



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**PETITION NO. 9A OF 2018**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 47, 48, 49 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CRIMINAL CASE NO. 480 OF 2017 PENDING BEFORE THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT LIMURU**

**BETWEEN**

**HENRY NGANG'A GIKONYO.....1<sup>ST</sup> PETITIONER**

**SUSAN WACHUKA GIKONYO.....2<sup>ND</sup> PETITIONER**

**VERUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**JOSHUA NGUGI GIKONYO.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. For determination is a Notice of Preliminary Objection filed on 26<sup>th</sup> September, 2018 being an objection by the Petitioners to the firm of **J.M.Njenga & Company Advocates** appearing for the 2<sup>nd</sup> Respondent.

2. The Preliminary objection is based on the grounds that the firm of **J.M.Njenga & Company Advocates** acted for the entire **Gikonyo family** including the Petitioners in preliminaries leading to **Succession Cause No. 516 of 2014**; and in the circumstances the said firm is privy to confidential information covered by the Advocate/Client privilege which information might be used against the Petitioners in this cause.

3. The 2<sup>nd</sup> Respondent, **JOSHUA GIKONYO** filed a replying affidavit on 6<sup>th</sup> May, 2019 in opposition to the objection. He deposed that he is the Complainant in **Limuru Criminal Case No. 480 of 2017** and he is represented by the firm of **J.M.Njenga & Company Advocates** in the said criminal case. He contended that the parties are represented by different advocates in the pending **Succession Cause No. 516 of 2014** and the firm of **J.M.Njenga & Company Advocates** is not involved in the said Succession Cause. He further stated that the Petitioners have not disclosed the alleged privileged information and that in any case, the two cases are not related. He denied that the firm of **J.M.Njenga & Company Advocates** has any information that would prove prejudicial as there is no nexus between the criminal case and the mediation conducted by the said firm in 2013 prior to the filing of the succession cause.

4. The Preliminary objection was canvassed by way of oral arguments. Mr. Njuguna for the Petitioners submitted that the genesis of the dispute between the parties and the criminal case the subject of this Petition is Succession Cause No. 516 of 2014 which case pits the two houses of **Geoffrey Gikonyo Ngugi**, the deceased father to the Petitioners and 2<sup>ND</sup> Respondent, against each other. He contended that the firm of **J.M.Njenga & Company Advocates** was prior to the succession cause representing both the deceased's houses and is therefore, privy to confidential information, which is detrimental to the Petitioners' case. He placed reliance on Section 134(1) of the Evidence Act and Rule 9 of the Advocates Practice Rules. The cases of **Uhuru Highway Development & others V Commercial Bank of Kenya (2003) eKLR** and **Law Society of Kenya v Martin Day & 3 others (2015) eKLR** were cited for the proposition that it is immaterial whether or not the advocate/client relationship has ceased, so long as the advocate is privy to information received in the course of the relationship with the client. The court was urged to guard against the likelihood of bias by upholding the Preliminary objection.

5. Mr. Okeyo for the 2<sup>nd</sup> Respondent submitted that the present case does not arise from the same cause of action as the succession case. It

was contended that the firm of **J.M.Njenga & Company Advocates** only mediated preliminaries prior to the filing of the succession cause and that another firm subsequently took over. And therefore, no nexus exists between the criminal and the succession case. Counsel submitted that every party is entitled to an advocate of their choice. Reliance was placed in the case of **Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others (2017) eKLR** where it was held that only in exceptional cases should the party's rights to counsel of his choice be interfered with. It was submitted that there is no evidence of the use of privileged information in the criminal case. Further, it was said that no real prejudice or real mischief had been demonstrated in this case as per the test prescribed in the case of **Yusuf Abdalla Ibrahim Abdi v Ibrahim Noor Hillowly (2017) eKLR**. The court was urged to strike out the Preliminary objection as there is no conflict of interest, mischief or proof of likely of prejudice.

6. The court has considered the arguments in respect of the preliminary objection premised on the grounds that the firm of J.M. Njenga & Co. Advocates had previously acted for the entire family of the late Geoffrey Gikonyo Ngugi in initial stages prior to the filing of the Succession Cause No.516 of 2014 in the High Court of Kenya in Nairobi, and that the instant matter has arisen from the succession dispute, pitting the Petitioners' house against the house of the 2nd Respondent, all of whom are children of the late Geoffrey Gikonyo Ngugi. Section 134 of the Evidence Act provides that:

**“ Privilege of advocates**

**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;**

**(2) 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.**

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

7. The advocate is bound to a duty of confidentiality in relation to privileged information arising out of his communication with a client. The advocates duty to his client according to **Halsbury's Law of England 3rd Edition Vol. 3 para 67** is, a

**“Duty not to disclose or misuse information: The employment of counsel places him in a confidential position and imposes upon him a duty not to communicate to any third person the information which has been confided to him as counsel to his client's detriment. This duty continues after the relationship of counsel and client has ceased.”**

8. In the case of **King Woolen Mills Ltd [formerly known as Manchester Outfitters Suiting Division Ltd] v Kaplan and Stratton Advocates [1993] e KLR** (per **Muli JA**) it was held of an advocate who had acted for common clients and who were parties in the subsequent main litigation before the court, that arising from the contractual fiduciary relationship between him and his common clients:-

