



**Mutinda & another v Ndaou (Environment and Land Appeal E002 of 2025)
[2025] KEELC 3120 (KLR) (Environment and Land) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E002 OF 2025**

EK WABWOTO, J

APRIL 4, 2025

BETWEEN

BRENDA G. MWALI MUTINDA 1ST APPELLANT

TITUS MUKOMA MBATHA 2ND APPELLANT

AND

AMANDA NERRISSA NDAU RESPONDENT

JUDGMENT

1. This is an appeal against the Ruling of Hon. C. K. Kithinji delivered on the 21st January 2025 wherein the learned Magistrate upheld the Respondent's preliminary objection dated 24th October 2024 and barred the law firm of Mwinzi and Associates from representing the Appellants in the suit before the trial court.
2. The Appellant being aggrieved by the said decision lodged the instant appeal and also sought for a stay of the said proceedings pending the hearing and determination of this interlocutory appeal which request was granted by this court pursuant to its Ruling delivered on 26th February 2025.
3. The Memorandum of Appeal was premised on the following grounds:-
 - i. That the Honorable Magistrate erred in law and fact by finding and holding that the dispute before the court was over the sale of the 2 plots by the Respondent to the Appellants when to the contrary there was express admission of the sale of the 2 plots to the Appellants by the Respondent herein.
 - ii. That the trial Magistrate erred in law and fact by failing to find and hold that the issue or the dispute before the court was over the issuance of the title to the Appellants for the 2 plots by



the Land Registrar containing erroneous acreage or size as opposed to the known size/acreage sold and hence the dispute in court was not over the sale transaction.

- iii. That the trial Magistrate erred in law and fact by finding and holding that the firm of M/s Mwinzi & Associates Advocates had serious professional conflict in the matter and interests of justice would not be served if the said law firm is allowed to continue to represent the Appellants when to the contrary and reality there was nothing conflicting arising in the firms participation in the matter as alleged.
 - iv. That the Honorable trial Magistrate erred in law and fact and violated the most valued Constitutional Right to a litigant to a legal representation of an Advocate of his/her choice.
 - v. That the Honorable trial Magistrate erred in law and fact by failing to find and hold that other than drafting of the sale agreement and its execution thereof no further involvement by the firm during the adjudication process over the area long after the sale transaction and as such the trial Magistrate misdirected herself by holding there still existed serious conflict of interests which may endanger the hallowed principles of confidentiality in Advocate/Client fiduciary relationships contrary to the express pleadings by the Respondent not denying the sale transaction.
 - vi. That the trial Magistrate erred in law and applied wrong principles of the law in finding and arriving that the Respondents had laid down real mischief or real prejudice which will in all human probability result to the Respondents if the law firm continues to represent the Appellants in the matter when to the contrary nothing was shown and proved.
 - vii. That the trial Magistrate erred in law and apparently had a cursory look at pleadings and as such failed to find that the Appellants herein had close to 10 years since the purchase continued in developing their plots only without trespass into the Respondent's portion and always been ready and willing to have the matter resolved by engaging a land surveyor since the Appellants were innocent of the wrong acreage contained in title and as such it would have in the best interest that M/s Mwinzi & Associates be allowed to help the matter resolved amicably and without delay.
 - viii. That the Honorable trial Magistrate erred in law and fact and outrightly applied and misinterpreted the law especially Rule 8 of Advocates (Practice) Rules in arriving the impugned ruling herein.
4. The Appellant thus sought the following reliefs:-
- i. The ruling of the Principal Magistrate C. K. Kithinji be set aside and that the firm of M/S Mwinzi & Associates be allowed to continue to represent the Appellants in the Voi MCELC Case No. E023 of 2024
 - ii. The costs of this appeal be provided for.
 - iii. Such or further orders the Honorable Court may grant in the interest of justice.
5. The appeal was canvassed by way of written submissions pursuant to the directions issued by this court on 18th March 2025. The Appellants filed written submissions dated 7th March 2025 while the Respondent filed written submissions dated 15th March 2025.
6. The Appellants submitted that the trial Magistrate erred in law and fact by holding that the dispute before the court was over the sale agreements of 2 plots by the Respondent/Plaintiff when to the contrary the dispute before the court was only over the Land Registrar's action of issuing title deed to



