



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO 9 OF 2019 (O.S)

MICHELINA FORINO.....1ST APPLICANT

SALVATORE FORINO.....2ND APPLICANT

(Suing as the administrators of the estate of GIOVANNI FORINO-Deceased)

VERSUS

ALFONSO FORINO.....1ST RESPONDENT

PARKER RANDALL-EAST AFRICA LIMITED.....2ND RESPONDENT

LAZARUS KIMANGA.....3RD RESPONDENT

REGISTRAR OF COMPANIES.....4TH RESPONDENT

GI-FO LIMITED.....5TH RESPONDENT

AND

GEKANANA & CO. ADVOCATES.....1ST INTERESTED PARTY

BENJAMIN WASIGE BINYENYA.....2ND INTERESTED PARTY

PHILLIP MICHIRA.....3RD INTERESTED PARTY

CORAM: Hon. Justice R. Nyakundi

Ms. Kimeto advocates for plaintiffs/applicants

Ms. Ruttoh Advocate for the 2nd & 3rd Respondents

Ms. Lutta advocate for the 4th Respondent

Mr. Binyenya advocate for the 1st and 5th Respondent

Mr. Mwarandu Advocate for the 3rd interested party

J U D G M E N T

Background

For determination before this court are three applications; the 1st and 2nd Applicants' application dated 27th January 2020 and filed on 28th

January 2020 and the application dated 24th December 2020 and filed on 28th December 2020 together with supporting affidavits and annexures therein. The third application is by the 1st and 5th Respondent vide a notice of motion dated 14th December 2020 and filed on 15th December 2020.

The 1st and 2nd Applicant's Notice of Motion dated 27th January 2020

This application seeks *inter alia*; -

a) That the firm of Binyenya Thurania & Co. Advocates by itself, its partners, associates, employees and/or agents be barred and removed from record as representing the 1st and 5th Respondents herein.

b) That the costs of the application be granted to the defendant.

The application is supported by the joint affidavit of **Michelina Forino** and **Salvatore Forino** who state that the firm of **Binyenya Thurania & Co. Advocates** is currently on record for the 1st and 5th Respondent and the advocate that is actively on record is one **Benjamin Wasige Binyenya**, and partner in the said firm. Further, the advocate **Benjamin Wasige Binyenya** drew the share transfer instruments that are in contest as forgeries.

They state that the firm of **Binyenya Thurania & Co advocates** undertook the irregular registration of the said share transfer that is being contested. They state that was done by **Mr. Binyenya** when he was practicing in the firm of **Gekanana & Co Advocates** which is the firm indicated to have drawn the documents.

They further state that from the replying affidavit on record by the 4th respondent dated 26th November 2019, **Mr. Binyenya** acting for the 1st Respondent effected the irregular transfer of 999 shares in the estate of the deceased thereby intermeddling. Further that **Mr. Binyenya** without consent irregularly obtained court orders in *Malindi Chief Magistrate's succession Cause no. 6 of 2019* to obtain the sum of Kshs. 6,500,000 from the deceased bank account with Diamond Trust Bank to his personal client account No. 1179012593 at KCB Malindi Branch.

That from the above, **Mr. Binyenya** together with the firm of **Binyenya Thurania** are in violation of Rule 9 of the advocates (Practice) Rules 1966 (L.N No. 19) and as such they should not act for the 1st and 5th Respondents as this will occasion prejudice to the applicants.

The 1st and 2nd Applicant's Notice of Motion dated 24th December 2020

This application seeks *inter alia*;-

a) Spent

b) Spent

c) That the honorable court be pleased to issue an order directed at the respondents and interested parties herein jointly and severally to furnish the applicant and/or produce before this honorable court for forensic examination and verification of the original signed resolution of the board of directors of GIO-FO Limited dated 8th November 2012 and filed on 22nd October 2018.

d) That the honorable court be pleased to issue an order directed at the respondents and interested parties herein jointly and severally to furnish the Applicants and/or produce before this honorable court for forensic examination and verification the original signed statutory declaration for the transfer of shares of the late Giovanni Forino dated 8th November 2012 and filed on 22nd October 2018.

