



**Korio & another v Korinko & 6 others (Environment & Land Petition E005 of 2024) [2025] KEELC 184 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 184 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND PETITION E005 OF 2024**

**MN MWANYALE, J  
JANUARY 29, 2025**

**BETWEEN**

**JAMES LESHAN KORIO ..... 1<sup>ST</sup> PETITIONER  
JOAB LEPOSE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**MOSES L KORINKO ..... 1<sup>ST</sup> RESPONDENT  
MUJAID KUROMONGI ..... 2<sup>ND</sup> RESPONDENT  
SIMEON TIEPOON ..... 3<sup>RD</sup> RESPONDENT  
DAVID OLE NTUKAI ..... 4<sup>TH</sup> RESPONDENT  
LANDS ADJUDICATION & SETTLEMENT OFFICER TRANSMARA SUB-COUNTIES ..... 5<sup>TH</sup> RESPONDENT  
LAND REGISTRAR, TRANSMARA SUB-COUNTIES ..... 6<sup>TH</sup> RESPONDENT  
HON ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. This Ruling relates to the Notice of Motion application dated 18.09.2024 filed by the 1<sup>st</sup> Petitioner/Applicant.

The Application seeks the substantive orders that: -

- i. Spent
- ii. The Honourable Court be pleased to order that the Firm of Oguttu Mboya, Ochwal and Partners Advocates be and is hereby disqualified/recused and/or debarred from representing the 1<sup>st</sup> to 4<sup>th</sup> Respondents in this matter.



- iii. That Oguttu Mboya, Ochwal and Partners Advocates be restrained from continuing to act for the 1<sup>st</sup> – 4<sup>th</sup> Respondents in these proceedings or in any litigation or proceedings in relation to the matter before court.
2. The grounds in support of the applicate are interalia that: -
- i. The Firm of Oguttu Mboya, Ochwal and Partners Advocates is tainted by Conflict of Interest and that the Applicants/Petitioners are apprehensive that it will occasion them real mischief and prejudice.
  - ii. That the said Firm of Advocates represented the 1<sup>st</sup> Applicant previously in Kisii ELC No. 21 of 2013.
  - iii. That the said firm is privy to details that qualify it to be a witness in this suit.
  - iv. That the said Law Firm is caught up in a conflict of interests and its conduct is unethical and in contravention of the provisions of Rule 9 of the Advocates Practice Rules.
  - v. The Application is further supported by the supporting affidavit of Mr. James Leshan Korio, who reiterates the grounds in support of the application and has annexed various annexures including correspondences to him by the Firm of Oguttu Mboya and Company Advocates in relation to Kisii ELC No. 21/2013, Mention Notice, Replying Affidavit as well as pleadings in Kisii ELC No. 21/2021, and the judgment thereof.
3. In opposition to the said application a Replying Affidavit deponed by Winny Adhiambo Ochwal Esq. Advocate was filed wherein the learned Advocate depones being a partner in the Law Firm of Oguttu Mboya, Ochwal Advocates and further depones interalia: -
- i. That the firm of Oguttu Mboya and Company Advocates which acted for Petitioners in Kisii ELC No. 21/2013 was a sole proprietorship managed by Mr. Oguttu Joseph Mboya until 2017 when a new firm was registered being a partnership known as Ms. Oguttu, Ochwangi and Ochwal and Company Advocates, which operated till December, 2020 which the same was dissolved and the firm of Oguttu Mboya Ochwal and Partners Advocates was formed.
  - ii. That in June 2021, Mr. Oguttu Joseph Mboya resigned from the said firm upon taking up his current Role of a judge of the Environment and Land Court leaving Oguttu Mboya, Ochwal and Partners Advocates in the hands and control of the deponent.
  - iii. That this Petition was filed long after the resignation of the said Mr. Oguttu Joseph Mboya and that the deponent did not represent the Petitioner/Applicants in Kisii ELC Case No. 21/2013, which was concluded in 2014 and the Petitioner was represented by firm of Oguttu Mboya and Company Advocates, the sole proprietorship that existed then.
  - iv. That the deponent acted for the Interested Party in Narok ELC Petition No. 3 of 2017 which concerned the subdivision of Transmara/Shartuka/ and that Transmara/Shartuka/165 did not form part of the proceedings therein.
  - v. That the deponent has never been retained and/or instructed by the 1<sup>st</sup> Petitioner/Applicant in Kisii ELC Case No. 21/2013 and therefore the Petitioner/Applicant has not demonstrated that he shared confidential information on the properties with the deponent, the deponent is thus not a potential witness in the proceedings on behalf of the Petitioners, neither is he in possession or seen any documents that would be privileged communication so as to infer



a fiduciary relationship a the firm of Oguttu Mboya Ochwal was not in existence in the year 2013/2014.