**“[T]he information imparted to (him) by the individual clients was confidential. [He] owed a duty to his individual clients not to disclose or divulge any confidential or secret information imparted to him in confidence to anyone else including the clients in the (common) transaction without the consent of the client imparting the confidential information... nor do I think for a moment that it can be argued that the duty and obligations imposed on him as a common advocate ceased after conclusion of the transaction for which returns were made.”**

9. After considering the English decision in **Supasave Retail Ltd v Coward Chance & Others [1991] 1ALL ER** where the decision in **Rukusen v Ellis, Munday and Clarke [1912]1 ch. 831** was followed, the Court of Appeal stated that:

**“Applying the above tests to the facts in the present case, I must be satisfied that real mischief or real prejudice are rightly appreciated”...**

**I have come to the firm conclusion that real prejudice and real mischief are anticipated if the Respondents are permitted to act for the defendants in the main suit.”.**

10. In the later decision of the Court of Appeal in **Delphis Bank Ltd v Channan Singh Chatthe & 6 Others [2005]e KLR** the objection against the participation of an advocate in representing the party in the matter was on grounds, that he had prepared disputed instruments and was likely to be summoned as a witness. The court stated that:

**“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. 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. The**

authorities we allude to are King Woolen Mills Ltd & Anor vs. M/S Kaplan & Stratton [1993] LLR 2170 (CAK), (C.A 55/93) and Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654.

In the first authority, a partner in the Firm of Kaplan & Stratton, Mr. Keith, participated in negotiations for offshore loan facilities between a Bank and the borrowers and he also went ahead and drew up the loan agreement, the guarantee, the debenture and the legal charge on behalf of the Bank and the borrowers, as their common advocate.

When disagreements subsequently arose and litigation commenced in respect of those transactions, the firm of Advocates chose to act for the Bank but the borrowers objected and sued the firm seeking an injunction to stop it from breaching client/advocate confidentiality. It was contended, and the court found, that the borrowers had imparted to Mr. Keith and the bank, confidential information and their secrets in confidence under the retainer to enable Mr. Keith to successfully conclude the loan transaction. The court concluded, per Muli J.A with whom the other members of the court agreed: -

“I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit.

The result will be that the appellants will not only be confronted with their own confidential information but will suffer great injustice and prejudice during the trial of the main suit”. Mr. Keith and any partner in the firm of Kaplan & Stratton were restrained from continuing to act for the Bank in the main suit or in any litigation or proceedings arising from the loan transactions. In so deciding the court cited with approval English decisions in *Rakusen vs Ellis Munday and Clerke* [1912] 1 Ch. 831, *Re – A Firm of Solicitors* [1992] 1 A 11 E.R 353, and *Supasave Retail Ltd v. Coward Chance and others* [1991] 1 All ER 668. The former two cases were applied in the latter, where Sir Nicolas Browne – Wilkinson V-C summed up the general rule as follows: -

“The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in *Rukusen v Ellis, Munday & Clerke* (1912) 1 Ch. 831 ...The law as laid down there is that there is no absolute bar on a solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause ( ..... ) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in *Rukusens* case itself. *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 act .....As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated”.

The King Woolen Mills case (supra) was applied in the Uhuru Highway Development Ltd case (supra) where it was contended in affidavit evidence, and the court found, that the Advocate, Mr. George Oraro, had acted for both the bank and the borrowers and had drawn up the Charge which had become contentious in subsequent litigation.

As is clear from those authorities, each case must turn on its own facts to establish whether real mischief and real prejudice will result. In this case, we hardly have any facts to consider in arriving at such conclusion. “

11. On the admitted facts of this case, the firm of **J. M. Njenga & Co. Advocates** acted as a common advocate for the entire **Gikonyo** family prior to the succession cause being filed. According to the 2<sup>nd</sup> Respondent his role was that of a mediator helping the members of the family identify possible administrators. Of course, in that role **J. M. Njenga** must have become privy to different information concerning the estate, family relations and affairs. With regard to the Petitioners, the nature of information disclosed by them, if at all, to **J. M. Njenga** is not described in any detail. This is an important point because, the matter before this court is a petition challenging the prosecution of the Petitioners in a criminal court for the offence of assaulting the 2<sup>nd</sup> Respondent.

12. It may well be that the relations between these siblings have soured due to the succession dispute. That however , only creates a very tenuous connection between the instant petition and the matters in which the **Gikonyo** family initially consulted **J. M. Njenga** advocate. The Petitioners’ position would have been stronger if the objection was being made against the participation of **J.M. Njenga** advocate in the existing succession cause. On the facts before me, I am not satisfied that this is a case where real mischief and real prejudice are rightly anticipated by the Petitioners.

13. Consequently, the court is not persuaded that this is a proper case for its intervention through barring the firm of **J. M. Njenga & Co. Advocates** from acting for the 2<sup>nd</sup> Respondent. As stated by **O’Kubasu J. A.** (as he then was) in **William Audi Odode & Another v John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004:**

“...[I]t 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.”

14. The upshot is that the preliminary objection has no merits and is accordingly dismissed. The court directs that the parties fix a date in the registry for the hearing of the petition.

SIGNED ON THIS 12<sup>TH</sup> DAY OF JUNE 2020 AND DELIVERED VIA eMAIL TO THE PARTIES ON 12<sup>TH</sup> DAY OF JUNE 2020

**C. MEOLI**

**JUDGE**