e) That the honorable court be pleased to issue an order directed at the Respondents and interested parties herein jointly and severally to furnish the applicants and/or produce before this honorable court for forensic examination and verification of the original signed instrument of transfer of share or stock signed by the late Giovanni Forino dated 8th November 2012 and filed on 22nd October 2018.

f) That this honorable court be pleased to issue an order directed at the respondents and interested parties herein jointly and severally to furnish the Applicants and/or produce before this court for verification the original KRA stamp duty payment slip dated 11th October 2018

g) That Mr. Benjamin Wasige Binyenya though the firm of Binyenya Thurania & Co. advocates be hereby estopped from using privileged and confidential advocate/client information obtained by him in the year 2012 from the late Giovanni Forino to sustain any legal suit against the estate of the late Giovanni Forino on behalf of the 1st Respondent.

h) That the costs of the application be granted to the applicants.

The application is supported by the affidavit of Salvatore Forino who reiterates the contents of the application dated 27th January 2020 and adds that; the prosecution of the matter by the Applicants is depended on the inspection of the original documents and instruments of transfer of shares of the deceased so as to prove the forgeries which in absence abridge the provisions of Articles 25, 47, 48 and 50 of the

Constitution of Kenya 2010. Further, the referenced documents are in custody of the parties that drew, signed, commissioned, registered and subsequently produced them before court.

He states that on 10th June 2019 this court froze the bank account of the firm of **Binyenya Thurania & Co. Advocates** pending the hearing of succession proceedings in *Malindi High Court Succession Cause No. 4 of 2020* which orders have been violated by **Mr. Binyenya** and KCB bank limited allowing Mr. Alfonso Forino to access any funds belonging to the deceased that may be lying in the client accounts.

The 5th Respondent's Application dated 14th December 2020

This application is brought by the 5th Respondent (the Applicant in this application) against the Registrar of Companies (the Respondent in this Application) with Michelina Forino and Salvatore Forino as interested parties.

The application seeks *inter alia*:-

a) Spent

b) The Respondent be ordered to rectify and remove the entry of archiving the status of Gio-Fo Limited on the company's e-citizen register platform

c) This honourable court be pleased to make such further or other orders as are just and fair in the circumstances of the case.

d) Costs be in the cause.

The application is supported by the affidavit of Mr. Alfonso Forino who states as follows;

The Applicant (Gio-Fo) is a private limited liability company registered on 19th May 2006 under the provisions of the Companies Act, Cap 486 of the laws of Kenya (now repealed) as company No. C. 124993 and conducting business within Kenya.

That the Respondent (Registrar of Companies) has unilaterally and without any lawful authority made an entry on the Applicant company's e-citizen platform to archive the status and thus make it unavailable by categorizing its status as archived which has caused and continues to cause, damage to the applicant and the Applicant's interest in removing the entry outweighs the interest (if any) of other persons in the continued appearance of the entry in the register. That the said archiving was occasioned vide the interested parties dated 12th June 2019.

That due to the above developments, the Applicant has been unable to operate effectively including being denied access to its accounts and filing of statutory returns and faces imminent danger of flouting the mandatory requirements of the law. He further states that the Applicant was incorporated by Terenzi Sergio and Joseph Mramba on 19th May 2006 and vide a Transfer of Share or stock dated the 27th June 2006, Terenzi Sergio transferred his 999 shares in the Applicant to Giovanni Forino while Joseph Mramba transferred his one share in the applicant to Renzo Quaciari. On 13th February 2007 vide a Transfer of Share/Stock, Renzo Quaciari transferred his one share in the applicant to Alfonso Forino and it is on the same day that he (Alfonso) was appointed a director.

That on 8th November 2012, pursuant to the provisions of Articles 9 (viii), 10 (b) and 11 on transfer of shares of the Articles of Association of the Applicant, the deceased transferred his shares to him and the agreement between the deceased and him was stamped on 12th October 2018 and the registration of the transfer of shares was done on 24th October 2018. On 16th November 2018, the deceased via the E-citizen platform under reference no. **AR-Z70XMBX** filed with the Respondent, the Applicant's Annual returns for the years 2016, 2017 and 2018 which were duly approved by the respondent on 21st November 2018.

