



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L C PETITION NO. 17 OF 2016**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**ARTICLES 19, 22, 23, 40, 47, 50 AND 64**

**AND**

**IN THE MATTER OF THE DEPRIVATION OF PROPERTY CONTRARY TO ARTICLE 75 OF  
THE OLD CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS CONTRARY TO  
ARTICLE 40 OF THE NEW CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF RIGHT TO OWN PROPERTY CONTRARY TO  
ARTICLE 40 OF THE NEW CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE KAMKUNJI LAND BUYING COMPANY**

**AND**

**IN THE MATTER OF REGISTRATION OF TITLES ACT CHAPTER 28 LAWS OF KENYA  
AND**

**IN THE MATTER OF REGISTERED LANDS ACT CHAPTER 300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF FRAUDULENT ACTS**

**BETWEEN**

**LEONARD GICHORA KIIU [Suing on behalf of the Estate of**

**KIIRU CHOMBA (DECEASED).....1<sup>ST</sup> PETITIONER**

**REBECCA MUREITHI WASHUKA**

**[Suing on behalf of the Estate of**

**HANNAH WAMBUI MUREITHI (DECEASED).....2<sup>ND</sup> PETITIONER**

**VERONICAH NJERI MWAURA**

[Suing on behalf of the Estate of

CHRISTINE WAMBU1 MWAURA (DECEASED)].....3<sup>RD</sup> PETITIONER

ESTHER NG'ENDO.....4<sup>TH</sup> PETITIONER

=VERSUS=

PETER GICHARU NGIGE.....1<sup>ST</sup> RESPONDENT

SIMON KIRENGO.....2<sup>ND</sup> RESPONDENT

KIIRU NGUGI.....3<sup>RD</sup> RESPONDENT

NJUGUNA NJEHIA .....4<sup>TH</sup> RESPONDENT

ESTHER NJENGA.....5<sup>TH</sup> RESPONDENT

GLADYS NJOROGE.....6<sup>TH</sup> RESPONDENT

EUNICE MBUGWA.....7<sup>TH</sup> RESPONDENT

NGUGI KITONGA.....8<sup>TH</sup> RESPONDENT

THE LANDS REGISTRAR, UASIN GISHU.....9<sup>TH</sup> RESPONDENT

MINISTRY OF LANDS HOUSING &

URBAN DEVELOPMENTS.....10<sup>TH</sup> RESPONDENT

NATIONAL LANDS COMMISSION.....11<sup>TH</sup> RESPONDENT

THE ATTORNEY GENERAL.....12<sup>TH</sup> RESPONDENT

UASIN GISHU FARMERS COMPANY LIMITED.....13<sup>TH</sup> RESPONDENT

#### RULING

#### [NOTICE OF MOTION DATED 24<sup>TH</sup> MARCH, 2020]

1. Vide an application through the notice of motion dated the 24<sup>th</sup> March, 2020, the petitioners/applicants seek for the following orders;

(a) *Spent.*

(b) *That the M/s Ngigi Mbugua & Company Advocates be recused from participating in the proceedings.*

(c) *That M/s Ngigi Mbugua & Company Advocates be removed from representing the 13<sup>th</sup> Respondent, having previously resented the Petitioners herein.*

(d) *Costs of the application be provided for.*

· The application is based on the five (5) grounds on its face, and supported by the affidavits sworn by **Leonard Gichora Kiiru**, the 1<sup>st</sup> applicant, on the 24<sup>th</sup> March, 2020 and 9<sup>th</sup> July, 2020. The applicants' case is that the firm of M/s Ngigi Mbugua & Company Advocates, respondent, has been in conduct of the briefs on behalf of the Petitioners in the following matters;

(i) *Eldoret Chief Magistrate's Court Award No. 47 of 2001; Kiiru Chomba & 2 Others =Vs= Peter Gichru Ngige.*

(ii) *Eldoret High Court Civil Suit No. 41 of 2004; peter Gicharu Ngige = Vs= Kiiru Chomba & 3 Others* and

