



**Mwavali & another (Suing on their own behalf and on behalf of Tuwan Farm Limited) v
Onsongo & 2 others (Civil Suit 8 of 2019) [2023] KEHC 2934 (KLR) (4 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 2934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL SUIT 8 OF 2019**

AC MRIMA, J

APRIL 4, 2023

BETWEEN

ERASTUS BRUCE MWAVALI 1ST APPLICANT

DAVID KIPKEMOI MARITIM 2ND APPLICANT

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF TUWAN FARM
LIMITED**

AND

KENNEDY BANTEREO ONSONGO 1ST RESPONDENT

JOSEPH KIPKIRUI LANGAT 2ND RESPONDENT

EZEKIEL KIPKORIR KILEL 3RD RESPONDENT

RULING

1. The Plaintiffs/Applicants vide an application by way of a Notice of Motion dated 2nd November, 2022 challenged the continued participation of the firm of Messrs. Kaosa & Company Advocates on behalf of the Defendants in this matter.
2. On their part, the Defendants/Respondents contended otherwise.
3. The instant ruling will, therefore, determine the contested issue.

The Application:



4. The application cited Articles 48, 50 (1) and 159(2) of *the Constitution*, Section 1B and 3A of the *Civil Procedure Act* and Order 51, Rules 1 & 3 of the Civil Procedure Rules as the basis of the following orders: -
 1. THAT the firm of M/S Kaosa & Company Advocates by themselves, their partners, servants or agents be disallowed from representing the Defendants/ Respondents in this suit and that the documents filed herein by the firm of M/S Kaosa & Company Advocates on behalf of the Respondent be expunged from the record.
 2. THAT any other relief the Honorable Court deems fit to grant.
 3. THAT costs of this Application be provided for.
5. The application is supported by the grounds on its face and by Affidavit of the 1st Applicant, Erastus Bruce Mwavali.
6. The gravamen of the application is that the firm of Messrs. Kaosa & Company Advocates acted for the Plaintiffs herein and Tuwan Farm Limited in Kitale High Court Civil Case No. 60 of 2011 thereby holding Mr. Kaosa as a potential witness. Annexed and marked as EBM1 (a), EBM1 (b) and EBM2 respectively are Joint Statement of Defence dated 15/07/2011, Notice of Taxation dated 20/12/2011 and minutes/Resolutions appointing the said firm on 10/05/2011. He further disclosed that by virtue of the minutes dated 21/10/2022 and authority to plead, EBM3 (a) and EBM3 (b) respectively, the Applicant derived leave to file the present application.
7. The Applicants lamented that the continued representation of the Defendants by the said firm is tainted with conflict of interest; the apprehension being that the same will cause real mischief, irreparable harm and prejudice upon the Applicants. Following the grant of the order, the Applicants further urged that all documents filed by the said firm be expunged from the Court record.
8. In a rejoinder, the Applicants rehashed the contents of the application to include the Affidavit and annexures thereto. They noted that it was admitted by the Defendants that the said firm of Advocates represented Tuwan Farm Limited in HCCC No. 60 of 2011 wherein the Applicants herein have immense interests. Annexed and marked as Exhibit BM1(a) and Exhibit BM1(b) are the 1st Applicant's Statement dated 20/09/2011 drawn by the said firm and a copy of the ruling dated 07/12/2011 respectively.
9. The Applicants firmly expressed the position that they intended to call the said firm as a witness to shed light on the transactions the firm handled. For this presupposition, the Applicants annexed and was marked Exhibit BM2 being a demand letter dated 16/10/2017 drawn by the said firm.
10. It is in light of the above that the Applicants remain perturbed that the Plaintiffs will suffer prejudice so long as the firm of Kaosa & Company Advocates continue representing the Defendants.
11. In their written submissions dated 15/11/2022 and filed on 16/11/2022, the Applicants defined 'conflicting interest' by embodying the wordings of Rule 6 paragraphs 95 and 96 of the Law Society of Kenya Code of Standard of Professional Practice and Ethical Conduct.
12. They submitted that the application was merited and the same ought to be allowed with costs.

