



REPUBLIC OF KENYA



**In re Estate of Kamil Sladek (Deceased) (Succession Cause 3589 of 2004)
[2023] KEHC 3294 (KLR) (Family) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 3294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 3589 OF 2004
EKO OGOLA, J
FEBRUARY 13, 2023
IN THE MATTER OF THE ESTATE OF KAMIL SLADEK
(DECEASED)**

BETWEEN

**MINNEH WANJIRU (AS LEGAL REPRESENTATIVE OF THE ESTATE OF
KAMIL SLADEK) APPLICANT**

AND

KAMILA SLADEK RESPONDENT

RULING

1. The application before this Court is dated February 5, 2021 where the Applicant prays for the following Orders:-
 - a. That this Honorable Court be pleased to order by way of an injunction that the firm of Muma & Kanjama Advocates be disqualified from representing Kamila Sladek the Respondent in the matter herein.
 - b. That this Honorable Court be pleased to order that Charles Njiru Kanjama Advocates of Muma & Kanjama Advocates be summoned to testify as a witness in the matter herein on account of purchase by the Applicant herein of one Edmund Harnandez's 62.5% share in property LR No 209/6469/4 as asset subject to probate proceedings herein.
 - c. That costs for this application be provided for.
2. The Application is based on the grounds set therein and the Applicant's Supporting Affidavit.



3. The Applicant deposed that she is the legal representative of the Estate of the late Kamil Sladek and was issued a Confirmation of Grant of Probate on February 14, 2005. However, the Respondent placed a caveat to the Petition but failed to follow it up. She deposed that the Grant of Probate was issued to her on February 22, 2017.
4. The Applicant alleged that the firm of Muma & Kanjama did not receive instructions from the Respondent to act on her behalf in this case. She averred that Muma & Kanjama were acting for Edmund Hernandez in HCCC 5444 of 2003 (OS) where the dispute related to LR No 209/6469/4 which is also the subject property of this case. She further deposed that in that matter she was ordered by consent to purchase 62.5% share of the said property belonging to Edmund Hernandez.
5. The Applicant deposed that she transferred the purchase price to the said Hernandez through the firm of Muma & Kanjama. Therefore, the firm should be disqualified from acting for the Respondent and called upon as witnesses by this Court to confirm ownership particulars for the aforementioned property.
6. It is the Applicant's contention that the Respondent is on record under oath deposing that her previous advocates, Mbugwa, Atudo, & Kanjama are the ones who instructed the firm of Muma & Kanjama to act on her behalf. She averred that the firm of Muma & Kanjama have never served upon her advocates a Notice of Change of Advocate.
7. The Applicant stated that the firm of Muma & Kanjama have a personal interest in the subject property and from time to time they have attempted to revoke the confirmed Grant of Probate. She deposed that Mr Kanjama is also on record as having written to the Director Directorate of Criminal Intelligence purporting to institute criminal proceedings against her. The Applicant averred that where an Advocate has developed a personal interest to the extent of making a criminal complaint against a litigant it is only mete and just that such an Advocate be barred from representing the adversarial party in a matter where the same Advocate can be called as a witness to ascertain ownership particulars of the assets in dispute.
8. In response Charles Kanjama, the managing partner of Muma & Kanjama Advocates filed a Replying Affidavit. Mr Kanjama deposed that it was a Constitutional right for a party to be represented by counsel and such right could be put to the serious test if there was a conflict of interest which could endanger the principle of confidentiality in an advocate-client fiduciary relationship or where an advocate could double up as a witness.
9. According to Mr Kanjama, the Applicant has not shown that there is a conflict of interest that can be occasioned to the Applicant. He deposed that the firm of Muma & Kanjama has never represented the Applicant, therefore cannot be said to own a fiduciary duty of confidentiality since no advocate-client fiduciary relationship exists between the firm and the Applicant hence, it is the Applicant's advocate on record who would have to be called as her witness.
10. Mr Kanjama deposed that the issue on the administration of the estate of the deceased is not a matter in issue in the Respondent's Application for the Revocation of the Grant of Probate. He stated that the Applicant's purchase of part of Hernandez's property is a non-contentious issue.
11. Mr Kanjama deposed that if this becomes contentious, the Applicant's counsel would be a witness rather than him. He deposed that he does not have a personal interest in the subject property. Mr Kanjama further deposed that a Notice of Appointment of Advocates was filed in court on July 24, 2019. In response to the Applicant's allegations on the letter he wrote to the DCI, Mr Kanjama deposed that the letter was written under the instructions of the Respondent.



12. Counsels were directed to canvass the matter by way of written submissions.

Submissions

13. Mr Githinji counsel for the Applicant submitted that the Applicant intends to call Mr. Kanjama as a witness on the testimony on the contentious issue specifically to nature and extent of the Applicant's relationship to the deceased; the validity of the will he now purports to be a forgery; and the description of the assets of the deceased. Counsel referred to Rule 8 of the *Advocates (Practice) Rules 1966* and the decision of Musinga J (as he then was) in *Francis Mugo & 22 others vs James Bress Muthee & 3 Others* (2005) eKLR and submitted that there is an apparent conflict of interest as Mr Kanjama is privy to contentious issues to which he will be summoned to testify as a witness.
14. Counsel further submitted that Mr. Kanjama and the firm of Muma & Kanjama is not properly on record for the Respondent as they have never served on them the Notice of change of advocate. To buttress his claim, counsel cited the case of *Murgor vs Murgor Advocates vs Kenya Pipeline Co Ltd* (2021) eKLR.
15. Counsel submitted that Mr Kanjama and the director of DCI have a personal relationship as they are both members of the opus dei fraternity of the Catholic Church. Counsel submitted that the Mr Kanjama sought to have the Applicant criminally charged.
16. Counsel also relied on the Law Society Code of Standards of Professional Practice and Ethical Conduct, 2016 to submit that Mr Kanjama's personal relationship with the subject matter is a conflict of interest.
17. Mr Kanjama learned counsel for the Respondent relied on the case of *William Audi Odode & another vs John Yier & another* and the case of *Dorothy Seyanoi Moschoni vs Andrew Stuart & another* (2014) eKLR and submitted that it is the right of a litigant to be represented by an advocate of his choosing.
18. Counsel submitted that the Applicant has not shown that there is any conflict of interest that can be occasioned to the Applicant, as the firm of Muma & Kanjama has never represented the Applicant. To put emphasis on this claim, counsel referred to several cases including the case of *Re a firm of solicitors* (1995) 3 All 482 and the Court of Appeal case of *Delphis Bank Limited vs Chatthe & 6 others* (2005) 1 KLR 766. Counsel submitted that there is no real risk that relevant confidential information is possessed by the advocate that can be passed to other parties.
19. Mr Kanjama further submitted that since the firm of Muma & Kanjama has never represented the Applicant, there is no need of him to testify as a witness in these proceedings.

