



REPUBLIC OF KENYA



**Okoyo v Gutti & 8 others (Civil Case E004 of 2022)
[2023] KEELC 20949 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20949 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
CIVIL CASE E004 OF 2022
GMA ONGONDO, J
OCTOBER 26, 2023**

BETWEEN

JOHN OWUORE OKOYO PLAINTIFF

AND

DOMINIC OWINO GUTI 1ST DEFENDANT

JAMES OYUGI MODI 2ND DEFENDANT

JOSHUA CALVINS OMOLLO 3RD DEFENDANT

BENARD OCHIENG OWINO 4TH DEFENDANT

JOSHUAM ODHIAMBO MODI 5TH DEFENDANT

FESTUS ODHIAMBO MODI 6TH DEFENDANT

FESTUS ONYANGO JUMA 7TH DEFENDANT

JANES OYUGI MODI 8TH DEFENDANT

SHEM KICHE ANYAMA 9TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion application dated 25th April 2023 and filed herein on 5th May 2023 under Article 159 (2) of the Constitution of Kenya, 2010 and Rule 8 of the Advocates (Practice) Rules, 1966, Section 1A, 1B, 3A and Section 63(e) of the Civil Procedure Act, Chapter 21 Laws of Kenya 2010 (the application). The 1st and 7th defendants (the applicants) through their counsel, O. H. Bunde and Company Advocates, are seeking the orders *infra*:
 - a. The firm of M/s Achillah T. O & Company Advocates be disqualified and henceforth barred from acting for plaintiff as against the defendants in the instant matter.



- b. The plaintiff/respondent's plaint dated 1st January 2022 be struck out.
 - c. The said firm of M/s Achillah T. O & Company Advocates be ordered to promptly account and disgorge all fees hitherto received towards institution and hitherto prosecution of the instant matter.
 - d. Costs of this application be borne by the plaintiff/respondent.
2. The application is anchored on the supporting affidavit sworn by Dominic Owino Gutu, the 1st applicant, on even date. He deponed that he knows M/s Achillah T. O & Company Advocates (the firm) as they acted as his advocates in an agreement dated 10th April 2018 between himself and the 7th Defendant (the agreement). That the said firm also attested the agreement. That the firm has now instituted the present suit against him, whose basis is the agreement. That the same amounts to breach of fiduciary obligations which the firm owes him. That he is prejudiced by the instant suit, as the firm is a direct witness herein. Thus, the applicant urged the court to allow the instant application.
 3. The respondent's counsel opposed the application by way of a replying affidavit sworn on 5th June 2023. He deponed, *inter alia*, that he has never attended to or received instructions from the 1st or 7th defendant. That therefore, he has no fiduciary relationship with the applicants nor has he ever received any privileged information relating to land parcel number West Kasipul/Konyango Kokal/2051 (the suit land) or legal fees from them. That further, the sale agreement annexed to the instant application does not form part of the documents and sale agreements prepared by and/or witnessed by the firm.
 4. He also stated that the plaintiff is not privy to the subject agreement as he is not a party thereto. That he has not been listed as a witness in the defendants' list of witnesses. That hence, the applicants have not demonstrated what prejudice they will suffer if the firm prosecutes the present suit on behalf of the plaintiff herein.
 5. On 14th June 2023, the court ordered and directed that the application be heard by way of written submissions in the spirit of Article 159 (2) (b) of the Constitution of Kenya, 2010 and Order 51 Rule 16 of the Civil Procedure Rules, 2010.
 6. Accordingly, the applicants' counsel filed submissions dated 6th July 2023 and identified one issue for determination thus: whether the applicant has laid out sufficient basis to warrant the disqualification of the firm from representing the respondent herein. Counsel submitted that the applicants entered into a sale agreement dated 10th April 2018 over the sale of the suit land. That the said agreement, which now forms the basis of this suit, was drafted by the firm. That there is a high likelihood that the firm will utilize the confidential information obtained from the applicants in prosecuting this suit in favour of the plaintiff/respondent. Counsel cited Rule 9 of the Advocates (Practice) Rules 1966 and relied on various authorities including the case of *Delphis Bank Ltd. v Channan Singh Chatthe and 6 others* (2005) eKLR, to fortify the submissions.
 7. The respondent's counsel filed submissions dated 28th July 2023 and identified twin issues for determination, to wit; whether there is evidence of conflict of interest to warrant disqualification of the plaintiff's advocate from the proceedings and who should pay the costs of this application?
 8. Learned counsel submitted that the existence and contents of the agreement are not in contention in this suit. That the applicants did not indicate in their statements of defence that they would be raising an objection on the issue of representation of the plaintiff by his advocates on record. That parties are bound by their pleadings. That further, neither counsel nor any of the advocates of the firm have been listed as witnesses in this suit. That the respondent stands to suffer prejudice if this application is



allowed as his suit risks being struck out yet he is not privy to the agreement. Thus, counsel urged the court to dismiss the instant application with costs.