The Response:

13. The application was opposed by the Respondents. They filed two Replying Affidavits.



14. According to Moriasi Moses Kaosa, the Defendants'/Respondents' Counsel vide his Affidavit sworn on 04/11/2022, the application is a delaying tactic with other numerous applications preceding the present one.
15. He acknowledged that he was appointed by Tuwan Farm Limited as per Exhibit BM2 in 2011 where he acted for the Company and not individuals in HCCC No. 60 of 2011. He thus denied that he was instructed to act for the 8th Defendant in those proceedings.
16. In a bid to negate the allegations of conflict of interest, the deponent continued that the said suit was dismissed for want of prosecution and that the Company's Directors had been sued as Defendants and had their own Counsel.
17. The deponent impugned the Director's meeting held on 21/10/2022. He observed that the said meeting was only attended by the Plaintiffs yet the Defendants/Respondents, who did not attend that meeting, continue to hold their positions as Directors of that Company. He added that the 1st Applicant could not purport to Chair the said meeting since he was not the Company's Chairman.
18. The deponent further invited this Court to consider that the Applicants' election to office is disputed in this case since he forged the list of members and death certificates. He cited that the 1st Applicant furthermore forged the Defendants'/Respondents' signatures purporting to claim that they had resigned as Directors. He added that there is a criminal case against the 1st Applicant that is alive. He urged this Court to dismiss the application with costs.
19. Supporting Counsel's notion, the 1st Defendant swore an Affidavit on 04/11/2022. He complained that the 1st Applicant had devised dubious means to oust the other Directors from Tuwan Farm Limited. For instance, the 1st Applicant effected changes at the Registrar of Companies irrespective of the fact that a suit remained alive. He annexed and was marked as Exhibit KBO1, a copy of a receipt from the Registrar of Companies. He pointed out that the Defendants/Respondents herein were not parties to the Directors' meeting held on 21/10/2022.
20. The deponent accused the Applicants of adding Directors totaling nine yet from the original seven that started the Company, three had since passed on. He cited illegality as no succession proceedings have by way of vesting orders, transferred the shares of the deceased Directors to their respective estates.
21. Further, one Bernard Kiprono Yetigei, swore an Affidavit on 19/08/2022 as Exhibit KBO2 to the DCIO Kitale Police Station complaining that his name was illegally included in the list of Directors as per KBO1 yet he was not privy to such a transaction.
22. The DCIO have since picked up the matter having written to the Registrar of Companies on 24/08/2022 as per Exhibit KBO3, with a view to conducting investigations. He similarly prayed that the application be dismissed with costs.
23. The Respondents filed their joint written submissions dated 18/11/2022 on even date. The Respondents outlined instances of forgery conducted by the 1st Applicant as forming the substratum of the issues for determination before this Court. They reiterated the contents of their Replying Affidavits.
24. They termed the Plaintiffs' actions as sideshows urging this Court to dismiss the present application and fix the matter for hearing and determination on its merits. They relied on the case of Christopher Mokaya Misiani vs. Jane Onyangi & another [2019] eKLR to fortify that submission.



Analysis:

25. This Court has considered the application and the response thereto alongside the parties' submissions and decisions referred to.
26. In a nutshell, the application seeks to oust the participation of the firm of Kaosa & Company Advocates as the Defendants' legal representatives. The ouster is founded upon allegations that the said firm acted for Tuwan Farm Limited in Kitale High Court Civil Case No. 60 of 2011 thereby holding Mr. Kaosa as a potential witness and that the Counsel's continued participation in this matter yields to conflict of interest.
27. In other words, the bone of contention is whether there existed an Advocate-Client fiduciary relationship between the Tuwan Farm Limited and the firm of Messrs. Kaosa & Co. Advocates and if so, whether the firm of Messrs. Kaosa & Co. Advocates ought not to appear for the Defendants who are members of the Tuwan Farm Limited.
28. As such, this Court will deal with those issues hereinbelow.