On 25th January 2019, he received an E-mail at around 1604hours from one **Mr. Victor Arara Were** which email had an Annual return of the Applicant for the year 2019 dated 14th January 2019 signed by **Mr. Were** on 25th January 2019 and the CR 12 of the Applicant as at 15th January 2019. That the deceased died domiciled in Italy on 22nd January 2019 and according to his belief the applicant is free property as the transfer of shares was done during the deceased's lifetime and such the Applicant and the deceased are separate and distinct entities.

Mr. Alonso further states that he believes that rectification is a remedy limited to the membership of a company and does not extend to directors, advocates and company secretaries who by every definition are not members of accompany but merely its agents.

It is his belief that one **Ms. Joyce Koech** for the registrar of companies authored the signed and unsigned letters dated 10th July 2019 which were annexed to the affidavit of urgency in support of the certificate of urgency sworn on 11th June 2019 by **Ms. Kimeto** in *Malindi High Court succession cause no. 11 of 2019* and the replying affidavit in opposition to summons for Revocation of Grant for letters of administration *ad colligenda bona defunct* raising concerns as to how the interested parties were to access an unsigned official letter.

He further states that one **Mr. Michira** who witnessed the deceased signature and his in the Transfer of share/stock dated 8th November 2012 has since confirmed that he attested the signatures to the Directorate of Criminal Investigations Malindi and to Ms. Joyce Koech of the registrar of companies. Also, **Mr. Gekanana** of **Gekanana & Co. advocates** who prepared the statutory declaration dated 8th November 2012 has confirmed to the Directorate of Criminal Investigations Malindi to having prepared the same.

Parties exchanged replying affidavits and/or grounds of opposition before canvassing the applications by way of written submissions

The submissions

1st and 2nd Applicant's Submissions

In respect to the Applications dated 27th January 2020 and 24th December 2020, the applicants through their advocate submit that the main issues for determination as raised in the submissions are;

- *Whether there was an advocate/client relationship between Mr. Binyenya and the late Giovanni Forino?*
- *Whether there exists a conflict of interest between Mr. Binyenya and the estate of the late Giovanni Forino?*
- *Whether there is a reasonable likelihood of bias and prejudice that will be occasioned if Mr. Binyenya is allowed to act against the estate of the late Giovanni Forino.*
- *What mischief has been occasioned by the advocate Mr. Binyenya and the firm of Binyenya Thurairia in acting in these proceedings?*
- *Are Mr. Binyenya, Gekanana & Co Advocates and Mr. Michira necessary parties to the suit having been involved in preparation and/or registration of the contested share transfer instruments*
- *Are the applicants herein constitutionally entitled to legal discovery of documents for purposes of the effective determination of this suit?*

In addressing the above issues, the applicants submit that this suit is anchored on the legal documents in the form of Share Transfer documents prepared by the firm of *Gekanana & Co. advocates*, documents that have been largely contested in this suit by the applicants as forgeries. The said document is said to have been drawn by the firm of *Gekanana & Co. Advocates*. The Applicants submit that at the time **Mr. Binyenya** had filed a false return to the Law Society of Kenya that he was a Legal officer with Bee Box Limited.

In their submissions, the applicants state that **Mr. Binyenya** forwarded a forged share transfer document to the registrar of companies for registration effectively transferring 999 shares from the deceased to the 1st respondent 7 years after the purported date of the documents. According to the applicants all this happened while the deceased was terminally ill with stage 4 cancer and also while in a legal dispute with the 1st respondent in *Malindi HCC No. 9 of 2018*.

In support of conflict of interest, the applicants cited the case of *Rakusen V Ellis Munday and Clarke [1912] Ch. 831, Cozens-Hardy MR* “*a court must be satisfied that the 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.*”

In regard to the 5th respondent's Notice of Motion dated 14th December 2020, the applicants submitted that it is *Res Sub Judice* under the meaning of Section 6 of the civil Procedure Rules. They relied on the case of the *Supreme Court of Kenya in National Commission on Human Rights Vs Attorney General, the IEBC and 16 others [2020] eKLR*. The applicants concluded by urging this court to strike out the 5th Respondents Application dated 14th December 2020 for being an abuse of the court process and instead allow the Applicant's applications dated 27th January 2020 and 24th December 2020.

