



REPUBLIC OF KENYA



**In re Estate of Kimani wa Nyoike (Deceased) (Succession Cause 10 of 2021)
[2022] KEHC 13792 (KLR) (Family) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 10 OF 2021

MA ODERO, J

SEPTEMBER 30, 2022

IN THE MATTER OF

MWARA NYOIKE APPLICANT

RULING

1. Before this court is the notice of motion application dated November 5, 2020 by which the applicant Mwara Nyoike seeks the following orders:-
 - ' 1. That the firm of Kimamo Kuria Adovates by itself, its partners, Associates, employees and/or agents be barred and removed from the record as representing the petitioner herein Chuhi Nyoike, in this matter and matters incidental to, and connected to, the estate of Kimani Nyoike (Deceased)
 2. That the cost of this application be provided for.'
3. The application was premised upon rules 8 and 9 of the Advocates (Practice) Rules, 1966, section 3A of the *Civil Procedure Act*, order 51 rules 1 & 3 of the *Civil Procedure Rules 2010* and all other enabling provisions of the law and was supported by the affidavit of even date sworn by the applicant.
4. The respondent Chuhi Nyoike opposed the application through his replying affidavit dated November 17, 2020. The application was canvassed by way of written submissions. The applicant filed the written submissions dated November 27, 2020 whilst the respondent relied upon his written submissions dated December 15, 2020.

Background

5. This succession cause relates to the estate of the late Kimani Wa Nyoike (hereinafter 'the Deceased') who died testate on April 29, 2020, having said to have written a will dated April 16, 2020. A copy



- of the death certificate serial number XXXX is annexed to a supporting affidavit dated September 29, 2020 sworn by the respondent.
6. The wife of the deceased Wairimu Nyoike pre-deceased him having passed away on April 20, 2017. According to a letter dated May 9, 2020 authored by the chief of Kinanie, Location, Mathatani Division Athi River Sub County, the deceased was survived by the following persons.
 - (i) Wairimu Nyoike – widow (deceased)
 - (ii) Mwara Mwatu – son
 - (iii) Chuhi Nyoike – son
 - (iv) Nduhiu Nyoike – son
 - (v) Wamuyu Nyoike – daughter
 7. One of the sons of the deceased Chuhi Nyoike on September 29, 2020 filed a petition seeking *grant ad colligenda bona*. That petition was opposed by the applicant (also a son to the deceased) herein Mwara Nyoike through his replying affidavit dated October 27, 2020. The applicant also filed this present application seeking to bar the firm of Kimamo Kuria Advocates (hereinafter ‘the law firm’) from acting on behalf as the respondent in this succession cause.
 8. The applicant avers that ‘the law firm’ have been the advocates for the family during the lifetime of the deceased and even dealt with the affairs of their late mother after her demise. It is claimed that the firm is in custody of title deeds relating to the properties of the late wife of the deceased.
 9. The applicant further claims that he and his sister Wamuyu Nyoike requested the law firm to hold meetings to resolve the issues between the family but instead the law firm proceeded to file the petition for a limited grant on behalf of the respondent.
 10. The applicant alleges that the law firm has proceeded to intermeddle in the estate of the deceased even before the will has been proved. That an amount of Kshs 400,000 was transferred to the advocates account and that the law firm is currently processing the sub division of LR 8783/165 without the authority of letters of administration.
 11. The applicant avers that in their position as legal counsel for the deceased the law firm came into possession of intimate of evidence relating to the family. The applicant states that there is every possibility that the law firm will be called to testify on matters relating to their drafting of the will of the deceased. That therefore the law firm ought to be barred from acting for any of the parties in this succession cause.
 12. On his part the respondent avers that none of the grounds advanced for disqualifying the law firm of Kimamo Kuria Advocates acting for him has merit. He states that it was the wish of the deceased to have the said law firm represent his affairs, which wishes ought to be respected.
 13. The respondent denies that the law firm is in possession of all title deeds relating to the estate of the deceased. He denies that any conflict of interest would arise as any communication between an advocate and his client is protected by advocate/client confidentiality. The respondent therefore urges the court to dismiss this application.



