and the defendant arose, the plaintiffs and the interested party consulted Acorn Law. Ultimately, only the plaintiffs elected to proceed with the suit against the defendant. The interested party proceeded to instruct his own advocate to pursue his interests. However, from the evidence presented, the interested party was intimately engaged in the negotiations that resulted in settlement of the suit and sale of the subject property.
26. Since the interested party was involved in the negotiations that resulted in the settlement which negotiations also involved Acorn Law, I do not find any conflict of interest. If anything, I agree with the plaintiffs and the defendant that the application is an afterthought given its timing for a number of reasons. First, in his pleadings before the court filed almost four years ago, the interested party never mentions or imputes any improper motive or involvement of the plaintiffs' advocates in this suit. The interested party's case is hinged on the allegation of fraud on the part of the plaintiffs and the bank in extending the facilities of kshs 15,000,000.00, kshs 17,600,000.00 and kshs 30,833,692.00 in February 2013, February 2015 and in the year 2014 respectively yet despite these allegations, he did not file any claim against the plaintiffs or the defendant.
27. Second, the interested party did not have any issues with Acorn Law when his advocate sent a letter to them on May 3, 2021 commenting on the sale agreement in respect of the property and seeking a meeting to "...iron out the issue as to sharing of the net proceeds of sale". third, in a follow up letter dated November 8, 2022, the interested party, through his advocate laments that there were earlier concerns that remain unanswered and that they were yet to receive a response. In the letter, the interested party makes reference to the earlier letter which I have stated does not mention the interested party's apprehension of Acorn Law acting for the plaintiffs. It is apparent that the interested party is much more interested in the sale agreement of the property as then drafted rather than the plaintiffs' representation.
28. What is apparent from the totality of the evidence is that, the interested party appears unhappy with the consent dated November 15, 2022 and this is evidenced by the interested party's advocate's email of November 17, 2022. This email does not raise any issue about conflict of interest or breach of confidentiality by the plaintiffs' advocates either in coming up with the consent or in their handling of this suit generally.
29. An applicant seeking disqualification of an advocate must demonstrate real mischief will occur if the advocate continues to act for another client or third party. From my appreciation of the evidence, I conclude that the interested party's application is nothing more of an afterthought and even if it is not, it is bereft of any evidence indicating a conflict of interest or breach of confidentiality by the plaintiffs' advocates to the detriment of the interested party.

## **Disposition**

30. For these reasons, I agree with the plaintiffs and the defendant that the interested party's application dated November 23, 2022 cannot succeed is now dismissed. The interested party shall pay the costs of the plaintiffs and the defendants which are assessed at kshs 30,000.00 respectively.



31. Finally, this suit has not been settled and it is now the duty of the court to give effect to the consent resolving the matter. I therefore mark the suit as settled in terms of the consent dated November 15, 2022 executed by the advocates of the plaintiff and the defendants. Orders shall issue accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY 2023.**

**D S MAJANJA**

**JUDGE**

**Court of assistant: Mr M Onyango**

**Mr Ojiambo instructed by Acorn Law Advocates LLP for the plaintiff.**

**Mr Akello instructed by Robson Harris Advocates LLP for the defendant.**

**Mr Odera instructed by Odera Obar and Company Advocates LLP for the interested party.**