The 1st and 5th Respondents' submissions

The 1st and 5th Respondents frame the following issues for determination

- *Whether Salvatore Forino has the locus standi to bring the Application?*
- *Whether the suit is sub judice?*
- *Whether the 1st, 2nd and 3rd interested parties should be enjoined in this suit as interested parties?*
- *Whether the 1st, 4th and 5th Respondents should be compelled to produce the original signed Resolution of the Board of directors of GIO-FO Limited dated 8th November 2012 and filed on 22nd October 2018; the original statutory declaration for the transfer of shares of the late Giovanni Forino dated 8th November 2012 and filed on 22nd October 2018; the original signed Transfer of Share or stock of the late Giovanni Forino dated 8th November 2012 and filed 22nd October 2018; and the original KRA Stamp Duty payment Slip dated 11th October 2018*
- *Whether Mr. Benjamin Wasige Binyenya through the firm of Binyenya Thurairia & Co. advocates should be estopped from using privileged and confidential advocate/client information obtained by him in the year 2012 from the late Giovanni Forino to sustain any legal suit against the Estate of the late Giovanni on behalf of the 1st Respondent?*

On the locus standi of **Salvatore Forino**, through their counsel the 1st and 5th Respondent submitted that it was not in dispute that grant of Letters of Administration *ad colligenda bona* of the estate of the deceased were issued to the applicants on 26th June 2019 and they were

both appointed administrators to the estate in *Malindi probate and Administration cause No. 3 of 2019* on the same day. However, it was their submission that a limited grant of letters of administration *ad colligenda bona defuncti* does not enable the representative of the estate or defend a suit or application in court where the estate has been sued. Further, the capacity to bring any suit on behalf of the estate must be brought jointly at all times by the administrators appointed by court. Therefore **Salvatore Forino** offends the provisions of **Section 81 of the Law of Succession Act, Cap 160 of the Laws of Kenya**. In support of this position, they relied on the case of *Simon Kamau Muhindi suing as the Administrator of the estate of Esther Nyokabi Muhindi vs Monica Ngugi & Another [2014] eKLR*.

On whether the interested parties should be enjoined, they submitted that neither of the interested parties have a personal or legal stake in these proceedings to warrant their enjoinder in this suit. On production of the referenced documents, they submitted that a notice to produce is not and cannot be equivalent to an order of the court to produce documents. They relied on the case of *Fatuma Zainabu Mohamed V Ghati Dennitah & 10 others [2013] eKLR*. Further it is the onus of the Applicant to prove that the 1st and 5th respondents are in possession of the documents sought.

As regards the advocate/client relationship between the deceased and **Mr. Binyenya**, they submitted that there was no evidence tendered in any form to show the existence of such a relationship.

The third interested party's submissions

The third party submits that from the pleadings filed by the applicants, they have failed to demonstrate that he has stake or interest in the suit to warrant being enjoined. He submits that he is an advocate of the high court of Kenya and a commissioner for oaths whose duty was to attest the execution of the instrument of transfer of shares by the late Giovanni Forino and the 1st respondent and also commission the statutory notice.

He relied on the cases of *Skov Estate Limited & 5 Others vs Agricultural Development Corporation & another* and the case of *Nicodemus Osoro & another V Jane Gatwiri & 2 others*.

Issues for determination

- 1. Whether there exists a conflict of interests with Mr. Binyenya representing the 1st and 5th respondents*
- 2. Whether the 1st, 2nd and 3rd intended interested parties should be enjoined as interested parties.*

Analysis and determination

Whether there exists a conflict of interest

What is conflict of interest? A conflict of interest refers to a situation where a person finds himself or herself confronted by two different interests so that serving one interest would be against the other interest.

The definition of Conflict of interest by *Black's Law dictionary 10th, edition* applicable to the present situation is a situation that can undermine a person due to self-interest and [public interest](#).

In *Rakusen vs Ellis Munday and Clarke [1912] 1 Ch. 83*, Cozens – Hardy M.R. 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 actAs a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated.”

