



In re Estate of Ahmed Abdulle Noor alias Ahamed Abdulle Noor (Deceased) (Succession Cause E501 of 2022) [2023] KEHC 18338 (KLR) (Family) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E501 OF 2022
PM NYAUNDI, J
MAY 12, 2023**

BETWEEN

FOZIA MOHAMMED HAROON 1ST APPLICANT

MOHAMMED AHMED ABDULLE 2ND APPLICANT

AND

HAWE DAGANE HASSAN RESPONDENT

RULING

1. The 1st and 2nd Applicants present Application dated 6th February 2023 under Section 1A and 1B, 3 and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules, the *Advocates Act* seeking the following orders
 1. Spent
 2. That the firm of Issa & Company Advocates be prohibited and restrained from acting as (sic) for the Respondent against the Applicants.
 3. That all the documents filed herein by the said firm of Issa & Company Advocates, be expunged from the record.
 4. That the costs of this application be awarded to the Applicants.
2. The Application is supported by the Affidavit of Mohammed Ahmed Abdulle, the 2nd Applicant.
3. The Applicants submit that the firm of Issa & Company Advocates are conflicted having acted for Applicant previously in the following matters;



- i. Chief Magistrate Commercial Case No. 568 of 2012, Reuben Kipkorir Terer V. Dakawou Transporters Ltd.
 - ii. Sale of land Reference Number 36/VII/533
 - iii. Sale of Apartment NO. B06, 2nd Floor (Mabruk Apartments) from Mohamed Ahmed Said & Abdi Aidid Ali.
 - iv. Sale of Apartment NO. G1, 7th Floor (Mabruk Apartments) from Mohamed Ahmed Said & Abdi Aidid Ali o Ismail Arte Rage Kassim
 - v. Sale of Apartment No. A02 to Farah Awadh Jama- Mabruk Apartments).
 - vi. HCCC No. 384 of 2015, Air Traders International Vs Global Lift Ltd & Anor
4. It is contended that the firm of Advocates is conflicted as they cannot purport to against the Applicants in a dispute relating to the estate of the Deceased and further that the proprietor and all other advocates practising in the firm are potential witnesses.
 5. The Applicants assert that the firm of Issa & Company Advocates acting for the Objector is prejudicial to the Applicant as the firm is in possession of information received from the deceased and therefore cannot act for the Objector against the Applicant.
 6. It is further submitted that the professional ethics of the legal profession in Kenya and the world over precludes an Advocate/ lawyer who has acted or acts for a client over matters that are in contention from turning around and acting against the same clients.
 7. The Applicants assert that the Counsel himself is aware of the Conflict and in the past has stated that his involvement in the matter is to secure an amicable settlement.
 8. The Application is opposed by Replying Affidavit of Mansur Muathe Issa sworn on the 2nd March 2023. He avers that the Applicants have not demonstrated any conflict of interest on his part and the application has been presented for the sole purpose of obstructing and delaying the cause of justice and specifically the hearing of the notice of objection dated 27th July 2022.
 9. It is his contention that the application was filed on the eve of the hearing of the Notice of Motion with the intention of scuttling it.
 10. He admits that he was a friend to the Deceased as they were both members of the same gymnasium at Intercontinental Hotel. He submits though that this fact alone is not sufficient to back claims of conflict of interest.
 11. He further submits that the Applicant has not demonstrated how legal services he rendered more than 10 years ago to the deceased place him in conflict.
 12. In paragraph 9 of the Replying Affidavit, he sets out each of the matters cited by the Applicant and explains the nature of representation and a clarification that the representation in the earlier matter would not place him in conflict in the current matter. With regards to Chief Magistrate's Commercial Case No. 568 of 2012, the Respondent submits that he was instructed by Dakawou Co. Ltd and not the deceased, and that the matter was dismissed for want prosecution and no confidential information was disclosed by the Company.
 13. With regards to the Purchase of L.R. No. 36 / VII/ 533 the Counsel avers that he received instructions from Mohammed Ahmed Said and Abdi Aidid Ali as the purchasers. The transaction is not related



