



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 541 OF 2003

IN THE MATTER OF THE ESTATE OF WAMATU WANGUKU

(DECEASED)

MARIA NJOKI WAMATU..... PETITIONER/APPLICANT

VERSUS

MWANGI WAMATU1ST PROTESTOR/RESPONDENT

ELIJAH KIMEMIA WAMATU2ND PROTESTOR/RESPONDENT

JOHN KAMAU MATU3RD PROTESTOR/RESPONDENT

MARY NJERI THIRIKWA.....4TH PROTESTOR/RESPONDENT

JANE WAMBUI KAMAU 5TH PROTESTOR/RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 16/5/2018 in which Maria Njoki Wamatu (hereinafter the applicant) seeks orders:
 - a. That Karanja Mbugua advocate by himself or through his law firm of Karanja Mbugua & Co. Advocates be disqualified from acting for the Protestors/Respondents in this matter.
 - b. That the cost of this application be provided for.
2. The application is based on the applicant's affidavit sworn on the 16/5/2018 and on grounds:
 1. We have been (sic) served with a notice of appointment of advocate by M/s Karanja Mbugua and Company Advocates that they have been appointed to act for Protestors/respondents herein.
 2. That the petitioner is objecting to Karanja Mbugua by himself or through his law firm of M/s Karanja Mbugua and Company Advocates representing or acting for the Protestors/Respondents in this matter.
3. It is the applicant's case that the firm of Karanja Mbugua & Co. Advocates in which Mr. Karanja Mbugua Advocate practices were her erstwhile Advocates in this matter. It is urged that Karanja Mbugua and the law firm are likely to use the information he has gathered in the course of representing the applicant to gain an unfair advantage against the applicant and hence prejudice the applicant's rights in this matter.
4. Further, the applicant contends that Karanja Mbugua's participation and involvement in this matter amounts to a conflict of interest and he should therefore be disqualified from any further participation. Evidence in support of the Advocate/Client relationship between the firm of Karanja Mbugua & Co. Advocates and the applicant is exhibited.

5. The application is opposed. Joseph Karanja Mbugua has averred in a replying affidavit that he is representing the protestors in this matter soon after an application for confirmation of grant was filed just as he can represent any creditor or caveator who were not parties at any earlier stage.

6. It is urged that the protestors were unknown and undisclosed individuals by the petitioner hence no confidential or otherwise information relating to the protestors was ever confided or disclosed by the petitioner.

7. It is the respondent's case that the protestors have a right to be represented by a lawyer of their choice. The protestors claim is totally different from the earlier objection proceedings. They claim beneficial interest in the estate of the deceased as his children under the Law of Succession Act. Counsel argues that he never represented them in this capacity previously nor did he represent the petitioner against them prior to the protest.

8. In a supplementary affidavit the petitioner states the Advocate on record for the protestors herein sought leave from the Court of Appeal in *Civil Appeal No. 289 of 2010, Jecinta Waithera and Mwangi Wamatu –Vs- Maria Njoki Wamatu* to cease acting due to conflict of interest.

9. That appeal arose from the ruling of the Hon. Justice Martha Koome J (as she then was) in *Nakuru High Court Succession Cause No. 541 of 2003, Maria Njoki Wamatu –Vs- Jecinta Waithera and Mwangi Wamatu* and had been lodged by the Advocate for the protestors herein on behalf of 1st protestor herein and his mother Jecinta Waithera the appellants therein.

10. It is urged that much as a party has a constitutional right to be represented by an advocate of choice, this right has to be balanced against the right of a party to confidentiality from his/her counsel.

11. The application was canvassed by way of written submissions.

12. I have had occasion to consider the application, the affidavits and grounds in support as well as the replying affidavit. I have had due regard to the submissions by counsel.

13. Of determination is whether a conflict of interest arises from representation of the protestors by M/s Karanja Mbugua & Co. Advocates and specifically Mr. Karanja Mbugua Advocate which prejudices the applicant herein.

14. What constitutes a conflict of interest? A. Ombwayo J in *Serve in Love Africa (Sila) Trust –Vs- David Kipsang Kipyego & 7 Others [2017]eKLR* described a conflict of interest as a conflict of duties or a conflict between interests or as a conflict between interest and duty. He goes on to state that to act when one had a conflict of interest involves breaching one's fiduciary duty to their client or former client. This he describes as the basis of the conflict of interest problem and goes on to set down the four elements of the fiduciary duty which are:

a. The duty of loyalty to the client.

b. The duty of confidentiality.

c. The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests.

d. The duty not to put your own or anyone's interest before those of the client.

