



REPUBLIC OF KENYA



**Katama & another v Chivatsi & 6 others (Civil Suit 77 of 2017)
[2023] KEELC 19339 (KLR) (31 August 2023) (Ruling)**

Neutral citation: [2023] KEELC 19339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 77 OF 2017
MAO ODENY, J
AUGUST 31, 2023**

BETWEEN

DAVISON DZOMBO KATAMA 1ST PLAINTIFF

GEORGE DZOMBO KATAMA 2ND PLAINTIFF

AND

SAMUEL DZOMBO CHIVATSI 1ST DEFENDANT

SIMBA DZOMBO CHIVATSI 2ND DEFENDANT

ALFRED RIKO MWALENGA 3RD DEFENDANT

HAMISI MZUNGU NZOVU 4TH DEFENDANT

JUSTIN MZUNGU 5TH DEFENDANT

LAND REGISTRAR KILIFI 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated September 19, 2022 by the Plaintiff/Applicant seeking the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to issue an order that the firm of M/S Kanyi J & Company Advocates be disqualified from representing the 3rd Defendant herein.
 - c. That costs of this Application be borne by the Defendants/Respondents



Applicant's Case And Submissions

2. The application is premised on the supporting affidavit of Davison Dzombo Katama sworn on September 19, 2022 the 2nd plaintiff who deponed that the family of Dzombo Katama Chivatsi instructed the firm of M/S Kanyi J & Company Advocates in 2017 to follow up a family dispute about their late father's Plot No Kilifi/Kinungu'na/319.
3. He further deponed that they gave the Advocate access to all their documents and are therefore privy to the family dispute involving the 1st, 2nd, and 4th Defendant of whom they are related. He also stated that the firm of M/S Kanyi J & Company Advocates are now representing the 3rd Defendant in the matter against the Plaintiff.
4. Mr George Dzombo deponed that their relationship with one Mrs Wangari of the firm of Kanyi J deteriorated because she never came to court and they came to discover that she was meeting the 1st and 4th Defendants without informing them and they instructed the firm of Munyithya, Mutugi, Umara & Muzna advocates to represent them in this matter.
5. It was the Applicant's case that the firm of M/S Kanyi J & Company is still in possession of their file and only gave him copies of the documents and has not forwarded the original documents to his advocates.
6. The Applicant further deponed that the firm of Kanyi J has filed another suit on behalf of the 3rd Defendant thus a clear issue of conflict of interest which is a breach of the advocate-client relationship if they continue to represent to the 3rd Defendant.
7. Counsel submitted that the record shows that the firm of Kanyi J Advocates on 8/4/2017 filed the primary pleadings including the Complaint dated 5/4/2017 and the initial pre-trial compliance documents on Record for the Plaintiffs. That the Complaint expressly & adversely named, the later joined, the 3rd defendant Alfred Riko Mwalenga at paragraphs 9 and 10.
8. Counsel also stated that this has not been controverted by the Replying Affidavit of Adoyo Julian from the firm of Kanyi J, that Ms Wangeci who was in the firm as the relationship was severed.
9. Counsel submitted that there is breach of client confidentiality as the 3rd Defendant is now represented by the Plaintiffs' former advocates Kanyi, J Advocates and is now prosecuting a counterclaim seeking eviction of the Plaintiffs and vacant possession of the suit property, which is a clear conflict of interest as the very firm that helped the Plaintiffs craft their suit and prepare the primary pleadings, is now aiding a party adversely mentioned in these pleadings and now a party to prosecute a claim against the Plaintiffs.
10. Counsel relied on the cases of *Murgor & Murgor Advocates v Kenya Pipeline Co. Ltd* [2021] eKLR and *Rajab Barasa Olemuteke v Shaiwaz S Jiwa* [2020] eKLR on the issue of conflict of interest and urged the court to allow the application as prayed.

3rd Defendant's Submissions

11. Counsel reiterated the contents of the Replying Affidavit and stated that the firm entered appearance for the 3rd Respondent after he was enjoined through a court order and during preparation of the initial pleadings, the 3rd Respondent was not a party in these proceedings hence there was no conflict of interest
12. Ms Adoyo further stated that it is not in dispute that Miss Wangari then an associate in the firm was personally in conduct of this matter on behalf of the Applicants herein, but the Applicants later on



withdrew their instructions from Ms Wangari and appointed their current advocate on record to take over and proceed with the matter.

13. Counsel also argued that it is also not in dispute that an advocate –client relationship existed between Ms Wangari and the Applicants then before they withdrew their instructions and that they are not privy to the confidential information shared between the Applicant and Ms Wangari .
14. Ms Adoyo submitted that the 3rd Respondent has a constitutional right to be represented by the firm of his choice and can only be interfered with if there is sufficient evidence to demonstrate the existence of conflict of interest that would cause prejudice to the Applicants.
15. Counsel cited the cases of *Uhuru Highway Development Ltd-vs-Central Bank Of Kenya* (2002) 2E.A 654 at page 661, *British –American Investments Company (k) Limited =vs=Njomaiha Investments Limited & another* (2014) eKLR, *National Bank of Kenya Limited =vs=Peter Kipkoech Korat* (2005) eKLR and urged the court to dismiss the application with costs.

Analysis And Determination

16. The issue for determination is whether the firm of Kanyi J & company Advocates should be disqualified from acting for the 3rd Defendant on account of conflict of interest.
17. It is not in dispute that the Firm of Kanyi J & Company Advocates was instructed by the Plaintiff to pursue this case on their behalf which culminated in filing of a Plaint dated April 5, 2017 as per the court records
18. The firm went ahead and completed the pretrial procedures and filed the initial pre-trial compliance documents on Record for the Plaintiffs and that the plaint expressly & adversely named, the later joined, the 3rd Defendant Alfred Riko Mwalenga at paragraphs 9 and 10.
19. The Applicant further claimed that the Firm of Kanyi J Advocates has not released his original document as he was only supplied with copies.
20. The reasoning of counsel for the 3rd Defendant on the issue of conflict of interest and client confidentiality is in agreement that the firm of Kanyi J & company Advocates is actually in breach and a culprit of both limbs. The argument that the Applicant had withdrawn instructions from Ms Wangari who was in the conduct of the case within the firm, gives the firm a go ahead to act for an opposing client where the firm has used the same information acquired from the plaintiff to file a counterclaim reeks of conflict of interest.
21. Further argument on the client’s constitutional right to counsel of his choice is also flawed. If you look at the record and find that Kanyi J filed the Plaint and later in the file you find that the same Kanyi J is acting for the 3rd Defendant, it sends a bad signal on Advocates practice.
22. I will not belabor much of the issue of conflict of interest and confidentiality as this case is an example of an advocate throwing care to the wind, abandoning what was taught at the law school on advocate – client relationships. Such kind of behavior can lead to disciplinary action.
23. The upshot is the application is allowed with costs to the Applicant and the firm of Kanyi J & company Advocates are therefore disqualified from acting for the 3rd defendant. The 3rd Defendant is hereby granted 30 days to engage the services of another counsel or firm save for the firm of Kanyi J & Company Advocates.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF AUGUST, 2023.

M.A. ODENY



JUDGE