Analysis and determination

14. I have carefully considered the application before this court, the affidavit filed in reply as well as the written submissions filed by the parties. The only issue for determination is whether the law firm of Kimamo Kuria Advocates ought to be barred from acting for the respondent in this succession cause.
15. The applicant stated that by virtue of having been the advocate for the deceased the firm had an intimate knowledge of all the legal affairs of both the deceased and his late wife. The applicant suggested that the law firm may be called upon to testify on matters relating to the drafting of the will of the deceased.
16. It must be remembered that any communication between a client and his/her advocate is protected by a veil of confidentiality.
17. Section 134 of the *Evidence Act* chapter 80, Laws of Kenya which deals with the privilege of advocates provides as follows:-

' (1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment

Provided that nothing in this section shall protect from disclosure—

- (a) any communication made in furtherance of any illegal purpose;
- (b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

(2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.'

18. Likewise section 137 of the *Evidence Act* provides as follows:-

' Communications with an advocate

No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.'

19. Therefore based on the above provisions of law the law firm cannot be compelled to disclose communication made to it by the deceased and/or his wife in their dealing with the said law firm as clients.
20. Parties to a suit are at liberty to engage an advocate of their choice. It is not for the court for the opposing party to dictate which law firm a party may engage as counsel to act for them. As a result, courts are generally reluctant to bar an advocate from acting for a party in any matter before them.



21. In the case of *William Audi Odode & Another v John Yier & another Civil Application No 360 of 2004* Hon Justice O’Kubasu (as he then was) observed as follows:-

‘ I must state on (sic) 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.’

22. Likewise in *Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 2 others [2017] eKLR* the court stated that:-

‘ I believe that 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.’

23. The test regarding whether an advocate ought to be barred from acting from one of the parties in a suit was set out in the case of *Rakusen – vs – Elvis Munday & Clarke [1911-1913] all ER* where it was stated that the 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 courts will not interfere unless – there be a case where real mischief is rightly anticipated.

24. The onus lies on the party seeking to bar counsel from acting in a matter to satisfy the court that there exists a real probability of prejudice. In *British American Investment Co (k) Ltd v Njomaitha Investments Ltd & Anor Nairobi HCCC No 570 of 2011* the court held that:-

‘ where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, 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.’ (own emphasis)

25. The court went further to reiterate that:-

‘ Every party has a right to be represented by counsel of his choice. In other words, he is entitled to his own choice of legal representation.’

26. The reasons cited by the applicant in seeking disqualification of the law firm from acting in this matter are firstly the fact that the advocate has been the family lawyer for a long time and is vested with information he may be required to testify about. On this the court has already found that communication between a client and his advocate is privileged. The advocate cannot be compelled by a third party to divulge such communication.

27. Secondly, it is stated that despite request being made the law firm failed to reconcile the warring family. The advocate had no duty to reconcile the parties. He may make an attempt as a gesture of goodwill and in his capacity as a family lawyer of long standing to bring the parties together but failure to reconcile the parties is not a reason to disqualify the law firm from acting in this matter.



28. Thirdly, it is claimed that the advocate may be called upon to testify regarding the drafting of the will of the deceased. This in my view is not sufficient grounds to bar the firm from acting for the respondent. The advocate would have merely drafted the will. The contents of the will, the execution thereto as well as the witnessing of the same are totally separate matters. The will belongs to the maker not to the advocate.
29. Finally, the fact that the advocate had custody of the title documents relating to property owned by the deceased is also not a valid reason to bar said advocate from acting in this matter. If the applicant requires production of said title documents he only need apply through the court to have the same produced.
30. I am persuaded by the observations made by Hon Justice Gikonyo in the case of *Dorothy Seyanoi Moschioni v Andrew Stuart & Another [2014] eKLR* as follows

' 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.' (own emphasis)



31. Based on the foregoing I do not find sufficient grounds to warrant the disqualification of the firm of Kimamo Kuria Advocates from acting in this matter. No real conflict of interest has been demonstrated. Accordingly, I dismiss in its entirety the notice of motion dated November 5, 2020. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

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MAUREEN A ODERO

JUDGE

