



**Limo & another v Limo; Jerop (Interested Party) (Succession Cause E040 of 2021) [2023] KEHC 2529 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE E040 OF 2021  
RN NYAKUNDI, J  
MARCH 27, 2023**

**BETWEEN**

**RICHARD KIPCHIRCHIR LIMO ..... 1<sup>ST</sup> PETITIONER**

**RUTH CHEPKOSGEI LIMO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**FAITH CHEMUTAI LIMO ..... BENEFICIARY**

**AND**

**KAREN CHESOO JEROP ..... INTERESTED PARTY**

**RULING**

1. The applicant approached the court *vide* an application dated September 7, 2021 seeking the following orders;
  1. The law firm of M/s Kalya and Company Advocates and the advocates working therein are disqualified from acting as counsel for the petitioners/respondents or any other party in the instant matter.
  2. The law firm of M/s Kamau Lagat and Company Advocates and the advocates working therein are disqualified from acting as counsel for the petitioners/respondents or any other party in the instant matter.
  3. Ms Karen Chesoo Jerop Advocate of Kenya national identity card number 2xxxx8 is disqualified from acting as counsel for the petitioners or any party herein.
  4. Mr Richard Kamau Langat Advocate of Kenya national identity card number 2xxxxx9 is disqualified from acting and appearing as counsel in the instant matter for any party.
  5. Costs of the application are awarded to the beneficiary/ applicant.



2. The application is premised on the grounds set out therein and the contents of the affidavit in support of said application.

### **Applicant's Case**

3. The applicant's case is that the late Joseph Kipkemoi Limo died on September 20, 2020 leaving behind his beneficiaries comprising the parties herein. Upon his demise the law firm of M/s Kalya & Company Advocates communicated to the parties that the deceased had left behind a will. The will was then read and the same on face of it indicate that it was made on January 25, 2020. The impugned will was drafted by the law firm of M/s Kalya & Company Advocates without distinction of specific advocates who did the drafting. The only witnesses to the said will are advocates Karen Chesoo and Richard Kamau who practice with the law firms of M/s Kalya & company Advocates and M/s Kamau Lagat & Company Advocates respectively. Further that the law firm of M/s Kalya & Company Advocates lodged the instant cause on behalf of the petitioners/respondents herein. The beneficiary/applicant herein lodged an application dated August 4, 2021 bringing to the fore the contest over the impugned will. Counsel Karen Chesoo lodged an application seeking to be joined into the suit and setting out her interest with respect to the estate. These set of acts then brought to the fore the potential conflict of interest on the part of the counsel and the affected law firms.
4. The apprehension on the part of the beneficiary/ applicant is informed by the fact that the affected counsel and proprietors of the two law firms will be called to testify in the matter in view of the contest alluded to in the application dated August 4, 2022. The beneficiary/ applicant herein has alleged fraud, undue influence and coercion with respect to the making of the impugned will. The only persons who can speak to the circumstances surrounding the preparation, execution and attestation of the will are the drafters and witnesses. The applicant stated that the Advocates Practice Rules (Rev 2012) guards against breach of a professional duty by an advocate practicing before a court of law and relied on rule 8, submitting that from said provision an advocate should not act in a matter where an advocate has reason to believe that he may be called as a witness. The existence of a probability of being called as a witness in a matter is sufficient ground for an advocate to decline to take instructions in a particular matter. The applicant relied on the case of *Sere Technologies Limited & another v Forward Cars Limited* [2019] eKLR to buttress this point.
5. The applicant submitted that sole proprietor law firms cannot be distinguished from proprietors. That they are not clothed with separate legal personality to warrant a distinction. Further, that where a conflict of interest attaches on a proprietor, the law firm will suffer the same fate. The applicant contended that it has been demonstrated that there are contentious facts in the matter with respect to the drafting, execution and attestation of the will which will form the basis for the hearing in the instant cause. The contests will only be resolved to evidence and the advocates who drafted and those who witnessed the will provided a crucial loop in resolving the contentious facts. They should be left out of the arena of contest so that their evidence is not tainted by the vagaries of contest. Counsel urged the application be allowed.