(iii) *Eldoret Environment & Land Case No. 192 of 2012 Peter Gicharu Ngige = Vs = Kiiru Chomba & 3 Others.*

· That it is applicants' case that in view of the earlier representation by the firm of M/s Ngigi Mbugua and Company Advocates, the said law firm is conflicted and will be unable to continue representing the 13<sup>th</sup> Respondent. That the advocate has been representing

the applicants for over 15 years, and that it is necessary that the said firm be removed from acting for the 13<sup>th</sup> Respondent due to the likely conflict of interest. That the continued representation of the 13<sup>th</sup> Respondent by the said firm amounts to conflict of interest and the applicants prayed that the application be granted.

2. That the application is opposed by the 13<sup>th</sup> respondent's Advocate, through the replying affidavit sworn by **Allan Rimui Mbugua Ngigi**, practicing as Ngigi Mbugua & Co. Advocates, on the 10<sup>th</sup> June, 2020. It is his case that his firm entered appearance for the 13<sup>th</sup> Respondent, Uasin Gishu Farmers Company Limited, after it was enjoined through the court order on the 4<sup>th</sup> March, 2019. He deponed that as per paragraph 1 of the Amended Petition, this proceeding was brought by the petitioners as members of Kamukunji Land Buying Company Ltd, which is not a party to these proceedings. That the matters his firm represented the applicants in had parties and issues different from those under consideration in this matter. The counsel detailed the previous matters, issues and status therein as follows;

(a) In **CMCC No. 47 of 2001 between Kiiru Chomba —vs- Peter Gicharu Ngige**, the issue before the court was adoption of an award from the Land Disputes Tribunal by the Magistrate's court.

(b) Arising from the above, the aggrieved party moved to the **High Court vide Eldoret ELC No. 192 of 2012 between Peter Gicharu Ngige —vs- Kiiru Chomba & 2 Others**. Again, no substantive proceedings were taken. The case was dismissed for want of prosecution *suo moto*.

(c) In **Eldoret Judicial Review No. 17 of 2002 between Republic —vs- Kiiru Chomba & 3 others ex parte Peter Gicharu Ngige** was an attempt by the 1<sup>st</sup> Respondent to impugn the decision of the Land Disputes Tribunal which had been delivered by the Magistrates Court.

The advocate deponed that the issue in controversy in the earlier disputes was over the two survey exercises that had been done on the common farm, Kamukunji in 1973, and a subsequent one allegedly done by the 1<sup>st</sup> Respondent. He further deponed that though the previous cases appear as three, they all had their genesis in the Lands Disputes Tribunal award, wherein he represented the Petitioners' parents, and not the Petitioners *per se*. That the petitioners, 1<sup>st</sup> respondent and the other parties, were not involved in the previous cases. That this petition seeks for declaration of rights and enforcement of the earlier decrees, awards/judgments, and that none of those awards/judgements was passed against the 13<sup>th</sup> Respondent. That the application to have his firm recused is made out of fear, and is devoid of any merit as there is no conflict of interest shown. That the applicants in their affidavits have demonstrated that the 1<sup>st</sup> - 8<sup>th</sup> Respondents were members of the 13<sup>th</sup> Respondent, and that the 13<sup>th</sup> Respondent was the vehicle they used to acquire land in Kamukunji and elsewhere. Further, they had demonstrated that the group farm at Kamukunji, Eldoret, was subdivided to its members first in 1973. That the subsequent subdivision by the 1<sup>st</sup> Respondent's father in the 1980's resulted in titles which were collected by the owners. He deponed that the 1<sup>st</sup> to 8<sup>th</sup> Respondents have issues of boundaries and acreages due to each of them, and since the combatants are members of the 13<sup>th</sup> Respondent, it is important that the 13<sup>th</sup> Respondent appears with its records to assist the court resolve the dispute. That the 13<sup>th</sup> Respondent like the other parties, has a right to counsel as enshrined by **Article 25(c) of the Constitution**, and has not complained over his being their counsel. That recusal of counsel is a very serious issue which cannot be treated casually the way the Applicants have done by bringing the application 4 years after the event, without availing any evidence of conflict.

