



Butt v Dawagi Investments Limited (Environment and Land Case E017 of 2022) [2025] KEELC 5466 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E017 OF 2022**

**EK MAKORI, J
JULY 10, 2025**

BETWEEN

HAMID BUTT AK BUTT PLAINTIFF

AND

DAWAGI INVESTMENTS LIMITED DEFENDANT

RULING

1. The Defendant filed an application dated May 13, 2025, seeking, among other reliefs, that the Director for the Defendant be allowed to produce specific exhibits marked for identification, listed as Nos. 3, 4, 5, 6, 7, 8, 9, 4,5,6,7,8,9,10, and 11, as marked in the Defendant's list of documents dated May 24, 2022—costs to be provided.
2. The application is supported by the affidavit of Anthony Safari Kitsao, a director of the Defendant, sworn on May 13, 2025.
3. The application was opposed, and Hamid Butt AK Butt filed a replying affidavit on May 30, 2025, contesting the application.
4. Counsels for the parties argued the application orally.
5. Based on the submissions and averments by the parties, I identify the central issue in this application as whether to permit the Defendants to present the listed documents as exhibits and who should bear the costs of the application.
6. Learned counsel for the Defendant, Mr. Shujaa, and as deposed by the Director of the Defendant, argues that the Defendant submitted its list of documents to this court on May 24, 2022, which includes 10 documents intended to be used as Defendant's exhibits in this case. However, during the hearing, the Plaintiff objected to the production of these documents because the Defendant was not the creator of the documents in question.



7. The documents listed as Nos. 3, 4, 5, 7, 8, 9, and 10 in the Defendants' list of documents were prepared by Mr. John Khaminwa in his capacity as the transaction advocate for both the Plaintiff and the Defendant, while document No. 6 was created by the Plaintiff and addressed to the said advocate concerning the transaction.
8. When the said advocate appeared in court to produce them, the Plaintiff objected on the ground that the advocate had not sought or obtained a waiver of client confidentiality or privilege from him.
9. Later, the Plaintiffs' advocate informed the defense that the Plaintiff would not grant the waiver under any circumstances, as per a copy of a letter marked Exhibit No.2
10. Therefore, because the client has not waived confidentiality and/or privilege, the advocate cannot produce the documents in this case.
11. It is submitted that the Defendant received the documents in question, which were prepared in the usual course of the advocate's business, and the others in the fulfillment of his professional duty as an advocate for both the Plaintiff and the Defendant in the transaction related to this lawsuit. Before the suit was filed, the advocate provided copies of each of these documents to the parties as a mutual advocate. They have remained in the Defendant's possession to date.
12. The defense contends that the contents of the said documents are relevant because they relate to the facts at issue in this case. It is in the interest of justice for the parties to be allowed to present all information pertinent to the court regarding the matters in question so that the court can make a ruling based on the merits of the case.
13. Learned counsel for the Plaintiff, Ms. Muthoni, argues, supported by the Plaintiff's statements, that while the firm of Khaminwa and Khaminwa Advocates was preparing the Agreement for Sale and/or related documents, and was representing both the Defendant and the Plaintiff, confidential information was disclosed to the lawyer. The release of such confidential information would be a serious violation of advocate-client confidentiality.
14. It is argued that advocate-client confidentiality is based on Section 134 of the *Evidence Act*, which protects communication between a client and an advocate. It is clear from Section 134 of the *Evidence Act* that privileged information—including any communication made to the advocate, the contents or condition of any document, or any advice given by an advocate to his client during the course and for such employment—is privileged and can only be disclosed with the client's explicit consent. Privileged information is information that is protected from disclosure in a legal proceeding, and its disclosure can only occur under specific conditions and with the client's consent.
15. That section 134 of the *Evidence Act* prevents an advocate from using privileged information obtained during employment with the parties to harm one party or benefit the other, to prevent any injustice to the other party.
16. It is argued that upon a close review of the documents that the Defendant now wishes to present before this court, it will be found that these documents are protected under the privilege outlined in Section 134 of the *Evidence Act*. This is particularly evident with Document Number 6, which was created by the Plaintiff and addressed to the said advocate.
17. Furthermore, the Plaintiff asserts that no one is required to disclose any confidential communication between him and his advocate as outlined in Section 137 of the *Evidence Act*. The information provided to the advocates by The Plaintiff was confidential. Therefore, the advocates had a duty not to disclose or reveal any confidential or secret information given to them in confidence to anyone else, including the Defendant, who was a client in the shared transaction, without permission. Disclosure of privileged



information can only occur with the consent of the concerned party. In such cases, the law allows the advocate to testify only on non-contentious matters arising from the agreement.