### **Respondent's Case**

6. The respondents filed submissions on December 13, 2020, stating that the affidavit in support of the application did not disclose much about the conflict of interest and the notion of calling the advocates at this stage is merely speculative. He relied on the case of *Sunrise Properties Limited v National Industrial Credit Bank* and state that the applicant has not established circumstances justifying reasonable apprehension of likelihood of bias.



7. The respondents submitted that they possess a right to representation by counsel of their choice which must be recognised and represented. Counsel urged that an advocate may be prevented from appearing in a matter if he may be required as a witness. It is not an absolute bar as an advocate can represent a party and still be a witness, so long as his evidence is confined to formal or non-contentious matters of fact.
8. The respondent submitted that the applicant has not provided any evidence to show that Ms Karen Chesoo who witnessed the last will and testament dated January 25, 2020 and by extension M/s Kalya and Company advocates engaging in any transaction with the parties other than preparing and witnessing the last will and testament dated January 25, 2021. The respondent cited the opinion of Stephen W. Fisher J.P, Mark C. Dillion, William E. McCarty and Ariel E. Belen JJ of the Supreme Court of New York in *Hudson Vakkey Marine Inc v Town of Courtland* 30AD 3d 378 and stated that the applicant completely failed to demonstrate the kind of evidence she seeks from the advocates, relevance of such testimony is in relation to the matters in question. On the standard of proof in respect of the issue of conflict of interest is that a party must not only allege such, but should adduce evidence in support of such an allegation. Counsel further cited the case of *Murgor & Murgor Advocates v Kenya Pipeline Co Ltd* (2021) eKLR where the principles guiding the disqualification of advocates from appearing for a client in a matter.
9. Counsel urged that the application was unmerited and should be dismissed with costs to the respondents.

#### **Analysis & Determination**

10. The issues for determination that arise is;
  1. Whether there exists a conflict of interest
  2. Whether the law firm of M/s Kalya and Company Advocates should be disqualified from acting as counsel for the respondents

#### **Whether There Exists A Conflict Of Interest**

11. The issue in contention in the cause is the validity of the will which the applicants dispute and contend that there was some manipulation of the purported will. I have considered the impugned will and it is evident that the same was witnessed by Karen Jerop Chesoo and Richard Kamau Langat, who are not disputed to be advocates in the firm of M/s Kalya and Company Advocates.
12. This is not the juncture to interrogate the veracity of the claims levelled against the validity of the will, of importance is the fact that the will is to be challenged and as such the witnesses might be required to testify as to the allegations raised on the same.
13. The Law Society of Kenya (LSK) Code of Conduct and Ethics for Advocates 2016 paragraph 96 provides as follows:

"A conflicting interest is an interest which gives rise to substantial risk that the advocate's representation of the client will be adversely affected by advocate's own interest or by advocates' duties to another current client, former client or a third person."



14. It is trite law that he who alleges must prove. In *British American Investment Co Ltd v Njomaitba investment ltd* HCCC No 57 of 2011 and *Sunrise Properties Ltd vs National Industrial Bank* HCCC No 452 of 2007 held as follows:

"Where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such a conflict of interest indeed exists. It is incumbent upon such a party wishing to disqualify an advocate from acting for a particular party to show that it has suffered prejudice such an advocate or firm of advocates continues to so act for that party. Mere suspicion or 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. Every party has a right to be represented by a counsel of his own choice."

15. Whereas it is not in dispute that the advocates mentioned witnessed the attestation of the will, there is no other instance they have been shown to be involved in the matter or to have participated in the proceedings. I am in agreement with the respondents that they were the only ones who witnessed and not the entire firm of M/s Kalya and company advocates.

16. The applicant drew the attention of the court to the provisions of rule 8 of the advocates practice rules which states that;

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."

17. The advocate witness rule is rooted in evidence law but it is now a matter of legal ethics. The general legal framework, founded on that model rule is that an advocate shall not act for a client in the cause of action he or she is likely to be a necessary witness. The only exceptions contemplated by the law, first is where an advocate's testimony relates to an uncontested issue, second where the advocates testimony relates with the nature and value legal services rendered in the case, and thirdly where the advocates disqualification will work substantial hardship on his or her client. In the scenario of substantial hardship exception an applicant ought to demonstrate prejudice or injustice likely to be occasioned beyond the normal inconvenience and expense associated with changing counsel.