Determination

20. I have considered the entire record of the court, the pleadings, the rival submissions of counsels, and the vast list of authorities cited.
21. To put matters into context, the deceased died on August 27, 2004. He left a will dated January 30, 2004 bequeathing all his property to the Applicant. The properties listed in the Will included LR 209/6496/4. The Applicant filed a Petition for Probate on November 26, 2004 and a Grant of Probate was issued on February 14, 2005. Certificate of Confirmation of Grant of Probate with Will was later issued on January 22, 2004 directing that the deceased estate be distributed as stated in the Will.
22. On December 7, 2006, the Respondent filed a caveat through the firm of Mbugwa, Atudo & Macharia. The Caveat stated that nothing should be done to the estate of the deceased without her notice. On February 19, 2010, the Firm of Mbugwa, Atudo & Macharia ceased acting for the Respondent. On



record, there is a letter from the Respondent dated May 8, 2019 instructing the firm of Muma & Kanjama to represent her in these proceedings. On May 16, 2019, Muma and Kanjama filed their Notice of Appointment of Advocates to represent the Respondent.

23. On October 19, 2019, the Respondent filed Summons for Revocation of Grant alleging that the proceedings to obtain the grant were defective as the Will was forged. On February 19, 2020, this Court issued orders stating that the parties consented that the Certificate of Grant of Probate issued to the Applicant on 22nd February be revoked; that the Applicant will remain the executrix of the Estate of the deceased pending the determination of the Summons for Revocation; and that there shall be no dealings with the estate of the deceased till the Summons were determined.
24. The firm of Muma & Kanjama wrote to the Director DCI seeking to challenge the signature of the deceased in the Will. One Emmanuel Karisa Kenga a retired commissioner of police and a qualified forensic document examiner swore an Affidavit dated February 10, 2022 where he deposed that the signature in the Will did not belong to the deceased.
25. It is uncontroverted that Mr Kanjama from the firm of Muma and Kanjama represented Hernandez in HCCC 544 of 2003. However, the consent judgment is not on record. It is the Applicant's case that due to this relationship, Mr Kanjama has a personal relationship with the subject property and therefore there is a conflict of interest if Mr Kanjama represents the Respondent. The Applicant further averred that he will be calling Mr Kanjama as a witness in this matter.
26. The Court in *Murgor & Murgor Advocates v Kenya Pipeline Co Ltd* [2021] eKLR cited with authority the case of *King Woolen Mills Ltd & Another vs Kaplan and Straton Advocates* (1990-1994) EA 244 where the Court of Appeal stated as follows:-

“An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate.”
27. The Court also cited with authority the case of *Delphis Bank Limited v Channan Singh Chattbe & 6 Others* (supra) . In that case the Court cited the decision in *Rakusen v Ellis, Munday & Clarke* [1912] CH 831 where it was held that: -

“ 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....”
28. Mr Kanjama represented Hernandez in HCCC 544 of 2003 where there was a consent judgment. I do not see how Mr Kanjama representing the Respondent will prejudice the Applicant. The ownership of LR No 209/6469/4 is not questioned. Therefore, I do not see how and when Mr Kanjama will be required to be called in as a witness.
29. Mr Githinji submitted that the Applicant would want to call Mr Kanjama to testify on the nature and extent of the Applicant's relationship to the deceased; the validity of the Will he now purports to be a forgery; and the description of the assets of the deceased. The Applicant has not shown how Mr Kanjama would know in detail the relationship between the Applicant and the deceased. If the Applicant claims to have known the deceased since the year 1999, how is Mr Kanjama coming in? How would Mr Kanjama describe the assets of the deceased? The ownership of LR No 209/6469/4 has not



been questioned. Further to this, on the issue of the validity of the Will, if a witness is to be called it should be the forensic investigator, Mr Emmanuel Kenga.

30. The Applicant also questioned whether the firm of Muma & Kanjama is actually under the instructions of the Respondent. There is an instruction letter from the Respondent and a filed Notice of Appointment. The Applicant claimed that they were not served with a notice of change of advocates. There are letters and pleadings that show that Mr Githinji was well aware of the firm of Muma & Kanjama representing the Responded.
31. From the foregoing, I am not satisfied that the Applicant will be prejudiced if the firm of Muma & Kanjama were to represent the Respondent. I hereby dismiss the Application dated February 5, 2021
32. The Applicant to bear the costs of the Application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2023

E.K. OGOLA

JUDGE

In the presence of:

Ms. Njeri h/b Githinji for the Applicant

Mr. Khesogo h/b Kanjam for the Respondent

Gisiele Muthoni Court Assistant.

E.K. Ogola J.

