In re Estate of Chemwok Chemitei (Deceased) (Succession Cause 176 of 1996) [2025] KEHC 7344 (KLR) (26 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7344 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 176 OF 1996

RN NYAKUNDI, J

MAY 26, 2025

IN THE MATTER OF THE ESTATE OF CHEMWOK CHEMITEI (DECEASED)

BETWEEN

JULIANA CHEMWOK & 3 OTHERS & 3 OTHERS ..... PETITIONER

AND

MARY CHERUTO CHEMWOK ..... OBJECTOR

RULING

1. This ruling determines an oral application made by the objectors on whether Mr. Chemwok, Advocate for the Petitioners ought not to be on record for the petitioners due to the fact that there is a conflict of interest. The petitioner filed submissions 28th April, 2025 whereas the objectors filed none.

2. Learned Mr. Chemwok, Advocate for the petitioners submitted that he is not representing clients with adverse interest hence there is no conflict of interest. He cited the definition of what constitutes a conflict of interest as captured in The *Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016* which defines a conflict of interest in Rule 6 Paragraph 96 as follows:

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

Rule 6 paragraph 95 of the Code provides that:

> "an advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a manner when there is a conflicting interest, unless he/she makes adequate disclosure to both clients and obtain their consent"

3. Owing to the said provisions, learned counsel Mr. Chemwok submitted that he is not representing clients with adverse interest hence there is no conflict of interest on this ground.

4. Counsel further cited the provisions of Rule 6 paragraph 99 of the 2016 Code which enumerates instances in which a conflict of interest might arise. They 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."

5. Counsel submitted that the objectors are merely apprehensive and suspicious, and these grounds cannot be basis of having the petitioners' advocate off the case. That the petitioners in exercising their right to legal representation chose the said advocate as their legal counsel. That the objectors have not demonstrated any exceptional circumstance that mandates the court to take away this right.

6. It is submitted that merely being related to a party in the matter does not automatically amount to conflict. That Mr. Chemwok does not have a compelling claim nor does his professional role is used to gain undue personal interest.

7. While citing various authorities, learned counsel submitted that the objectors have not proven that there is a serious conflict of interest as they claim. They appear to pursue this assertion as an afterthought as a way to frustrate the petitioners and as such, the issue should be dismissed.

Decision

8. I have considered the oral application by the objectors seeking disqualification of Mr. Chemwok as counsel for the petitioners on the basis of an alleged conflict of interest. I have also considered the written submissions filed by learned counsel Mr. Chemwok dated 28th April, 2025 in response to the application.

9. The law on disqualification of advocates on grounds of conflict of interest is well settled. The Court of Appeal in *Delphis Bank Limited v Channan Singh Chatthe & 6 others* [2005] eKLR observed as follows:

> "…. 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 probability result…."

10. The burden is upon the objectors to establish the factual basis for their claim of conflict of interest. As stated in *Albert Chaurembo Mumba & 7 others v Maurice M. Munyao & 148 others* [2015] eKLR, the burden is upon the party seeking to bar an advocate to prove the existence of factors such as conflict

of interest, actual or potential breach of confidentiality, or misconduct giving rise to real mischief or real prejudice.

11. In the present case, the objectors have failed to discharge this burden. Their application appears to be based on mere suspicion and apprehension arising from Mr. Chemwok's familial relationship to the deceased. However, as correctly submitted by learned counsel, mere relationship to a party does not automatically constitute conflict of interest.

12. The objectors have not demonstrated: That Mr. Chemwok is representing clients with directly adverse interests; That his representation of the petitioners will be materially limited by duties to another client or his personal interests; That there is risk of him using confidential information to the disadvantage of any former client; That he is likely to be called as a witness in the proceedings; or That any real mischief or prejudice will result from his continued representation.

13. In the circumstances, I find that insufficient material has been placed before this court to establish any conflict of interest that would warrant the removal of Mr. Chemwok as counsel for the petitioners. The objectors have failed to meet the threshold established in the authorities for such an extraordinary remedy.

14. This branch of law was explicitly stated in the following extract by the Court of Appeal "The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, 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 otherwise 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 this Court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are *King Woolen Mills Ltd & another v M/S Kaplan & Stratton* [1993] LLR 2170 (CAK), (C.A 55/93) and *Uhuru Highway Development Ltd & others v Central Bank of Kenya Ltd & others* (2), [2002] 2 EA 654.

> In the first authority, a partner in the Firm of Kaplan & Stratton, Mr. Keith, participated in negotiations for offshore loan facilities between a Bank and the borrowers and he also went ahead and drew up the loan agreement, the guarantee, the debenture and the legal charge on behalf of the Bank and the borrowers, as their common advocate.
>
> When disagreements subsequently arose and litigation commenced in respect of those transactions, the firm of Advocates chose to act for the Bank but the borrowers objected and sued the firm seeking an injunction to stop it from breaching client/advocate confidentiality. It was contended, and the court found, that the borrowers had imparted to Mr. Keith and the bank, confidential information and their secrets in confidence under the retainer to enable Mr. Keith to successfully conclude the loan transaction. The court concluded, per Muli J.A with whom the other members of the court agreed: -
>
> > I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit.
> >
> > The result will be that the appellants will not only be confronted with their own confidential information but will suffer great injustice and prejudice during

the trial of the main suit". Mr. Keith and any partner in the firm of Kaplan & Stratton were restrained from continuing to act for the Bank in the main suit or in any litigation or proceedings arising from the loan transactions. In so deciding the court cited with approval English decisions in *Rakusen v Ellis Munday and Clerke* [1912] 1 Ch. 831, Re – A Firm of Solicitors [1992] 1 A 11 E.R 353, and *Supasave Retail Ltd v Coward Chance and others* [1991] 1 All ER 668. The former two cases were applied in the latter, where Sir Nicolas Browne – Wilkinson V-C summed up the general rule as follows: -

> The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in *Rukusen v Ellis, Munday & Clerke* (1912) 1 Ch. 831 ...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 a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated".
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> The *King Woolen Mills case* (*supra*) was applied in the *Uhuru Highway Development Ltd case* (*supra*) where it was contended in affidavit evidence, and the court found, that the Advocate, Mr. George Oraro, had acted for both the bank and the borrowers and had drawn up the Charge which had become contentious in subsequent litigation.

As is clear from those authorities, each case must turn on its own facts to establish whether real mischief and real prejudice will result. In this case, we hardly have any facts to consider in arriving at such conclusion."

15. Accordingly, the oral application by the objectors seeking to have Mr. Chemwok removed as counsel for the petitioners on grounds of conflict of interest, bias or prejudice is hereby dismissed. The matter shall proceed for hearing on 28th May, 2025.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 26TH DAY OF MAY 2025

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R. NYAKUNDI

JUDGE