3. The applicants filed a supplementary affidavit sworn by Leonard Gichora Kiiri wherein he deponed that the firm of Ngigi Mbugua & Co. Advocates, represented the applicants in the listed cases, which form part of the genesis of the present petition. That the said advocate has been their family lawyer, who has kept and authored several of their documents regarding the suit herein among others. The said documents and/or information is likely to conflict with the advocates' capacity to act for the 13<sup>th</sup> respondent in this matter, since he is likely to be a competent witness. That the mere fact that the advocate had previously acted for the petitioners in matters that are related to the petition herein, does not sit well in the court of equity, fairness and reasonableness. That the applicants feel shortchanged as a result as their concerns of achieving fair trial when their previous advocate represents their adversely. That it is a basic and critical principle of law that justice must not only be done, but must be seen to be done.

4. The learned counsel for the applicants filed their submissions dated the 3<sup>rd</sup> November 2020. That it is their submissions that the applicants would suffer untold prejudice should M/s Ngigi Mbugua Advocate not be recused from the proceedings on behalf of the 13<sup>th</sup> Respondent. They cited **Rule 9 of the Advocates (Practice Rules) which prevents** an advocate appearing as advocate in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court.

· The counsel cited The Black's Law Dictionary for the definition of conflict of interest, where it is stated to refer to "**a situation that can undermine a person due to self-interest and public interest**". That conflict of interest arises only where there was advocate-client relationship with the Advocate representing an opposing party, and the said Advocate is in personal knowledge of information which can be used to the detriment of that person.

· The counsel relied on the decision by *Ombwayo J*, in the case of **Serve in Love Africa (Silo) Trust —Vs- David Kipsang Murey & 7 Others [2017]eKLR**, where conflict of interest was described as a conflict of duties or a conflict between interests or as a conflict between interest and duty. The Court went ahead to hold that to act when one had a conflict of interest involves breaching one's fiduciary duty to their client or former client. The Court 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.

· The learned counsel also cited the Law Society of Kenya Code of Ethics and Conduct for Advocates, 2015 Rules 82-86 which provides that;

**“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 party.**

**84. Rationale for the rule: The Advocate's ability to represent the client may be materially and adversely affected unless the Advocate's judgement 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 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.”**

· The applicants' counsel submitted that it was unfair for Mr. Ngigi Mbugua to represent the 13<sup>th</sup> respondent, which is the company against whom the applicants are seeking redress, on being dropped from being the applicants' family lawyer. They submitted that the said advocate's role in the previous matters was not peripheral, but central to the pleadings/suits. The counsel cited the case of **Stanley Ngugi Kinuthia VS Eliud Matu Wamae & 3 Others [2018]eKLR**, where *Okwany, J.* noted that the information obtained from a retainer is confidential. She held that;

**“The advocate/client privilege is one of the incidents of the retainer between the advocate and client that binds the advocate not to disclose information reposed in him or her during the period of the retainer. This nature of this privilege is set out in section 134(1) of the Evidence Act (Chapter SD of the Laws of Kenya) which provides as follows:**

**“No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment...”**

· That it is well settled in the case of **MacDonald -vs-Martins [1990] 3 S.C.R. 1235** that in establishing the existence of a confidential relationship the following 2 questions should be answered:

**1. Did the lawyer obtain confidential information; and**

**2. Is there a risk that it may be used against the client?**

· That counsel submitted that in their view, the advocate had obtained confidential information when representing the applicants in the previous matters, which counsel may use in the current case to their detriment. That no matter how slight the interest may be, even the slightest information may warrant the removal of an advocate. That the general rule is that an advocate may not act against a former client without his consent, no matter how slight the information may be. The case of **Analytica vs. NPD Research Inc 708 F. 2d 1263(7<sup>th</sup> cir 1983)** was cited wherein it was held that where there is clear relationship given during the retainer and the current case, then there is an irrebuttable presumption that the information will be used against the client, and the court will presume that the client will be prejudiced by such information.

