



**Ndiga v Said; Isbrecht (Interested Party) (Civil Case E009 of 2021)
[2025] KEHC 3255 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL CASE E009 OF 2021
DK KEMEL, J
FEBRUARY 14, 2025**

BETWEEN

CHARLES OCHIENG NDIGA PLAINTIFF

AND

NEREA MICHAEL SAID DEFENDANT

AND

HEINZ ISBRECHT INTERESTED PARTY

RULING

1. The Defendant/Applicant herein has filed a Notice of motion application dated 7th November 2024 seeking orders that this Honorable court be pleased to bar, prohibit and/or disqualify Mr. Wycliffe Ouma Okutta and Ouma Okutta & Company Advocates from acting for the Plaintiff in this matter. The instant application is brought under Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the *Civil Procedure Act*, Rule 95 of the Code of Standards of Professional Practice and Ethical Conduct of the Law Society of Kenya 2016. It is supported by an affidavit dated 7th November 2024 sworn by the Defendant/Applicant herein Nereah Michael Said who averred inter alia; that Wycliffe Okuta Advocate and his firm Ouma Okuta & Company Advocates were in contact with the Applicant when one Mathews Tonado engaged him to assist her and the Plaintiff sort out their issues including on property No. Uholo/Ugenya/1019 which was part of the suit; that the Applicant and the Plaintiff being former partners who have fought in this particular matter vigorously were relieved when the said Tonado volunteered in mediating their dispute and roped in Wycliffe Okuta and his law firm; that Mr Wycliffe and his law firm received confidential information from the Applicant relating to the history of their dispute including those touching on the suit properties herein; that Mr Wycliffe Okuta and his law firm in appearing for the Plaintiff will therefore expose the Applicant to extreme prejudice as the said advocate will use the said confidential information to defend the Plaintiff; that Mr. Wycliffe Okuta did confirm vide a suit in Ukwala Law courts (Msc. No. E017 of 2017) that he had been involved in



the mediation dispute between the Applicant and the Plaintiff herein and that he cannot now feign ignorance; that Rules 92 to 96 of the Code of Standards of Professional Practice and Ethical Conduct of the Law Society of Kenya require that Mr. Wycliffe Okuta be disqualified from acting in this matter; that it is just and fair that Mr. Okuta be disqualified from representing the Plaintiff in this matter; that no prejudice will be suffered by the Plaintiff who is at liberty to appoint another advocate to act on his behalf.

2. The application is opposed by the Plaintiff's advocate vide a replying affidavit dated 12th November 2024. In the said affidavit, Mr. Wycliffe Okuta averred inter alia; that he acts for the Plaintiff and not the Defendant herein; that the Plaintiff had been represented by the firm of Mungla & Co. Advocates and that the matter has since been concluded; that he has never met Nereah Michael Said in person, virtually or otherwise neither has he acted for her in any matter in this jurisdiction or elsewhere; that he has never been a mediator between Nereah Michael Said and Charles Ndiga as regards any controversy; that he only acted for one Mathew Tonado Okech who was an interested purchaser to a property held by the parties herein and in a case in Ukwala court but when the transaction failed his client advised him to pull out of the whole transaction; that at that particular level, each of the parties namely Nereah and Charles had their own advocates; that the allegations by the Applicant are unnecessary sideshows meant to deny him from a party engaging his services; that the Plaintiff stands to be prejudiced as his rights to have an advocate of his choice will be curtailed. He prayed that the application be dismissed with costs to him.
3. The interested party did not file a response to the application.
4. The application was canvassed by way of written submissions. Both the Plaintiff and the Defendant duly complied.
5. In her submissions, the Applicant pointed out that fact the Plaintiff and Defendant are former spouses having formally divorced in the year 2010. That in 2021 the Plaintiff filed the instant suit seeking for purported shares in properties acquired by the Defendant during the pendency of the marriage. The Applicant further submits that Mr. Wycliffe Okutta and his law firm were in contact with the Applicant and the Plaintiff on negotiations about property on land parcel No. Uholo/Ugunja/1019 which formed part of the suit properties herein and that the Defendant /Applicant is apprehensive that the advocate and his law firm received confidential information which is likely to prejudice her if the said advocate continues to act for the plaintiff in this matter.
6. The Applicant relied on the case of Charles Gitonga Kariuki vs. Akuisi Farmers Company limited (2007) eKLR where Kimaru J considered the circumstances where an advocate could be disqualified stated that:

“...an advocate would not be allowed to act for the client where he would consciously or unconsciously or even inadvertently use the confidential information acquired when he acted for such a client to his detriment. The court held that where it is established that such a client would suffer prejudice then the court would have no alternative but to order that such an advocate ceases to act for the opposing party.”
7. The Applicant likewise submitted that the cornerstone of any mediation is the duty of confidentiality to parties which is held even after the process whether successful or not. She placed reliance on the case of Kitili vs. Malusi & 2 others (Environment and Land Appeal No. 29 of 2021) [2023] KEELC156(KLR)



8. On the other hand, the Respondent submitted that the application whose participation of Mr Wycliffe Okutta is sought to be barred from participating in is by an interested party, one Heinz Isbrecht who is yet to be allowed to participate and whose interest is purely executionary in nature.
9. It was the Respondents submission that the Judgment sought by the interested party Heinz Isbrecht is from a separate and distinct suit number 370 of 1997 in Mombasa, concluded 25 years ago and is not wholly dependent on the issues in this suit already concluded.
10. That the Applicant Nereah Said has no known disclosed interest in the proceedings intended by the Interested Party seeking to be paid his costs in suit No. 370 of 1997 Mombasa, and hence no disclosed prejudice in participation of Ms Okutta advocate in such proceedings to defend him as this is a case of misfiling and or abuse of procedure.
11. That Nereah Michael Said has filed an appeal in the Court of Appeal Kisumu against the Judgment of this court and which the Court of Appeal proceedings has not challenged participation of Ms Okutta. (see application for stay pending appeal ordered to be filed).
12. I have considered the Defendants application, rival affidavit plus submissions. It is not in dispute that the firm of Paul Mungla had been acting for the Plaintiff in this suit up to the date of delivery of ruling by Ogembo J on 31/1/2024 and thereafter up to 13/6/2024 when the Plaintiff herein filed a notice dated 13/6/2024 to act in person. It is also not in dispute that the Plaintiff acted in person in an application dated 28/3/2024 filed by the Defendant herein. It is also not in dispute that Mr Wycliffe Okuta only came in and acted for the Plaintiff upon the filing of an application dated 8/8/2024 by an interested party which is still pending determination. It is also not in dispute that a party is entitled to legal representation of an advocate of his own choice. That being the position, the only issue for determination is whether the Defendant's application seeking for the disqualification of Mr Wycliffe Okuta from acting for the Plaintiff has merit.
13. It is clear that the participation of Mr. Wycliffe Okuta as counsel for the Plaintiff has caused some jitters on the Defendant on the ground that she had earlier on bumped into him when she and the Plaintiff who were the a couple and who had some tumultuous period in their marriage and that a mediator by the name Tonado Okech had brought him into the picture with a view to resolving their dispute. It transpired that the Defendant and the Plaintiff were involved in a certain case before Ukwala law courts being Misc E017 of 2022 and in which Mr Okuta confirmed having been roped in by Mr Tonado Okech to mediate on the dispute between the Plaintiff and Defendant so as to ensure that the said Tonado Okech manages to purchase the couple's land parcel number Uholo/Ugenya/1019. The Defendant/Applicant herein has brought out the affidavit of Mr Okuta sworn on 12/7/2022 wherein he averred thus-"It is true that there was an attempt to settle the issue between the parties and that is how I came in. The advocate from whom I took over was also involved. When the negotiations failed I was instructed by the plaintiff to pursue the matter.. That in the short period I transacted for Mathews Okech my client, he a potential purchaser of the suit property from both parties and it was only just and expedient I kept to know the position of the antagonistic parties as part of due diligence and to enable me advise my client appropriately, which transactions I did with their advocates."
14. From the above excerpt by Mr. Okuta in his affidavit aforesaid, that he actually went ahead and conducted due diligence by getting to know more about the Plaintiff and the Defendant. He therefore, received sufficient information which he passed to his client who was the prospective purchaser of the property in dispute between the couple namely LR No. Uholo/Ugenya/1019. It is also believed that he occupied the position of a mediator as he was to resolve the differences between the Plaintiff and the Defendant and as a result enable his client Mathew Tonado Okech to purchase the property. However, since the deal did not sail through, and so the purchaser went his way and left the couple to sort their



differences. It is instructive that while this was going on, the Plaintiff had to file this suit Siaya High Court Civil Case No. E009/2021 and in that case the Plaintiff was being represented by the firm of Paul Mungla & Co. Advocates. It is also instructive that the said suit was later concluded by Justice Ogembo wherein judgment was rendered in favour of the Plaintiff against the Defendant. It is also instructive that the Defendant, being aggrieved, moved to the Court of Appeal for redress. It is also instructive that Mr. Wycliffe Okuta came in the picture to represent the Plaintiff after Mr. Mungla left and this was after an application dated 8th August, 2024 was filed by an interested party seeking to join in the proceedings.