- vi. Hence the application is merely a side show and ought to be dismissed.
4. Parties were directed to file written submissions on the application, which they did and the court summarizes the submissions as follows: -

### **Applicant's Submission**

5. The Applicant submits that the Law Firm of Oguttu Mboya Ochwal should be restrained as it previously acted for the 1<sup>st</sup> Applicant/Petitioner in Kisii ELC No. 21/2013, and the Applicant places reliance on the decision in the case of King Woolen Mills Limited and Galot Industries Vs. Kaplan and Straiton Advocates, the Applicant submits that the Law Firm had an existing Advocate/Client relationship with the 1<sup>st</sup> Applicant/Petitioner, and ought to be disqualified.
6. That the continued participation of the firm of Oguttu Mboya and Ochwal Partners poses a conflict of interest that creates a risk of professional judgment which might affect primary interests with secondary interest; the primary interest being the principal goals of the profession including protection of clients, while secondary interests are the personal benefits, including financial gain.
7. The Applicant cites paragraph 96, 97, 99 of the Code of Standards of Professional Practice and Ethical Conduct of the Law Society of Kenya, in support of their submission. The Applicant cites the Decision of Dare slam Commercial Case No. 102/2021 Mexons Energy Limited Vs. NMB Bank PLC. On the strength of the said submissions the Applicants acting in person submit for grant of the orders set out at paragraph 1.

### **Respondent's Submission**

8. The Respondent has framed and submitted on 3 issues for determination, to wit
- i. whether there exists a conflict of interest on the part of the Advocates on record for the 1<sup>st</sup> – 4<sup>th</sup> Respondents.
  - ii. Whether the 1<sup>st</sup> – 4<sup>th</sup> Respondents are entitled to be represented by Counsel of their choice.
  - iii. Whether the application is merited.
9. On issue number 1, the Respondent submit that it is Mr. Oguttu Joseph Mboya who acted for the 1<sup>st</sup> Petitioner in 2013, and that he resigned from the Partnership after appointment as a Judge, that the current Partner Winny Ochwal joined the partnership in 2017, after the matter had been concluded in 2014 and was not instructed in the matter and that mere apprehension is not enough to disqualify an Advocate from acting for a client.
10. On Rule 9 of the Advocates Practice Rule, the Respondent submits that there is no indication that the Advocates would be called as potential witnesses in this matter.
11. The Respondent cites the decision in the case of British American Investments Company (K) Limited Vs. Njomaitha Investments Limited and Another (2014) eKLR, as well as the Decision in the case of RE ESTATE OF BERNARD MARTENS to buttress the point that a whole Firm of Advocates cannot be barred from representing clients where one Advocate is likely to be called as a witness.
12. In further support of this limb of Argument, the Respondent relies on the decision in the case of Standard Chartered Kenya Nominees Ltd Vs. Samuel Njeru Muthi and 3 Others; as well as the decision



in the case of John Nyamari Mogaka T/A Ouru Hyper Stores Vs. Charles Matundura Mogaka and Another.

13. On issue number 2 the Respondent submits placing reliance on the decision in the case of John Nyamari Mogaka T/a Ouru Hyper Stores Vs. Charles Matundura Mogaka and Another, that everyone has a right to have a counsel of their choice to represent them in any matter.
14. The Respondent further places reliance in the decision in the case of Standard Chartered Kenya Nominee Vs. Samuel Njeru Mutui.
15. On the strength of the above submissions, the Respondent urges the court to dismiss the application.

### **Issues for Determination**

16. Having analyzed the application, the affidavits and the annexures thereto, the rival submissions as well as the authorities cited by the parties, the court frames the following as issues for determination: -
  - i. Whether or not the application is merited?
  - ii. What orders ought to issue?