5. I have considered the grounds on the application, affidavit evidence, submissions, superior courts decisions cited and come to the following determinations;

(a) That the issue for determination is, whether the firm of M/s Ngigi Mbugua & Co. Advocates should continue representing the 13<sup>th</sup> Respondent, or be recused for having previously acted for the petitioners/applicants as their family lawyer for about 15 years in the three previous matters. That it is apparent that the applicants have reasons to believe that by virtue of the advocate-client

relationship between the said law firm and themselves, it is not possible for the advocate to be objective as there is a real risk of conflict of interest, if he continues to act for the 13<sup>th</sup> respondent. That whereas the applicants insist that the prior representation by the said law firm involved issues touching on the current suit, the Advocate insists that the issues in the matters in which he acted for the applicants are completely different from those in the current case. He stated that he is entitled to earn a living and clients are entitled to legal representation of their choice. He further insisted that no conflict of interest had been demonstrated by the applicants to warrant grant of the orders sought in the present application.

(b) That it is not in dispute that the applicants and or their deceased's relatives, whose estates they represents, were once represented by **M/s Ngigi Mbugua & Co. Advocates**. That on whether the said representation qualifies to place the said advocate in a conflicted situation for purposes of the current suit, the applicants have re-iterated that the issues in the former matters are related to the current one, while the advocate has insisted that they are not, and that there is no conflict of interest demonstrated. That while the advocate admitted that the Petition herein seeks enforcement of rights arising from the earlier decisions, wherein he acted for the applicants in the Lands Disputes Tribunal Award, he reiterated that he had represented the petitioners' parents, and not the petitioners/applicants *per se*; and other than the petitioners and the respondent herein, the other parties were not parties in the other cases.

(c) That **Rule 9 of the Advocates (Practice) Rules, 1966** provides that:

***“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.”***

That **Section 134(1) of the Evidence Act, Cap 80** stipulates:

***“No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.”***

That the import of these two provisions is that an advocate who acts for two parties in a matter, say in conveyance, will be barred from representing one party in a case against the other, in respect of a dispute that arises from the conveyance, unless the client against whom he acted gives an express consent. That the applicants herein have not given M/s Ngigi Mbugua & Co. Advocates such a consent, to act for the 13<sup>th</sup> respondent, their adversely in this petition.

(d) That the conflict of Interest is defined in the case of **R. v. Neil (2002) 3 S.C.R. 631** as follows;

***“A conflict is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyers' duties to another current client, a former client, or a third person.”***

Conflict of interest in an advocate-client relationship arises if the advocate's representation of the client may be adversely affected by: the advocate's own interest; the advocate's duty to a current client; the advocate's duty to former client or the advocate's duty to a third person. If a conflict arises after representation has been undertaken, the advocate ordinarily must withdraw from the representation, unless the advocate has obtained the informed consent of the client. That in the case of **H. F. Fire Africa Ltd vs AMR Gharieb {2005}eKLR, Emukule J**, held that:

***“There is a general principle, applicable not to solicitors only but to confidential agents of all kinds, that confidential information shall not be used against the principal from whom or for whom and in whose employment, it has been obtained.”***

The existence of conflict does not necessarily preclude representation unless it is an instance expressly prohibited by law, for example, an advocate cannot represent clients with adverse interests in related litigation.