These principles are echoed in the case of *Philomena Mbete Mwilu v Director of Public Prosecutions & 2 Others V Stanley Kiima (interested party) [2018] eKLR* where the court held that; *a party alleging a Conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party.*

In *Delphis Bank Ltd v Channan Singh Chatte & 6 others [2005] eKLR* the court held as follows:

“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 probability result.”

In *British-American Investments Company (K) Limited V Njomaiha Investments Limited & another [2014] eKLR*, the court reiterated that existence of conflict of interest must be demonstrated and stated as follows: -

“It is therefore clear 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.”

Conflict of interest is not an abstract notion but is fundamentally a question that must be demonstrated on the facts alleged. In determining

what a personal interest is should be on a case to case basis for each case presents its own facts. I am alive to the facts presented before this court that require me to determine whether real mischief and real prejudice will result. I am guided by the holding in **Rakusen vs Ellis Munday and Clarke (supra)**.

I am further guided by the holding in **William Audi Ododa & another –vs- John Yier & another CA No. Nai 360 of 2004 (UR)** where the court held *inter alia* that:

“The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters in Section 77(1) (d) but Section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.”

Flowing from the foregoing, I find that no material has been placed before this court to prompt me cause the deprivation of the 1st and 5th respondents the right to be represented by a counsel of their choice.

Whether the 1st, 2nd and 3rd intended interested parties should be enjoined as interested parties.

Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013^[1] defines an interested party as follows: -

“Interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;”

The Black's Law Dictionary defines an interested party as **“A party who has a recognizable stake (and therefore standing) in the matter.”** It also defines a **“Necessary Party”** as **“a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.”**

The court in **AMM v JMN [2019] eKLR** in regards to enjoining interested parties stated that;

“An interested party is one who has a stake in the proceedings, though he was not party to the cause ab initio. He is one who will be affected by the decision of the Court when it is made, either way. The Court should not act in vain by enjoining a party that clearly would have no interest in the subsequent proceedings.”

In **Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR** the court held that; **For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit..."**

The elements to be satisfied in seeking to enjoin an interested party are; **identifiable stake, legal interest or duty in the proceedings before the court.**

The supreme court in **Communications Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others [2014] eKLR** held that; **“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court’s decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:**

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;**
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;**
- (iii) Joinder to prevent a likely course of proliferated litigation.**

We ask ourselves the following questions: a) what is the intended party’s state and relevance in the proceedings and b) will the intended interested party suffer any prejudice if denied joinder?”

In considering the application to enjoin the 1st, 2nd and 3rd intended interested parties as interested parties, I must first examine the elements that have been set out above herein. Do they satisfy any or all of the elements above? It is my considered view that the 1st and 2nd applicants have not demonstrated whether the intended interested parties have any identifiable stake, legal interest or duty in the proceedings. Further, the applicants have not demonstrated that they are likely to suffer from any mischief or prejudice should the intended interested parties not be enjoined as interested parties. Therefore, I decline to allow the application to enjoin the intended interested parties as interested parties.

I do take note that vide the application dated 14th December 2020, the 5th respondent in one of its prayers petitions this court that the respondent (the Registrar of Companies) be ordered to rectify and remove the entry of archiving of the status of the Gio-Fo Limited on the Company's e-citizen register platform. The effect has been that the 5th respondent has been unable to meet its statutory obligation of filing tax returns. The 5th respondent has not tendered any proof before this court showing correspondences or engagement with the Registrar of companies in respect to the same. I am not convinced that this requires the intervention of the court. The 5th respondent is at liberty to approach the Registrar of companies and have the same straightened out. I make no specific orders as regards this.

In sum, it is therefore ordered that;

1. There is no prima facie case on conflict of interest to cause the deprivation of the 1st and 5th respondents the right to be represented by a counsel of their choice.

2. There is no justification to enjoin the intended interested parties as interested parties to this suit.

3. Costs shall abide by the outcome of the main suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29th DAY OF JUNE 2021

.....

R. NYAKUNDI

JUDGE

In the presence of; -

1. Kimetto for the Petitioners
2. Binyenya for the 1st Respondent
3. Michelina Forino
4. Salvatore Forino

jacklinekimeto@lpolegal.com, wasigeb@gmail.com)