- to the Applicant or the deceased. The title to the property is registered in the names of Sheikh Una Mohammed and Abubakar Mohamed
14. He submits that the property isn't listed as an asset of the deceased and then suggests that the Applicant may be disclosing that the deceased had a beneficial interest in the property.
 15. With regard to the sale of the 3 apartments (No. B06, G1 and A02) at Mabruk Apartments the Respondents submits that the was instructed by the said Mohamed Ahmed Said and Abdi Aidid Ali and has attached sale agreements showing the purchasers were persons other than the deceased.
 16. With regard to representation in HCCC No. 384 of 2015, Air Traders International Limited Vs. Global Lift Limited. It is submitted the claim did not involve ownership of the Aircraft and no confidential information that would be prejudicial to the parties in the proceedings was divulged to him. He further avers that to the best of his knowledge the shares in Air Traders International Limited do not form part of the deceased's estate.
 17. In summing up the Respondent submits that none of the issues in contention in the matters listed in paragraph 7 of the supporting Affidavit of the 2nd Applicant are in contention in the succession proceedings and therefore no conflict is likely to arise contrary to what has been suggested by the Applicant.
 18. It is submitted that the Application is an attempt by the Applicant to determine the Respondent's representation which is contrary to the law and the Respondent's right to a fair hearing.
 19. The 2nd Applicant swore a further affidavit dated 27th March 2023. In the said affidavit the Applicant submits that the Counsel has in admitting that he was a friend to the deceased confirmed that he is likely to be conflicted.
 20. Further it is reiterated that the Counsel is a potential witness on the relationship between the deceased and the Objector and on the involvement of the Objector in the companies of the deceased.
 21. It is further contended that the Counsel is in a position to testify on the correct position of the interest of the deceased in relationship to Air Traders International Ltd and Mabruk Apartments.
 22. Parties agreed to canvass the Application by way of written submissions. The Applicants written submissions are dated 28th March 2023. The Respondents are dated 5th April 2023. The Applicant has in addition filed Supplementary written submissions dated 14th April 2023.

Applicant's Submissions

23. The Applicant relies on the Rule 9 of the Advocates (Practice Rules) that provides

‘ 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.

Provided that this rule does not prevent an advocate from giving evidence whether verbally or declaration or affidavit on formal or non- contentious matter of fact in any matter in which he acts or appears’.
24. For conflict of interest as a disqualifier the Applicant relies on the decision in *Serve in home African (SILA) Trust Vs David Kipsang Kipyego & 7 Others* [2017] eKLR and the Law Society of Kenya Code



of Standards of Professional Practice and Ethical Conduct, 2016 which defines conflict of interest in Rule 6 paragraph 96 as follows: -

“A conflicting interest is an 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.”

25. The Applicant goes on to explain that where there is a possibility of conflict that Advocate is required to make adequate disclosure to both clients and obtain their consent. Rule 6 enumerates instances in which conflict of interest may arise which it is submitted are pertinent in the instant case. These are
 - 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.
26. The Applicants identifies 2 issues for determination, whether;
 - a. The firm of Issa & Company Advocates in acting for the Objector is serving or attempting to serve two or more interests which are not compatible.
 - b. The firm of Issa & Company Advocates, and the Advocates of the said law firm are potential witnesses of these proceedings.
27. On the first issue, the Applicant submits that the Respondent through the firm of Michael Daud & Associates vide letter dated 12th April 2022, has alleged that the deceased made inter vivos gifts to his children including the Mabruk Building located in California Estate. It is contended that the Counsel is a potential witness, having acted in the sale and purchase of Mabruk Building.
28. Noting that in his replying affidavit Mr. Issa averred that the property does not form part of the estate it is contended that the position taken by Mr. Issa is contrary to that of his client, the Respondent in the succession matter.
29. It is submitted additionally that Mr. Issa and the counsel in his firm are potential witnesses to the fact of actual ownership of the property LR No. 36/ VII/ 533.
30. In the Applicants supplementary submissions, reliance is placed on the decision in Republic v Silas Mutuma Marimi & 2 Others [2016] eKLR as laying setting out the principles upon which as advocate may be disqualified from acting for a litigant. These include where there is a possibility the advocate may be called as a witness and where there exists a conflict of interest between two clients out of a previous advocate/ client fiduciary relationship with the opposing client.
31. In urging the Court to find that once it is established that there is possible conflict, the firm is required to cease acting. It is further urged that the duty to the court is paramount to all other duties, including loyalty to the client. The Applicant reiterates the earlier submissions



32. Reliance is also placed on the decision in *Maina Njenga v Republic* [2017] eKLR. Whilst conceding that 'it is not the business of the courts to tell litigants which advocate should or not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate, and unless it is shown to a court that the interests of justice would not be served if a particular advocate were allowed to act in a matter, the parties must be allowed to choose their own counsel'. (Emphasis supplied).

