



REPUBLIC OF KENYA



**In re Estate of Heinz Ostertag (Deceased) (Succession Cause
410 of 2005) [2021] KEHC 9806 (KLR) (28 May 2021) (Ruling)**

Neutral citation: [2021] KEHC 9806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 410 OF 2005**

JN ONYIEGO, J

MAY 28, 2021

IN THE MATTER OF THE ESTATE OF HEINZ OSTERTAG (DECEASED)

BETWEEN

PIA MIRIAM STEIN OSTERTAG 1ST APPLICANT

PATRICIA OSTERTAG 2ND APPLICANT

AND

TERRY NZILANI IBRAHIM 1ST OBJECTOR

GERDA OSTERTAG 2ND OBJECTOR

RULING

1. The deceased herein died intestate on February 12,2005 while domiciled in Kenya. According to form P&A 5 he was survived by a widow known as Yvonne Osertag and two daughters namely; Pia Mariam Stein Ostertag and Patricia Ostertag. On January 4,2005, the widow petitioned for a grant of representation. She later filed a citation against Pia Mariama Stein Ostertag under succession file no 5/005 seeking her to show cause why she could not petition for a grant of representation.
2. However, on May 2, 2006, Terry Nzilani Ibrahim and Gerda Ostertag also claiming to be widows to the deceased filed their objection thus seeking inclusion or recognition as the deceased's windows hence dependants.
3. By a Notice of Motion dated February 25, 2021, Terry Nzilani Ibrahim now acting in person sought orders barring the law firms of Musinga and Munyithya and Co advocates and Gor and Gor Advocates from representing the respondents herein Pia Mariam Stein Ostertag and Yvonne Ostertag.
4. The application is based on grounds anchored on the face of it and an affidavit in support sworn on February 26, 2021. Basically, the applicant claimed that when the deceased filed divorce proceedings against the petitioner in divorce cause no 34/2004 Mombasa, it was the law firm of Musinga



and Munyithya advocates who represented him against the petitioner. That she was the one who introduced the deceased to Musinga and Munyithya advocates hence they cannot turn round and now represent the petitioner in this succession cause. A copy of the divorce petition annexure JM1-3 was attached.

5. She averred that, out of trust, she and the deceased whom she claims to have been her husband gave the law firm of Musinga and Munyithya all their properties' title deeds for safe custody. She further claimed that she is the one who introduced the petitioner to the law firm of Musinga and Munyithya to assist in processing a grant of letters of administration in her (objector /applicant) favour.
6. She further stated that, she was surprised when the law firm of Muthithya turned against her after seeing "mzungu" (petitioner /respondent) thereby handing over all the deceased's title deeds to her (the petitioner/respondent).
7. In response, the firm of Gor and Gor Advocates filed grounds of objection dated March 1,2012 stating that there is no ground stated upon which they cannot represent Yvonne Ostertag who is still active in these proceedings.
8. The firm of Muthithya filed a replying affidavit sworn on 21st March, 2021 by Joseph Manzi Munyithya arguing that the firm of Muthithya is not conflicted. It was averred that the firm of Musinga and Munyithya does not exist as it ceased the year 2009. That the partnership in the former Musinga and Munyithya advocates is totally different and that he never represented the deceased nor the applicant in the said divorce cause.
9. It was further contended that the firm of Musinga and Munyithya has never represented the applicant in any case leave alone the said divorce proceedings. That the divorce proceedings were between Ostertag and Yvonne which divorce cause was not finalized following the death of the deceased before completion of the hearing.
10. During the hearing, parties basically adopted their respective affidavit in support and in opposition to the application. Mr Omollo appearing for Yvonne stated that the firm of Munyithya has been on record representing the children of the deceased from the year 2005 in which nobody has ever complained.
11. I have considered the application herein, responses thereto and oral submissions by both parties.
12. The gist of this application is whether the firms of Gor and Gor and Musinga and Munyithya advocates are conflicted by appearing for their respective clients. According to the applicant, the firm of Musinga and Munyithya did represent the deceased in divorce proceedings against Yvonne Ostertag.
13. When is an advocate deemed to be conflicted in the course of discharging his or her duties? Rule 9 of the Advocates practice rules provides 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 orally or by declaration or affidavit or formal on non-contentious matter of fact in any matter in which he acts or appears”.
14. It is clear from the above rule that, for an advocate to be barred from representing a client, there must be proof that he is likely to be called as a witness in the subject matter hence cannot play twin role of



advocate and witness at the same time. see *Serve in Love Africa (Sila) Trust V David Kipsang & 7 others* (2017) e KLR where the court held that;

“ From the text of this rule, it is clear that an advocate 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”.

15. For a court to arrive at the conclusion to bar an advocate not to represent a client, it must carefully balance a client’s right to legal representation by an advocate of his or her choice which is a constitutional underpinning under article 50 (2) (b) of the *Constitution* against the claim of conflict of interest by the opposing party. See *William Audi Odode & another vs John Yier & another* court of appeal civil application no Nair 360 of 2004 (KSM 33/04 where Okubasu J stated that;

“ ...I must state on (sic) the outset 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 interest of justice would not be served if a particular advocate were allowed to act in a particular matter, the parties must be allowed to choose their own counsel”.

16. In the instant case, the firm of Musinga and Munyithya is accused of having represented the deceased against Yvonne where proceedings were not completed. Mr Munyithya argued that he did not represent the deceased. There is no proof that Mr Munyithya did represent any of the parties in that case. Besides, the applicant herein was not a party in the divorce cause hence cannot claim prejudice on account of conflict of interest. Further, the applicant does not claim that she wants to call Mr Munyithya as a witness to testify either orally or by way of affidavit.

17. I do not see any element of conflict of interest. If anything, the notice of the objection proceedings herein in which the applicant is claiming to have been a wife to the deceased has no nexus at all with the alleged divorce proceedings. In any event, Munyithya is only representing the children of the deceased who were not party in the divorce proceedings.

18. As regards Gor and Gor advocates, the applicant fell short of giving any explanation or reasons why the law firm should cease representing Yvonne Ostertag. There is no single mention of any conflict of interest in the firm Gor and Gor representing in the said Yvonne Ostertag.

19. Courts should not casually be asked to bar an advocate from representing a litigant without any tangible and real convincing explanation. There must be proof of real danger or prejudice likely to be suffered by such representation or conflict of interest. See *Delphis Bank Ltd Vs Channa Sing Chatthe and 6 others* (2005) eKLR where the court stated that;

“ 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 possibility result.”

20. From the above analysis and guidance from the relevant case law, I do not find any ground or basis to bar the two law firms from representing their respective clients. Accordingly, the application herein is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF MAY, 2021

J N ONYIEGO



JUDGE