- the Appellants with erroneous acreage and consequently, the firm of Mwinzi & Associates Advocates couldn't have any role or at all and infact they participated in the processing and issuance of the title deed in question more than 6 years after execution of the sale agreements as to warrant the firm being declared conflicted.
7. It was argued that there being no time Mwinzi & Associates participated anywhere during the processing of the titles issued, then the Respondent herein cannot allege that Mwinzi & Associates holds any information over what transpired during the processing of the title deeds.
 8. The Appellants contended that it was erroneous for the trial court to bar the firm of Mwinzi & Associates from representing the Defendant in the lower court since there really existed no fiduciary relationship between the Respondent and the firm.
 9. Counsel submitted that the trial court placed much emphasis in the sale agreements without looking at the actual dispute before the court and hence did not apply its legal mind on what constitutes Advocate/Client fiduciary relationship that could result to serious conflict of interest which may endanger the hallowed principles of confidentiality in Advocate/Client relationship.
 10. The Appellants faulted the trial magistrate for failing to be guided by the Constitution which protects and enshrines the most valued Constitutional Rights to a litigant to a legal representation of an Advocate of his/her choice.
 11. The Appellants reiterated that there is no serious conflict of interests which endangers the principles of confidentiality in Advocate/Client fiduciary relationship or at all. Further that, there is no real prejudice which will in all human probability result to the Respondent if the firm of Mwinzi & Associates continues to represent the Appellants herein. None has been shown and proved by the Respondent and clearly the objection remains a mere allegation which does not address real fundamental issues of law.
 12. The decisions of Murigi J. in the case of Janet Mwendu Kilonzo =Versus= Godfrey Kyalo Ndenge ELC No. 31 of 2019 Makeni and Gikonyo J. who were faced with a similar controversy as the one herein, in the case of Guardian Bank Limited =Versus= Sonal Holdings (K) Limited & 2 Others (2014) eKLR, were cited in support.
 13. It was also submitted that the right to legal representation is a fundamental principle of the constitution of Kenya 2010 and the case of William Audi Odode & Another =Versus= John Yier & Another, the Court of Appeal Application No. NAI 360 of 2004 was cited in support.
 14. The court was urged to allow the appeal.
 15. The Respondent on the other hand submitted that the Respondent had filed a suit before the trial court and the cause of action arose due to a transaction that happened between the Appellants and the Respondent. While the transaction was taking place both parties were represented or transaction was witnessed by the firm of Mwinzi & Associates Advocates.
 16. Since the said transaction that was carried out by the firm of Mwinzi & Associates therefore there is no way the said firm can represent one party against the other. The firm of Mwinzi and Associates Advocates acted for both parties in the transaction.
 17. Counsel submitted that there is clear conflict of interest that can be seen from the transaction if Mr. Mwinzi or his firm is allowed to represent the Appellants. It was argued that Mr. Mwinzi Advocate can be a potential witness to this case and he should be barred from representing either of the parties.



