



In re Estate of Sikunyili Lusike Mulia (Deceased) (Succession Cause 64 of 1998) [2022] KEHC 17137 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 17137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 64 OF 1998
REA OUGO, J
DECEMBER 16, 2022
IN THE MATTER OF THE ESTATE OF SIKUNYILI LUSIKE MULIA
(DECEASED)**

**IN THE MATTER OF
CHRISANTUS JUMA WAFULA APPLICANT
AND
JABAN WAFULA MURUNGA (DECEASED) PETITIONER
AND
BEN SIMIYU WAFULA INTERESTED PARTY**

RULING

1. Christantus Juma Wafula (the Applicant) vide an application dated the November 25, 2022 seeks orders that; Omundi Bw' Onchiri Advocate by himself or through his law firm of Omundi Bw' Onchiri Advocates be disqualified from acting for the purported interested party in the matter. He also seeks that the documents drawn and filed by Omundi Bw' Onchiri Advocates for the interested party be expunged from the record and that costs of the application be provided for.
2. In his supporting affidavit to the said motion the applicant Mr Omundi Bw' Onchiri used to represent the petitioner who is now deceased. He represented the petitioner in this succession cause and a series of other matters involving the suit parcel land East Bukusu/West Sang'alo/681. That Mr Bw'Onchiri has all the information pertaining to the suit parcel and the estate of Sikunyili Lusike Mulia. That was shocked to be served with a replying affidavit by the interested party herein drawn and filed by the firm of Omundi Bw' Onchiri Advocates. That the conduct of the aforementioned firm of Advocates is tantamount to representing and advising both sides of this dispute. That the firm is likely to use information gathered in the course of representing the petitioner to gain an unfair advantage against him and hence prejudice any right in the matter. That Counsel is still bound by the hallowed principle



of confidentiality in advocate client fiduciary relationship. That the involvement of the firm of Omundi Bw'Onchiri Advocates in the matter would amount to conflict of interest and that it is the best interest of justice that the firm not only be disqualified from further participation but also the pleadings filed by them be expunged.

3. The application was opposed. Ben Simiyu Wafula (the Interested Party) filed a replying affidavit dated the November 28, 2022. In it he depones that the applicant's application is frivolous, vexatious and an abuse of the due process of the court and the same is a gimmick geared towards delaying the quick disposal of the issue of substitution of their late father. That the grant in this matter was confirmed in November 2018. That their late father Javan Murunga filed a notice to act in person when he failed to meet the legal fees of M/s Omundi Bw' Onchiri when an appeal was preferred against the confirmation but the two maintained a mutual respect for each other. That his advocate has informed him that nothing is remaining in the cause other than substituting his late father which is a procedural issue hence the issue of unfair advantage and prejudice as alleged by the Applicant is hot air. That in his replying affidavit filed in opposition to the application by the Applicant dated 6/5/2022 he has proposed that their late father be substituted by three dependents namely Ben Simiyu Wafula (interested party), Joseph Sifuna Wafula and Christantus Juma Wafula (the applicant) and hence the issue of mischief as alleged by the Applicant is unfounded and baseless. That he has a constitutional right to be represented by counsel of his choice and the court should be dismissed with costs.
4. The application was canvassed by way of oral submissions. The Applicant reiterated the contents of his application and affidavit. He further informed the court that his mother is still alive and that in this matter he is a grandchild to the deceased. That his mother is listed as a beneficiary but she is unwell and weak. That the lawyer used to represent them but he has changed and is representing one side and that he will not get justice.
5. Mr Bw'Onchiri argued that the applicant has failed to inform the court that the succession cause was determined as the grant was issued and hence his representation will not bring any conflict in the matter. That what is left is substitution of the deceased. That the matter went to the Court of Appeal and it was determined. That the substitution will help in actualizing the confirmed grant. He does not represent Joseph Simiyu Wafula. His client is Ben Wafula who proposed that the Applicant becomes one of the administrators for what he wants is peace and a move on the next step. That he has been there to assist the family. That he only filed the documents for the interested party and if the court decides that he should not represent the interested party there is no need to expunge the documents as the issues stated are issues of law and not fact. Counsel relied on the case of David Mereka t/a Mereka & Co Advocates vs County Government of Nairobi HCC No E052 of 2021 where the court held that removal of an advocate was not to be taken lightly as the client has a right to Counsel and fair hearing. It was further submitted that the Applicant has failed to demonstrate how the representation will affect the determination of the matter.
6. Joseph Simiyu Wafula informed the Court that Mr Bw' Onchiri is not his lawyer and that he does not wish to have removed from the cases as he is not at fault. That the deceased was his father and he is the first-born son.
7. In response the Applicant submitted that Joseph and the lawyer are together and that the lawyer has lied to the court. That there is a consent from the family that supports him that he should not act of the administrator. That the lawyer became bad when he filed taxation proceedings.



Determination

8. The applicant's main issue in this matter is that Mr Bw' Onchiri (Counsel) should not represent the Interested Party. His reasons are that Counsel was the family lawyer before the petitioner (deceased) passed on and that Counsel has a lot information of the matter having represented the petitioner who is now deceased. It is evident that the grant in this cause was confirmed on the November 8, 2018. The parties need to move to wind up the estate inline with the confirmed grant. Every in a case, if need be, a party has a constitutional right to engage an advocate of his choice. The applicant is required to demonstrate the conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships. In the case *William Audi Odode & Another v John Yier & Another* Court of Appeal Civil Application No NAI 360 of 2004, the court held that:

“It is not the business of the courts to tell litigants which advocate should or 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 a matter, the parties must be allowed to choose their own counsel.”

9. In *Charles Gitonga Kariuki v Akuisi Farmers Co Ltd* [2007] eKLR the Court stated the following on the subject of conflict of interest;

“The fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest. The applicant was required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a possibility that a conflict of interest would arise where the advocate is allowed to act for the opposing party against such a litigant”

10. In my view the Applicant has failed to demonstrate the conflict of interest or prejudice that will be or would be caused to him and the other parties if Mr Bw' Onchiri acts for the interested party. I find no merit in the orders sought. Mr Bw' Onchiri is on record as representing the larger family. No prejudice will be caused to the applicant if Mr Bw' Onchiri represents the other family members. I therefore decline to grant the orders sought by the applicant. Application is dismissed with no orders as to costs.

Dated, Signed, and Delivered at Bungoma this 16th day of December, 2022

R.E. OUGO

JUDGE

In the presence of:

Christanus Juma Wafula Present in person

Mr Bw' Onchiri for Petitioner Present

Wilkister C/A