Whether there existed an Advocate-Client fiduciary relationship:

29. There is no doubt that Learned Counsel Mr. Kaosa admitted that his firm was appointed by Tuwan Farm Limited and acted for Tuwan Farm Limited in the said HCCC No. 60 of 2011. Learned Counsel clarified that the representation was limited to the Company and not the rest of the Defendants in the said suit.
30. The Court of Appeal in Civil Appeals 286 of 2001 & 15 of 2002, Uhuru Highway Development Ltd & 3 others v Central Bank of Kenya & 4 others [2003] eKLR spoke to the manner in which a Court may ascertain whether an Advocate-Client relationship existed. The Court stated as follows: -

Whether the plaintiffs were the counsel's client may be discerned from a careful consideration of the correspondence on record. A careful consideration of the same is, of course, required.
31. With such guidance and to be able to address the issue, this Court ought to deal with what a fiduciary duty or fiduciary relationship is all about.
32. The 11th Edition of the Black's Law Dictionary defines a 'fiduciary duty' as follows: -

.. a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.
33. In *Wolf v. Superior Court* (2003) 107 Cal. App. 4th 25, 29 [130Cal.Rptr.2d 860], the Court defined a 'fiduciary relationship' as follows: -

.... any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent.....



34. The Court of Appeal in *King Woolen Mills & Another v. Kaplan & Stratton Advocates* (1990 - 1994) E.A. 244 acknowledged that a Retainer Agreement between an Advocate and a Client creates a fiduciary relationship.

35. Section 2 of the [Advocates Act](#) further defines who a 'client' is. It states as follows: -

“client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs;

36. Returning to the case at hand, it is apparent that this instant suit was instituted by and on behalf of Tuwan Farm Limited. The said Company is, therefore, the complainant, so to say, in these proceedings. That is the very entity in which Learned Counsel Mr. Kaosa acted for in HCCC No. 60 of 2011.

37. With such a position, this Court finds and hold that there was an Advocate-Client fiduciary relationship between the firm of Messrs. Kaosa & Co. Advocates and Tuwan Farm Limited.

Whether the firm of Messrs. Kaosa & Co. Advocates ought not to appear for the Defendants:

38. Section 134 of the [Evidence Act](#) precludes disclosure of any communication or information between an Advocate and a Client except with the Client's consent. Pursuant to Section 134(2) of the [Evidence Act](#), the Advocates' duty of non-disclosure continues even after the employment of the Advocate has ceased.

39. Section 136 of the [Evidence Act](#) also provides for instances where the grant of the consent can be presumed. The provision states as under: -

136. Waiving of privilege of Advocates, etc.

(1) If any party to a suit or proceeding gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 134(1) of this Act.

(2) If any party to a suit or proceeding calls any advocate, interpreter, clerk or servant as a witness, he shall be deemed to have consented to such disclosure as is mentioned in section 134(1) of this Act only if he questions such witness on matters which, but for such question, the witness would not be at liberty to disclose.

40. The Court of Appeal addressed the above privilege in *Mohammed Salim Balala & Another v Tor Allan Safaris Limited* Civil Appeal No. 28 of 2014 (2015) eKLR where the Court stated that: -

Of particular importance is that the advocate client privilege is only there for the sake of the client not the advocate. It is for the client to choose whether or not to lift the privilege. All that the advocate can do is plead privilege if sued. (see. Halsbury's Laws of England 4th edition vol 44 at page 52). This does not mean that an Advocate cannot be sued on the basis of his relationship with his client. It only means that he cannot be compelled to disclose information thus obtained unless his client chooses to lift or pierce the privilege.....