18. The Plaintiff states that he testified at the hearing that he never received some of the letters allegedly sent to him by Messrs. Khaminwa and Khaminwa Advocates. Furthermore, he emphasized that he had verbal discussions with the advocates about the transaction and that he only saw the letters after filing the claim. Since there is no record of these verbal conversations and the validity of the letters is in question, disclosing privileged information without his consent would significantly prejudice him.
19. He stated that if the Defendant is allowed to introduce the documents shared with him by their advocates, it would amount to a waiver of confidentiality on his part. A waiver of confidentiality is a voluntary and informed decision to disclose privileged information. However, this does not amount to a waiver of confidentiality on his part. If one party chooses to waive confidentiality, it does not mean the other party should suffer the consequences of that waiver. Confidentiality in legal representation is a duty owed to each client individually, and an advocate must balance the interests of both parties while upholding professional ethics. Additionally, A defendant cannot usurp or assume the role of the client and advocate afterward to present evidence related to issues in controversy.
20. From the above discussion, an advocate is explicitly barred from disclosing communications made by their client or revealing information about documents they come across during their work as the client's advocate. This prohibition is for the benefit of the client, not the advocate. All the advocate has is the privilege of non-disclosure. See *Tom Ojienda t/a Tom Ojienda and Associates Advocates v Ethics and Anti-Corruption Commission and 5 others* [2016] eKLR, where the court held:

“In that context, in the case of *Mohammed Salim Balala and Anor v Tor Allan Safaris Ltd* (2015) eKLR, the Court of Appeal held that advocate-client privilege can only be breached where the communication between an advocate and the client furthers an illegal purpose or where the advocate observes that the client used the privilege to commit a crime.

Further, the legal principle that advocate-client privilege can only be waived by a client was upheld in the case of *Conlons v Conlons* (1952) 2 ALL ER 462 in the following terms;

“What is the rule [as to privilege] and what is the meaning of the rule? ...The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication be so makes to his should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enable properly to conduct his litigation. That is the meaning of the rule.”



In the case of *King Woolen Mills Ltd & Another v Kaplan & Stratton Advocates (supra)*, it was held that;

“... the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client’s consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created.”

21. The principle derived from the above decisions and legal provisions is that communications between an advocate and a client are privileged because they are essential for obtaining legal advice. This privilege lasts throughout a specific transaction and even afterwards. However, the client’s protection is not absolute, as the proviso indicates that there are situations where the advocate may be compelled to disclose such communications or the contents of documents for compelling reasons. The privilege can be broken only in two cases: first, when the communication between the advocate and the client furthers an illegal purpose, and second, when the advocate observes that the client used the privilege to commit a crime.
22. The situation involves a land sale transaction where Dr. Khaminwa represented both the Plaintiff and the Defendants. The transaction went awry and is now the subject of this lawsuit. Dr. Khaminwa prepared the documents that the defense seeks to introduce during his dealings with both parties involved in the disputed sale agreement. The main issue is who completely breached the sale agreement. Dr. Khaminwa could not testify because the Plaintiff stated he would not waive the client-advocate privilege. Therefore, the current application argues that the documents, which were typically created or received by Dr. Khaminwa while representing both parties, are relevant to these proceedings. It is important to note that both parties were clients of Dr. Khaminwa. The documents mainly relate to the sale transaction and do not involve any third parties.
23. As already observed, even if an advocate is not bound to disclose information obtained in the course of the advocate–client relationship, pursuant to Article 24 of the *Constitution* and Sections 134 and 137 of the *Evidence Act*, as well as Rule 7, clause 123 of the *Law Society of Kenya Code of Conduct and Ethics*, 2016, the advocate-client privilege is not absolute and can be waived.
24. The communications, in my view, involved transactional documents concerning a sale of land between the parties, which Dr. Khaminwa facilitated as a mutual advocate. As I mentioned earlier, the sale was never finalized. The communication among the Plaintiff, the Defendant, and Dr. Khaminwa centered on the transaction – and no more. The sale agreement outlined the timelines for completing the transaction and the responsibilities of each party. These deadlines were not met, resulting in a breach, and the matter is now the subject of litigation before this court.
25. The documents currently held by the Defendant are also in the possession of the Plaintiff and cannot be considered confidential or privileged. They are central to this case, and their production will promote a just and equitable resolution of this matter between the parties. Neither side will gain an unfair advantage. To me, the confidentiality shield cannot be invoked here.
26. Consequently, the Defendant should be permitted to submit the exhibits as requested. Therefore, the motion application dated May 13, 2025, is granted with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 10TH DAY OF JULY 2025.

E. K. MAKORI



JUDGE

In the Presence of:-

Ms.Muthoni for the Plaintiff

Mr. Shujaa, for the Defendant

Happy: Court Assistant