(e) That in the case of **Uhuru Highway Development Ltd v Central Bank Ltd [2002] 2 EA 654**, the Court of Appeal enjoined a firm of advocates from representing the respondents on the ground that they had prepared security documentation that was a subject of the suit. It was held that:

***“We are satisfied that the real mischief or real prejudice was not rightly anticipated. ...we have no doubt whatsoever in our minds that in the particular circumstances of this case mainly due to the role played by counsel in bringing about the first and second plaintiffs to agree to sign the charge, he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will no doubt be prejudice.”***

That in the case of **King Woolen Mills Ltd v Kaplan and Stratton, Civil Appeal No. 55 of 1993**, the Court of Appeal relied on **Section 134(1) of the Evidence Act** and cited, with approval, **Supasave Retail Ltd vs. Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER**, where it was held that:

***“The Law is laid down that each case must be considered as a matter of substance on the facts of each case...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... Cozens-Hardy MR 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 is a case where mischief is rightly anticipated.”*

(f) That it has been upheld by various superior courts, as evidenced by the above decisions, that a court would always be reluctant to dictate which advocate may or may not represent a client in a matter, unless where there is a ‘*real likelihood that prejudice would arise.*’ In the case of Delphis Bank Limited vs. Channan Singh Chatther and 6 Others; Nairobi CA. Nai 136 of 2205 (76/05 UR, it was also held that:

*“The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters... The right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.”*

And Article 50(2) (g) of the Constitution of Kenya provides;

*“Every accused person has the right to a fair trial, which includes the right to...choose, and be represented by, an advocate, and to be informed of this right promptly.”*

That the above right was stressed in the case of William Audi Odode & Another v John Yier & Another; (Court of Appeal Civil Application No. Nai 360 of 2004 (KSM33/04), where it was stated:

*“I must state from the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate was allowed to act in a matter, the parties must be allowed to choose their own counsel.”*

That the above decisions serve one purpose; to demonstrate that there is no hard and fast rule as to when there will be a conflict of interest between an advocate and client. This can only be determined objectively on a case by case basis. The test that determines whether an advocate should be barred from representing a client due to conflict of interest was set out in the case of Rakusen v Ellis Munday and Clarke [1912] 1 Ch 831, where *Hardy MR* stated:

*“The court must be satisfied that real mischief and real prejudice will, in human probability, result if a solicitor is allowed to act... The general rule the court will not interfere unless where the mischief is rightly anticipated.”*

(g) That I do note that the petitioners were members of the 13<sup>th</sup> Respondent, which they used to acquire properties in Kamukunji and elsewhere. In view of this, it is apparent that there existed some form of association between the applicants, the 13<sup>th</sup> Respondent and M/s Ngigi Mbugua & Co. Advocates, wherein he acted for the applicants in the matters that led to the current suit. That, having made the above observations, it is my considered view that the Applicant has convinced this Court that the firm of M/s Ngigi Mbugua & Co. Advocates should be barred from further representing the 13<sup>th</sup> Respondent in this petition due to the apparent conflict of interest. This is apparent from the fact that the advocate having acted for the petitioners in the earlier related matters, there is a real and present danger that his continued representation of the 13<sup>th</sup> Respondent will prejudice the applicants as the counsel is in possession of confidential information that may be used against them in the present petition. That in view of the parties’ previous relationship and history, I find this to be an appropriate case where each party to the application should bear their own costs, the provision of section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya notwithstanding.

6. That the upshot of the foregoing is that the petitioners’/applicants’ Notice of Motion dated the 24<sup>th</sup> March, 2020 has merit and is hereby allowed with and order that each party bears their own costs in the application.

**DATED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF JUNE, 2021.**

**S. M. KIBUNJA**

**ENVIRONMENT AND LAND COURT JUDGE**

**IN THE PRESENCE OF;**

**PETITIONERS/APPLICANTS: ABSENT**

**RESPONDENTS: ABSENT**

**M/S NGIGI MBUGUA & CO. ADVOCATES:**

**MR. NGIGI ADVOCATE PRESENT**

**COUNSEL: MR. KANDIE FOR ANGU FOR THE PETITIONERS**

**MR. NJUGUNA FOR 2<sup>ND</sup> TO 8<sup>TH</sup> RESPONDENTS**

**MR. KURIA FOR 9<sup>TH</sup>, 10<sup>TH</sup> AND 12<sup>TH</sup> RESPONDENTS AND MR. NGIGI FOR THE 13<sup>TH</sup> RESPONDENT.**

**COURT ASSISTANT : CHRISTINE**