REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE(PROBATE AND ADMINISTRATION) DIVISION

SUCCESSION CAUSE NO.404 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE MICHAEL

JOHN KIPLIMO SANG *alias* MICHAEL KIPLIMO SANG

BETWEEN

BETTY SANG.....APPLICANT

AND

JAMES KIMELI SANG.....1ST RESPONDENT

PETER KIPTANUI SANG.....2ND RESPONDENT

Coram: Hon. Justice R. Nyakundi

Birech, Ruto & CO. Advocates for the petitioners

Kutto & Kaira Nabasenge Advocates for the applicant

M/S R.M Wafula & CO. Advocates

R U L I N G

Before me is an application dated 16/9/2021 expressed to be brought under Article 45 and 159(2) of the Constitution, Section 29, 42, 45, 46 and 47 of the Succession Act as read with rules 60, 63 and 73 of the Probate Administration Rules, Section 1a, 1b, 3 and 3a of the Civil Procedure Act and Order 9 rule 5 and 6 of the Civil Procedure Rules seeking a substantive order in terms of prayer No.2 of the Motion to wit:

1. **That this application be certified urgent and service in the first instance be dispensed with.**

2. **That the Law firm of Birech & Co. Advocates, and/or Associates and/or Agents and/or any other person linked and /or had professional association with the said Law firm be distinguished from this matter and/or be barred from acting for and/or representing Peter Kiptanui Sand, Joe Michael Sang, James Kimeli Sang and any other beneficiary and/or any other person with vested interest in the Estate of Michael John Kiplimo Sang alias Michael Kiplimo Sang that is the subject of this matter.**

3. **That in granting prayer 2 above, may the Honourable Court be pleased to strike out summons dated 8th April 2021 with costs.**

The motion is premised on the grounds outlined on the face of it together with an affidavit of one Betty Sang. The brief grounds in which the applicant invites the court are couched as follows:

a) **That on 8th April 2021 the Law firm of Birech Ruto & Co. Advocates filed summons dated same date seeking the**

appointment of peter Sang, Joe Michael Kiprono Sand and James Kimeli Sang as the joint administrators of the deceased Estate herein.

b) That the applicant Betty Sang raised a Preliminary objection (P.O) on point of law in view of the aforestated application of which the Honourable Court ruled vide the Ruling delivered on 1st day of July 2021 directed that the Applicant should file a formal application as opposed to a Preliminary Objection (P.O).

c) That the firm of Birech Ruto is conflicted in this matter and hence it is in the interest of justice the same should be disqualified and or barred from this matter as its associates are potential witnesses.

d) That the impugned will that is being challenged by the applicant vide summons dated 8th July 2020 was authored by the law firm of Birech Ruto & Co. Advocates and as such there is conflict of interest on part of the said law firm.

e) That unless the law firm of Birech Ruto is disqualified from this matter the applicant shall suffer prejudice.

f) That the instant application has been filed in good faith and in the interest of justice.

To that extent the learned counsel for the respondent canvassed her objection on the application by way of written submissions. She placed reliance in the provisions of section 67, 68(1) and 81 of the Act. In furtherance to the arguments she also cited the principles in the following cases in re estate of Charles Kibe karanja (Deceased) [2015]eKLR and re estate of Andrew Kabera Gachini (Deceased) [2020] eKLR.

Having considered the material so filed the question is whether the applicant has satisfied the test on disqualification of the law firm of Birech Ruto & Co. Advocates from representing the estate of the deceased in proceedings touching on devolution of the estate of the beneficiaries. Delving into the matter in light of the affidavits and submissions by both parties, I reiterate as follows:

The Law

As it appears in the motion section 34 of the Evidence Act provides that:

> ***"No advocate shall at any time be permitted unless with his clients express consent to disclose any information made to him in the courts and for purpose of his employment, as such advocate by or on behalf of his client or to State, the contents or condition of when document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose and advise given by him to his client in the cause and for the purpose of employment. Provided that nothing in this section shall protect from disclosure communication made in furtherance of any illegal purpose, any fact by any advocate in the cause of his employment as such thinking that any crime or fraud has been committed since the communication of his employment."***

Therefore in this motion the undisputed facts show that the firm of Birech & Ruto & Co. Advocates received instructions received instructions from the deceased to prepare and seal the impugned will. Notwithstanding that fact, the record demonstrates there was compliance with the will the moment a certificate of confirmed Probate Grant was made and declarations therein rendered by the Court. Stemming from the Certificate of Confirmed Grant one of the alleged beneficiaries is desirous in challenging the validity of the will, long after foreclosure of proceedings. Naturally this sparked a debate to demonstrate that the firm of Birech Ruto & Co. Advocates stands conflicted as legal counsels for the deceased testamentary. As further demonstrated from the able arguments by Mr. Nabasenge for the objector the law firm in question having been involved in the drafting of the will contends that there are high chances of them being called to testify as witnesses in the pending matter.