15. The Applicant in her affidavit has given a chronology of the instances when Mr. Okuta and her conversed and that out of those conversations, Mr. Okuta received a lot of information about the Defendant. It is therefore, obvious that the Defendant is now uncomfortable to learn that Mr. Okuta is now the Advocate of the Plaintiff who was once her husband and now her adversary.
16. Even though the Plaintiff is entitled to appoint an advocate of his choice as guaranteed under *the Constitution*, the fact that his advocate has plenty information from the Defendant, it is natural for the Defendant to feel uncomfortable about the fact that the person who has information about her is now assisting her adversary in this case. I am inclined to agree with the Defendant that Mr. Okuta is conflicted in this matter because he knows a lot about both parties. Hence the Defendant will be prejudiced in that certain adverse information which Mr. Okuta has might be used against her to the advantage of the Plaintiff and to her disadvantage. I find the Defendant's discomfiture to be legitimate and that her grievances appear legitimate.
17. It is true that all advocates practicing in the country are members of the Law Society of Kenya which is the body mandated to regulate the practice of law in the country by advocates. The said LSK has put in place a raft of rules and regulations to govern the conduct of advocates. One of these rules regulations is Rule 98 and 99 of the Advocates Code of Standards of the Professional Practice and Ethical Conduct which prohibits advocates from representing parties and yet they are aware that there is a conflict of interest. The same provides as follows:

“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.”

From the foregoing rules, it is clear that the Applicant apprehension is legitimate because the confidential information that she shared with Mr. Okuta and his law firm is likely to be used against her and that could prejudice her right to a fair hearing. Mr. Okuta, having known both the parties ought not to represent or act for any of them due to conflict of interest. Mr. Okuta has vehemently denied the accusations and maintains that the Applicant is working in cahoots with the interested party with a view to teaming up against the Plaintiff. I find that even if that was the position, Mr. Okuta is conflicted since he has a lot of confidential information on both parties as he had acted as a mediator between



them on behalf of a prospective purchaser of their property over which they had a dispute. Having played the role of a mediator in which confidential information was passed to him by the parties, the aforesaid rules bars him from representing any of the parties. Even though Mr. Okuta claims that his client is entitled to legal representation of his choice, the above rule does not allow him to represent the Plaintiff in this suit. The Plaintiff will not suffer any prejudice since he can secure another advocate or even act in person. In any event, the Plaintiff herein had filed a Notice to act in person after his former advocate Paul Mungla ceased acting for him. In fact, the Plaintiff had been acting in person until recently when the interested party filed the application dated 8th August 2024 which is pending determination.

18. The issue of conflict of interest by advocates was discussed by Kimaru, J(as he then was) in the case of Charles Gitonga Kariuki vs. Akuisi Farmers Co. Limited [2007] eKLR where the learned judge considered the circumstances where an advocate could be disqualified from acting for a client or acting for a client to the prejudice of the opposite party. He observed as follows: -

“..an advocate would not be allowed to act against the client where he could consciously or unconsciously or even inadvertently use the confidential information acquired when he acted for such a client to his detriment. The court held, that where it was established that such a client would suffer prejudice then the court would have no alternative but to order that such an advocate cease to act for the opposing party.

19. Looking at the circumstances of this case between the Plaintiff and the Defendant as far as Mr. Okuta is concerned, it is clear that Mr. Okuta was a central cog in the matrix involving the Plaintiff and the Defendant. This can be seen in the mediation that he carried out between them. It is believed that during the mediation, he came across confidential information regarding the feuding couple and therefore under the guidelines regarding mediation, he is obliged not to disclose any confidential information which he came across. I find Mr. Okuta and his law firm not qualified to represent the Plaintiff who is an adverse party to the Defendant. Further, the parties herein who were once married and have since parted ways are likely to use any arsenal in their position against each other. That is the danger that the Defendant herein is trying to avoid by seeking that Mr. Okuta and his law firm should stay away from representing the Plaintiff herein.
20. In view of the foregoing observations, I find merit in the Defendant’s application dated 7th November, 2024. The same is allowed in terms of prayer No. 1 thereof. Each party to bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF FEBRUARY, 2025

D. KEMEI

JUDGE

In the presence of:

Aburili for Okanda.....for Plaintiff

Miss Mutua for Abidha.....for Defendant

Tindika.....for Interested Party

Ogendo.....Court Assistant.