### **Analysis and Determination**

17. Under issued 1, the court shall examine whether the Applicant has established conflict of interests as well as the breach of Advocate/Client confidentiality thus establishing merits of the application.
18. On conflict of interest, the Applicant has submitted on a possible conflict of what he refers to as primary interest and secondary interest and have submitted on what the two mean as captured as paragraph 6 of this Ruling.
19. The annexures exhibited by both the Applicant and the Respondent lend credence to the fact that the firm of Oguttu Mboya and Company Advocates acted for the 1<sup>st</sup> Petitioner/Applicant in Kisii ELC No. 12 of 2013 whose judgment was delivered in 2014. There was thus an Advocate/Client relationship between the firm of Oguttu Mboya and the 1<sup>st</sup> Applicant which existed between the 2013 – 2014 when the said Advocates were instructed by the 1<sup>st</sup> Petitioner in Kisii ELC No. 12/2013.
20. The Respondent in their affidavit have deponed that at the said time of the instructions the said firm was a sole proprietorship owned and managed by Mr. Oguttu Joseph Mboya and had one associate, and the firm was dissolved in 2017 when a new firm, different in composition and status being a partnership was formed.
21. In this 2<sup>nd</sup> firm, two new partners joined, but at this moment the matter which the Advocate acted for the 1<sup>st</sup> Applicant had already been finalized. This new outfit Oguttu Mboya, Ochwangi and Ochwal and Company Advocates operated till December 2020 when again it was dissolved. Since Kisii ELC No. 12 of 2013 had been concluded in 2014 before the new outfit Oguttu Mboya, Ochwang and Ochwal and Company Advocates, which was formed in 2017, no Advocate/Client relationship existed between the new outfit and the 1<sup>st</sup> Petitioner/Applicant.
22. In accordance with the Replying Affidavit, this 2<sup>nd</sup> outfit was dissolved in December 2020 and the current outfit being Oguttu Mboya, Ochwal and Partners Advocates was formed in 2021, Mr. Oguttu J. Mboya, resigned from the said partnership upon his appointment as a judge, it similarly follows that the firm of Oguttu Mboya, Ochwal Advocates that is sought to be barred from these proceedings did not act for the 1<sup>st</sup> Petitioner/Applicant in Kisii ELC No. 12/2013 and no Advocate/Client relationship existed.



23. From the above findings the only Advocate/Client relationship that existed was between the original firm of Oguttu Mboya Advocates and the 1<sup>st</sup> Petitioner/Applicant, Mr. Oguttu Joseph Mboya having resigned from the current firm, and having found no existence of Advocate/Client relationship between the current firm and the 1<sup>st</sup> Respondent/Applicant, it follows that the 1<sup>st</sup> Petitioner/Applicant has not established any conflict of interest by the continued participation of Oguttu Mboya, Ochwal and Partners Advocates, the firm currently on record.
24. In her affidavit, learned Counsel for Respondents Winny Ochwal Esq, depones that having not been instructed by the 1<sup>st</sup> Petitioner/Applicant in Kisii ELC No. 12/2013, she is thus no privy to any privileged information that would lead to a breach of fiduciary duty and make her a potential witness in the matter.
25. The court agrees that the Advocate/Client relationship existed between the 1<sup>st</sup> Applicant/Petitioner with the original firm Oguttu Mboya Advocates and any privilege communication was between the said firm and in particular Mr. Oguttu Joseph Mboya Advocate (as he then was) and his then Associate, and that the same did not extend to the two subsequent Law Firms, and certainly not the current Law Firm. It is doubtful that the new partners are in possession of confidential and privileged communication or are likely to be potential witnesses more so with the resignation of Mr. Oguttu Joseph Mboya from the said partnership.
26. Can the current firm of *Advocates act* against a former client? As already held, the current firm of Advocates had no advocate/client relationship with the 1<sup>st</sup> Applicant/Petitioner, at best, the 1<sup>st</sup> Applicant/Petitioner is a former client of a former partner in the said firm, the said partner having been appointed as a judge cannot act for the previous client or against the previous client; but the current firm having had no instructions and advocate/client relationship can act against the former client.
27. In arriving at the above finding, I am guided by the decision in King Woolen Mills (formerly known as Manchester out/fitting division and Galot Industries Vs. Kaplan and Stratton Advocates (1993) eKLR where the court quoted the decision in Rukusen Vs. Ellis, Munday and Clerk which held inter alia;
- “A solicitor who has been retained by a client is under an absolute duty not to disclose any information.....There is no general rule prohibiting a solicitor who has acted for one client in a matter acting for an opposite part in the same matter, but where a solicitor owes a duty to a third party which conflicts his duty to a particular client he is not relieved of his duty to that client.”
28. Having found and held that there was no Advocate/client relationship between the 1<sup>st</sup> Applicant/Petitioner and the firm of Oguttu Mboya, Ochwal and Partners Advocates, the current firm of Advocates on record for the 1<sup>st</sup> to 4<sup>th</sup> Respondents, there is no possibility of a conflict of interest and there being no confidential and privilege communication between the Applicant and the Advocates there is absolutely no bar for the said Advocates to continue participation in this matter.
29. The court finds that the application is based on mere apprehension and the same lacks merit and it is hereby dismissed with costs.

**DATED AND DELIVERED AT KILGORIS THIS 29<sup>TH</sup> DAY OF JANUARY, 2025**

**HON. M.N. MWANYALE**

**JUDGE**

**In the presence of:**



1<sup>st</sup> Petitioner/Applicant in person  
Ms Ochwal for 1<sup>st</sup> – 4<sup>th</sup> Respondents  
Ms Opiyo for 5<sup>th</sup> – 7<sup>th</sup> Respondents  
C/A Emmanuel.