9. I have carefully considered the application, the response thereto and the parties' respective submissions. Therefore, the following issues arise for determination:

- a. Whether the applicants are likely to suffer prejudice if the present application is not allowed.
- b. Who should bear the costs herein?

10. *Black's Law Dictionary* 10th Edition defines "conflict of interest" as:

- "1. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.
2. A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent..."

11. Rule 9 of the *Advocates (Practice Rules)* 1966 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 verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears".

12. In the case of *Delphis Bank Ltd. (supra)* the Court of Appeal held that a litigant's right to legal representation by an advocate of his choice is not absolute. The court stated as follows:

"...The right to a legal representative or advocate of his choice is a most valued constitutional right to a litigant. In some cases, however particularly civil cases, 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 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 the Court of Appeal is whether real mischief or real prejudice will in all human possibility result..." (Emphasis added)

13. In the English case of *Koch v Richards Butler* (2002) EWCA Civ 1280, the court laid down the principles to be followed when considering the issue of disqualification of counsel on the need to prevent the breach of the advocate-client privilege as follows:

- i. The court's jurisdiction to intervene is founded on the right of the former client to the protection of his confidential information.



- ii. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.
 - iii. The duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take reasonable steps to do so.
 - iv. The former client cannot be protected completely from accidental or inadvertent disclosure, but he is entitled to prevent his former solicitor from exposing him to any avoidable risk. This includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information may be relevant.
 - v. The former client must establish that the defendant solicitors possess confidential information which is or might be relevant to the matter and to the disclosure of which he has not consented.
 - vi. The burden then passes to the defendant solicitors to show that there is no risk of disclosure. The court should intervene unless it is satisfied that there is no risk of disclosure. The risk must be a real one, and not merely fanciful or theoretical, but it needs not be substantial.
 - vii. It is wrong in principle to conduct a balancing exercise, if the former client establishes the facts in (v) above, the former client is entitled to an injunction unless the defendant solicitors show that there is no risk of disclosure.
 - viii. In considering whether the solicitors have shown that there is no risk of disclosure, the starting point must be that, unless special measures are taken, information moves within a firm. However, that is only the starting point. The Prince Jefri case does not establish a rule of law that special measures have to be taken to prevent the information passing within a firm.... on the other hand, the courts should restrain the solicitors from acting unless satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure will occur. This is a heavy burden.
 - ix. Each case turns on its own facts
14. In the instant case, the respondent's counsel denied ever attending to or receiving instructions from the 1st or 7th defendant. He averred that he has never received any privileged information relating to the suit land or legal fees from them. That further, the sale agreement annexed to the instant application does not form part of the documents and sale agreements prepared by and/or witnessed by the firm. That he has not been listed as a witness in the defendants' list of witnesses. He also stated that the plaintiff/respondent is not privy to the subject agreement as he is not a party thereto.
 15. So, have the applicants demonstrated that they shall suffer prejudice if the respondent's counsel prosecutes the present suit on behalf of the plaintiff herein?
 16. In the Koch case (*supra*), the court stated that the former client must establish that the defendant solicitors possess confidential information which is or might be relevant to the matter and to the disclosure of which he has not consented.
 17. I note that in the present application, other than the agreement for sale dated 10th April 2018, the applicants have not produced any instruction note, fee note or any other documentation indicating the existence of their relationship with the respondent counsel's firm. The respondent's counsel stated that there have been incidences where his official stamp was used by unknown persons masquerading as advocates.



18. In view of the foregoing, it is my considered view that the applicants have failed to establish that the respondent's counsel possesses confidential information which might be relevant to this suit. The burden has not passed to the respondent's counsel to show that there is no risk of disclosure.
19. In *Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others* [2015] eKLR, the Court of Appeal reiterated that the burden is upon the party seeking to bar an advocate from acting in a matter to prove the existence of factors such as conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct giving rise to the anticipation of real mischief or real prejudice.
20. This court cannot therefore, intervene as it is not satisfied that there is a risk of disclosure in the circumstances. Indeed, the onus is upon the applicant to provide evidence of asserted conflict of interest and not merely cite apprehension of possible conflict or prejudice.
21. Indeed, the removal of an advocate from representing a client is a serious matter since litigants have a constitutional right to be represented by an advocate of their choice and to a fair hearing.
22. In *William Audi Odode & another v John Yier & another*, Court of Appeal Civil Application No. NAI 360 of 2004, O'Kubasu J. A. (as he then was) noted 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 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.”
23. In the foregone, I find the instant application originated by way of a Notice of Motion dated 25th April 2023 and filed herein on 5th May 2023 devoid of merit. The same is hereby dismissed, with costs in the cause.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 26TH DAY OF OCTOBER 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. T. Achillah, learned counsel for the plaintiff/respondent
2. Terrence Luanga- Court Assistant