18. A clear and purposive reading of the provisions above reveal that an advocate may not appear in a matter he may be required to give evidence but the same does not prohibit the advocate from giving evidence on formal or non-contentious matters. This therefore begs the question as to what would be considered a non-contentious matter. In this regard, it is my considered view that the applicant has merely stated that there was manipulation of the will in a bid to disenfranchise and disinherit her. From my assessment the only allegation with regard to this is the registration of Karen Chesoo Jerop as a beneficiary of an allegedly suspicious subdivision of Sergoit/Elgeyo Border Block 1 (Beliomo)/489. It is trite that an advocate being retained by a client and in the course of the proceedings it emerges that he or she is likely to be a necessary witness in that trial article 50 (g) of the *Constitution* cannot be invoked to provide immunity from being disqualified. Essentially, where an advocate is expected to testify on matters touching on his client he or she cannot escape disqualification. The conflict rule as widely conceptualized precludes an advocate acting as both a legal representative and a witness in



the contested issues under adjudication. It is presumed that a confidential relationship exists between a client and an advocate in all circumstances, which may have arisen upon retention by a client. The clear restatement on this matter is clearly articulated in the Law Society of Kenya (LSK) code of Standards of Professional Practice and Ethical Conduct- June 2016 version:

“In this code under part iv headed “Guidance on the Interpretation of the Standards”, more particularly on the standard dealing with conflict of interest, it may be apt to examine three paragraphs namely paragraphs 96, 97 & 99;

96; 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.

97; Rationale for the standard :the advocate’s ability to represent the client may be materially and adversely affected unless the advocate’s judgment and freedom of action are as free as possible from compromising influences and the relationship between the advocate and the client is not materially impaired by the advocate acting against the client in any other matter.

19. Finally para 99 provides thus;

Situations in which a conflict of interest might arise 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.]]

20. In the contextual analogy of the court room forum, the reality of existence or non-existence of a fact in the probative evidence forms the reality and the totality of things which goes on in a proceeding to secure a judgement in a particular claim. Speaking in most general terms, the knowledge of a witness either directly or indirectly consists of things from the sensory organs as a source of knowledge which he or she came across independently concerning a particular incident. That stream of events known only by the processor may hold to someone else to provide a justification of the so called perception. As a matter of fact, it can be said that instruction by clients to his legal counsel begins with the awareness of the claim subject matter of the dispute before hand. This conclusion is derived from the arguments of the perceptual relativity of the advocate client’s relationship.

21. Given this critical threshold, a court may disqualify a legal counsel when the subject matter of a case bears a substantial relationship and the issues which may be canvassed flow from the previous instructions retained by such counsel and now matter of litigation by an adverse party. There can be no doubt in the case at bar the aforementioned advocates in the course of their duty are believed to have come into contact with impugned Will as the drafters or witnesses. In this sense, at an opportune



moment they may be called upon to provide easy or hard answers pursuant to the making of the will as prescribed in section 11 of the *Law of Succession Act*. Strongly client centered ethics provide a reason to justify disqualification of the cited and identified advocates in the instant application. Harder still to grant is the remedy and desire by the applicant to disqualify the entire law firm. I reiterate that it is not the entire firm that witnessed the impugned will and as such to disqualify the entire firm from acting would be tantamount to throwing out the baby with the bathwater. Examination of the differences between the two alternatives, and the grounds for preferring one to the other persuades me to primarily disqualify the individual advocates on the law firm be free and at liberty to substitute other advocates continue representing the client in the subject matter under contestation. To me this is not a corner cutting case by the applicant.

22. In the premises, I am satisfied thus there are sufficient grounds to find merit in the application lodged by the applicant. Each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 27<sup>TH</sup> DAY OF MARCH 2023**

.....  
**R. NYAKUNDI**

**JUDGE**

**Mr. Yego Advocate for Kalya & Co. Advocates for the Petitioner**

**M/s Chesoo Advocate Present**

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