15. As a clear guide to Advocates, the Law Society of Kenya Code of Ethics and Conduct for Advocates, 2015 under Rules 82-86 describes what a conflict of interest is. The rules provide;

82. Rule 6: The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to both clients and obtains their consent.

83. A conflicting interest is an interest which gives rise to substantial risk that the Advocate's representation of the client would be materially and adversely affected by the Advocate's own interests or by the Advocate's duties to another current, former client or a third person.

84. Rationale for the rule: The Advocate's ability to represent the client may be materially and adversely affected unless the Advocate's judgment and freedom of action are as free as possible from compromising influences and the relationship between the Advocate and the client is not materially impaired by the Advocate acting against the client in any other matter.

Maintaining loyalty to clients promotes trust and confidence in the Advocate. Therefore, as a general rule, an Advocate should not knowingly assume or remain a position in which a client's interests conflict with the interests of the Advocate, the firm's or another client. The Advocate should not represent a client if the representation involves a conflict of interest.

86. Situations in which a conflict of interest might arise include:

a. Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;

b. Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.

c. Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.

16. It is common ground that the firm was instructed (albeit at another stage of the proceedings) by the applicant to act for her in this matter. The said firm drafted pleadings that were presented before court after interviews with the applicant. The instructions at hand related to the estate of Wamatu Wanguku.

17. The said firm has taken instructions from the protestors who stake a claim as beneficiaries of the estate of Wamatu Wanguku. In the current position the firm will take on the applicant in the litigation doing pleadings for the protestors and including cross examination of the applicant. There is no gainsaying that the firm possesses information gathered in the course of representing the applicant and the use of such information shall be prejudicial to the applicant.

18. My considered view is that an Advocate who has acted for one party in a matter is not suitable to represent an opposite party in the same matter notwithstanding the stage at which the matter has reached. The danger of prejudice to the erstwhile client is real.

19. Indeed, the Law Society Code of Ethics and Conduct for Advocates, 2015 provides at rule 82 thus:

Rule 82: The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to both clients and obtains their consent.

20. The attempt by the respondent to wish away the existence of conflict of interest based on the stage the matter has reached must fail. The instructions received by the firm from the applicant were in respect of the same estate. The protestors are laying a claim in the same estate. The firm certainly is privy to information which is likely to be used against the applicant in the matter.

21. In the course of representing the protestors there is a risk of the firm using, wittingly or unwittingly information obtained by the firm from the applicant to the applicant's disadvantage.

22. It is also not lost on this court that the firm of Karanja Mbugua and Co. Advocates sought leave to cease acting in an appeal pitting the 1st protestor and one Jacinta Waithera (1st protestor's mother) against the applicant herein (Civil Appeal No. 289 of 2010). This further buttresses the unsuitability of the firm to represent the protestors.

23. Jacinta Waithera is the mother to the 1st protestor. The submissions by counsel for the respondent that the firm is not representing the objector (Jacinta) but the protestors who were not parties in the matter before court, is in my view not sustainable. I find it extremely difficult to draw a distinct clear line between the proceedings already taken in the matter and the current application for confirmation of grant. This is the same litigation continuing albeit at another phase.

24. In **Rukusen –Vs- Ellis, Munday & Clerke [1912] 1 Ch. 831 at page 835**. It was stated;

“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 general rule, the court will not interfere unless there be a case where mischief is rightly anticipated.”

25. In the circumstances of the instant case, and having due regard to, and considered all the facts herein, I am persuaded that real mischief and real prejudice will in all human probability result if Ms Karanja Mbugua and Company Advocates are allowed to continuing representing the protestors herein. I am of the view that this is one case where the right to be represented by counsel of choice should be interfered with.

26. As held in **Delphis Bank Ltd –vs- Chatt and 6 Others[2005] 1 KLR**, the right to be represented by counsel of choice is not absolute. It was held;

“1. 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.

2. 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.”

27. With the result that I find and hold that the Notice of Motion dated 16/5/2018 has merit, I allow the same and make the following orders;

1. That Karanja Mbugua Advocate by himself or through his Law firm of Karanja Mbugua and Co. Advocates be and are hereby

disqualified from acting for the protestors in this matter.

2. Each party to bear its own costs.

Dated and Signed at Kisii this 20th day of November 2019.

A.K NDUNG’U

JUDGE

Delivered this 27th day of November 2019.

R. NGETICH

JUDGE