18. It was further argued that the rules of ethics demand so. An Advocate who has acted for both parties in a transaction cannot later represent one party against the other if the cause of action arises from a transaction where the advocate had represented both parties.
19. The firm of Mwinzi & Associates Advocates having procured and witnessed the sale agreement for land between the Appellants and the Respondent, it will be prejudicial to the Respondent's case as he has confidential information with regards to the transaction that he might use to the detriment of the Respondent's case.
20. According to the Respondent, the firm of Mwinzi & Associates Advocates does not deserve to appear in this matter. The court is a shrine of justice and parties are supposed to be in a level playing ground. In this case the appellants are in a higher level holding a sword ready to finish the Respondent. The person who is holding the sworn is Mwinzi & Associates Advocates who acted for both parties in transactions in dispute.
21. The Counsel for the Respondent concluded his submissions by urging the court to dismiss the appeal with costs.
22. The court has considered the Record of Appeal and the written submissions filed herein and is of the considered view that the singular issue for determination in this appeal is whether the law firm of Mwinzi and Associates should be disqualified from representing the Appellants as was held by the learned Magistrate in her ruling dated 21st January 2025.
23. The court has perused the plaint dated 13th June 2024 filed before the lower court and notes that the disputes the Plaintiff (now Respondent) and the Defendants (now Appellants) were parties to a sale agreement dated 13th September 2013 and 26th September 2013 which sale agreement were drafted by the firm of Mwinzi and Associates. It is also evident that pursuant to the sale agreement the Defendants proceeded to obtain the title for the whole land which was contrary to the terms of the said agreements. As such it is certainly expected that the trial court will have to consider and examine the terms of the sale agreement in determining the dispute.
24. While at this stage it is not clear if the Advocate who drew the sale agreement may be called as a witness, it is more than obvious that the said Advocate who is acting for the Appellants in the matter has confidential information which may be to the detriment of the Respondent.
25. The general principles guiding the disqualification of Advocates from appearing for a client in a matter are well established as follows: -
 - i. The basis upon which a court disqualifies an Advocate from acting arises from the need to protect the interests of administration of justice. Whereas it is understood that choice of Counsel is an entitlement of a party, such Counsel must always bear in mind that he/she becomes an officer of the court and as such owes an allegiance to a higher cause (justice and truth) than serving the interests of the client.
 - ii. Disqualification of an Advocate is only desirable in contentious matters and where there is or was an Advocate-Client relationship.
 - iii. It must be apparent that the Advocate sought to be disqualified will be required as a witness to give evidence in the matter.
 - iv. It is desirable that when the principle of confidentiality in an Advocate/Client fiduciary relationship will be prejudiced or where there is a possibility of real conflict of interest, then an Advocate sought to be disqualified ceases to appear in the matter.



- v. The fact that an Advocate acted for a litigant does not, per se, lead to a situation of conflict of interest.
 - vi. Conflict of interest is an issue of fact which must be proved by way of evidence.
 - vii. It is not a requirement that in a situation where a firm of Advocates acted for the opposite party all the Advocates in the firm be disqualified from the matter. In such an instance, only the Advocates who are in possession of confidential information relevant to the matters in issue before court or tribunal may be called upon to cease from appearing in the matter.
26. Further it is also worth noting that an advocate can be disqualified from representing a party in a case if a conflict of interest or a reasonable apprehension of bias arises, or if the advocate is required to give evidence in the matter, as outlined in the *Advocates Act*.
27. This court will now apply the above general principles to the case at hand. In the instant case it is not disputed that the firm of Mwinzi and Associates drafted the sale agreement dated 13th September 2013 and 26th September 2013 between the parties herein. Subsequent to the said agreement the Appellants proceeded to apply and obtain a title deed contrary to the terms of the said agreement an action which prompted the Respondent to institute a suit before the lower court.
28. Certainly, in considering the foregoing, there indeed existed an Advocate – Client relationship between Mwinzi and Associates and the parties herein and thus this being a contentious matter and specifically where the Respondent has pleaded fraud on the part of the Appellants it is not in the interest of justice and tenets of fair trial to allow the law firm of Mwinzi and Associates to continue representing the Appellants. Right to a fair hearing applies to both parties and any court or tribunal is obligated to ensure that the same is achieved. The Respondent have successfully demonstrated the prejudice that would be suffered should the law firm of Mwinzi and Associates be allowed to represent the Appellants and there is reasonable apprehension of bias if the said law firm of Mwinzi and Associates are allowed to continue representing the Appellants.
29. In the circumstances, it is the finding of this court that the Learned Magistrate did not err when she arrived at her decision and this court has no basis to interfere with the same.
30. In respect to costs of the appeal, it is worth noting that the suit before the trial court is pending for determination and further the Appellants are still expected to engage the services of another Advocate. Bearing this in mind, this court directs each party to bear own costs of the appeal.
31. In conclusion, it is the finding of this court that this appeal lacks merit and the same is dismissed with an order that each party bears own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 4TH DAY OF APRIL 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

N/A for the Appellants.

Mr. Mwazighe for the Respondent.

Court Assistant: Mary Ngoira.