Let us go to the basics as demonstrated in the well set principles in **Tom Kusienya & Others vs 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:***
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> ***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.***
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> ***20. From the test of this Rule, it is clear that an advocates 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:***
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> ***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 particular 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 canot 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 comparing King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd vs 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 Clerke (1912) 1 Ch. 83 (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 continues acting of one partner in the firm against a former client of another partner is likely to cause (and I use the work "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." (Emphasis added)

23. The decision of O'kubasu, JA in William Audi Odode & 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 states at page 3 of his ruling as follows:

I must state on (sic) the o0utset 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." (Emphasis added)

For reasons that would be clear in a moment, it has been stated in the law society of Kenya code of standards or professional practice and ethical conduct of June 2016 version par. 96 does provide as follows:

"A conflicting interest is an interest which givens 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."

I have always believed primarily that the right to legal presentation under article 50 (2) (g) of the Constitution is sacrosanct. In the promotion of that right, decisions and actions taken between a client and his advocate are based on the law and not whims or caprice. It also demands that an advocate as an officer of the court performs his/her professional duty with due diligence and integrity. With reference to a particular matter under consideration the courts in **British American Investment Co. Ltd vrs Njomaitha 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 of 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."

What does this means in practical terms in relation to the issue at hand, I am fortified in my decision by the Court of Appeal in **Rakusen vs Ells Munday & Clarke (1912) 1 CH 831 ALL ER.** In this scenario Conzens laid down the test as being **"that a court must be satisfied that the real mischief and real prejudice which in all human probability result in the solicitor allowed to act. As a general rule the court will not interfere unless there will be a case where mischief is rightly anticipated."**

In this respect, the advocate witness rule is rooted in Evidence Law but is also a matter of Ethics. The model rule being that an advocate shall not act as counsel at a trial which he or she is likely to be a necessary witness. The framers of our Constitution were also very much alive to the danger of interfering with client's right to legal representation of his or her choice. It is a provision not subject to judicial review unless on rare exceptions on a case to case specific circumstances. It has been noted that generally there is a ban on advocates testifying as witnesses in trials which they are also advocates. The rationale is that it protects the adjudication of issues from confusion for it may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.

From the facts of this case, there is no dispute that Birech Ruto & Co. Advocates has been wound up and assets transferred or taken over by another advocate. It is worth noting that the managing partner Paul Birech has since passed on during the subsistence of the proceedings touching on the estate of the deceased. That is important for it brings forth the interplay on personal disqualification versus implied disqualification by the law firm. The essentials of this legal proposition is to the effect of an advocate's serving in his individual capacity or at a law firm who would likely be summoned as an eye witness at the trial may be disqualified from representing a client at a pending trial. In my view it is permissible to disqualify an advocate seized of the instruments which form part of the evidence at the trial. What is at stake in this relationship is for opposing party to show that there is danger and prejudice if the advocate is not disqualified.

The distinct features of this application are that as known in law following the demise of the managing partner and takeover of the assets and

liabilities by another advocate does not necessarily call for disqualification. It is in the realm of conjecture whether indeed the issues raised by the intended objector are capable to impeach the veracity of the testamentary of the testator.

On the other hand, the will being contested in so far as the record shows was considered by the court and a certificate of confirmed grant issued to that effect. There is therefore a question of standing on the face of it in view of the fact that the estate may have been distributed to its logical conclusion. As much as the validity of the will is questionable the starting point may be for the objector to establish her locus standi. In other words in so far I am concerned there is absence of substantial and compelling evidence on conflict of interest, to exercise discretion to tip the scale in favour of disqualification of counsel who drafted the aforesaid will. In spite that position the cannons of ethics in the legal profession provide yardsticks that when a lawyer is a witness for his client, except as to merely formal matters such as attestation or custody of an instrument he or she should leave the trial of the case to other counsels. It is not lost advocates essentials is in facilitating the court to meet the ends of justice. In an occasion in which the advocate's testimony is sought by an adverse party the threshold question would be whether the testimony is covered by the advocates client- privilege or is purely an evidential question. In this respect the disqualification factor urged by the applicant fails. In sum the motion is denied with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 25TH DAY OF MARCH 2022.

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R. NYAKUNDI

JUDGE