41. In Nairobi High Court Misc. Application No. 15 of 2020 Murgor & Murgor Advocates -versus- Kenya Pipeline Co. Ltd this Court, upon review of various decisions from both local and other jurisdictions, enumerated various guiding principles in disqualification of Advocates from appearing for parties in matters. The Court stated as follows: -

41. From the foregoing, the following are some of the general principles guiding the disqualification of Advocates from appearing for a client in a matter: -
 - i. The basis upon which a Court disqualifies an Advocate from acting arises from the need to protect the interests of administration of justice. Whereas it is understood that choice of Counsel is an entitlement of a party, such Counsel must always bear in mind that he/she becomes an officer of the Court and as such owes an allegiance to a higher cause (justice and truth) than serving the interests of the client.
 - ii. Disqualification of an Advocate is only desirable in contentious matters and where there is or was an Advocate-Client relationship;
 - iii. It must be apparent that the Advocate sought to be disqualified will be required as a witness to give evidence in the matter;
 - iv. It is desirable that when the principle of confidentiality in an Advocate/Client fiduciary relationship will be prejudiced or where there is a possibility of real conflict of interest, then an Advocate sought to be disqualified ceases to appear in the matter;
 - v. The fact that an Advocate acted for a litigant does not, per se, lead to a situation of conflict of interest;
 - vi. Conflict of interest is an issue of fact which must be proved by way of evidence;
 - vii. It is not a requirement that in a situation where a firm of Advocates acted for the opposite party all the Advocates in the firm be disqualified from the matter. In such an instance, only the Advocates who are in possession of confidential information relevant to the matters in issue before Court or Tribunal may be called upon to cease from appearing in the matter;

42. Further exposition on the rule was made in *Conlons vs Conlons* (1952) 2 ALL ER 462.

43. On the subject of conflict of interest, the Court of Appeal in *King Woolen Mills Ltd & Another vs. Kaplan and Straton Advocates* (1990-1994) EA 244 observed 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.

44. In the current matter, Tuwan Farm Limited has posited that it intends to call Mr. Kaosa as a witness since he acted for the Company in previous matters. Further, the Defendants herein are sued on the basis of being Directors of the Company, Tuwan Farm Limited and the Plaintiffs are seeking a declaration that they are no longer Directors of the Company. It, therefore, emerges that Mr. Kaosa acted for all the parties through the Company in one litigation and as such he cannot later act for either party in another litigation.



45. What a Court is to consider in such circumstances is not the nature of the evidence likely to be tendered by the Counsel, but the fact that the Client wishes to call the Counsel as a witness. It is a right hinged on the Client and not the Counsel. As long as the Client wishes to call the Counsel as a witness in a matter on the basis of the existence of a fiduciary relationship between the Client and the Advocate, then the matters stops there. Such a Counsel cannot represent the opposite party in the same proceedings.
46. From the above discussion and going by the decision in King Woolen Mills Ltd & Another vs. Kaplan and Straton Advocates, it can only be the position that the firm of Messrs. Kaosa & Co. Advocates is not properly suited to represent the Defendants in current proceedings.
47. As I come to the end of this issue, the Applicants also sought an order that the documents filed by the firm of Messrs. Kaosa & Company on behalf of the Defendants be expunged from the record.
48. This Court's response to the matter is that since expunging the documents will not preclude the filing of similar documents by another firm of Advocates or the Defendants in person, then such an order serves no meaningful purpose. The request is, therefore, declined.
49. In the end, the issue under consideration is, hence, answered in the affirmative.

Disposition:

50. Having considered the issues raised in this matter, this Court now makes the following final orders in respect to the Notice of Motion dated 2nd November, 2022: -
 - a. **The firm of Messrs. Kaosa & Company Advocates be and is hereby disqualified, whether by themselves, their partners, servants or agents, from representing the Defendants in these proceedings.**
 - b. **The Defendants shall bear the costs of the application.**

Orders accordingly.

DELIVERED, DATED and SIGNED at KITALE this 4th day of April, 2023

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Erastus Bruce Mwavali and David Kipkemoi Maritim – Plaintiffs.

Mr. Kaosa, Learned Counsel for the Defendants.

Regina/Chemutai – Court Assistants.

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