Respondent's Submissions

33. The Respondent's opposition to the Application is hinged on the decision in *Tom Kusienya & Others vs Kenya Railways Corporation & Others* [2013] eKLR where Mumbi Ngugi J (as she then was) pronounced as follows

"... I believe that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice particularly Articles 48, 50 (1) and 159(2)(a) of *the Constitution*, and it is only in exceptional circumstances that this right should be taken away."

34. The Respondent has framed 2 issues for determination;

- i. Whether the Respondent's Advocates M/S Issa & Company Advocates are conflicted; and
- ii. Whether the documents filed by the firm of M/S Issa & Company Advocates should be expunged from the court record.

35. The Respondent cites the Court of Appeal decision in *Delphis Bank Ltd vs Channan Singh Chatthe & 6 Others* [200] eKLR in support of the assertion that a party's right to representation is sacrosanct. The Respondent asserts that the test is that laid down in the case which is

"The test which has been laid down in the authorities applied by this court is whether real mischief or real prejudice will in all human probability result"

36. The same point was reiterated in *Supersave Retail Ltd Vs Coward Chance & Others* (1991) 1 All ER 688 and *Cooperative Bank of Kenya Limited vs. Charterhouse Bank Limited* [2015] eKLR where the Court cautioned thus

"...courts should be careful not to grant orders which will impinge on right to representation by legal counsel of choice unless it is satisfied that real mischief or prejudice will result if the advocates in question continue to act for the particular party in a proceeding; the contrary will only bring its holocaust on the right to legal representation."

37. On rule 9 of the Advocates (Practice) rules, the Respondent refers to the decision in *Tom Kuseiny & Others vs Kenya Railways*, where the Court cited with approval the decision of O'Kubasu JA in *William Audi Odode & Anor vs John Yier & Anor* Court of Appeal Civil Application No. NAI 360 of 2004

'I must state on (sic) the outset that it is not the business of the court to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a 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 were allowed to act in the matter, the parties must be allowed to choose their own counsel.'



38. The Respondent also cited the decision of *Mrima J in Murgor & Murgor vs Kenya Pipeline Co. Ltd [2021] eKLR* on the guiding principles for disqualification of an Advocate

(41) From the foregoing , the following are some of the general principles guiding the disqualification of Advocates from appearing for a client in the matter

- i. ...
- ii.
- iii. ..it must be apparent that the Advocates sought to be disqualified will be required as a witness to give evidence in the matter;
- iv.
- 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.”

39. The Respondent further relies on the decision in *Serve in Love Africa (Sila) Trust vs David Kipsang Kipyego (supra)* where the court distinguished between actual, potential or perceived conflict of interest and cautioned thus in relation to perceived conflicts of interest

“...there is an implied suggestion that all ‘perceived’ conflicts of interest should lead to an advocate withdrawing which is fraught with problems because many assertions of conflict of interest are misguided and many are made for tactical reasons and have no basis.”

40. The Respondent contends that notwithstanding that he and Deceased attended the same gym, nothing further has been placed before the court to demonstrate that the nature of the relationship was such as he was privy to the personal and confidential affairs of the deceased.

41. With regard to the letter dated 12th April 2022 from M/s Daud & Associates and the contents thereof, the Respondent distances himself from them and further assert that the issue of ownership of L.R.No. 36/VII/533 has not arisen in the succession cause. This issue is therefore not in contention and therefore Rule 9 of the Advocates (Practice) Rules would not apply.

42. Further the Respondent cites the decision in the *Sila Trust Case (Supra)* where the court stated

“Rule 9 of the Advocates (Practice) Rules, basically 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 Court. I have considered the application and reply by Mr. Korir where he admits transacting the sale on behalf of the defendants and do find that though Mr. Korir has admitted that the dispute revolves o who is the legitimate and bonafide trustees and has also stated to the best of his knowledge, the defendants are the bonafide trustees, it has not been demonstrated that he will be called to testify as a material witness as to who is the bonafide trustee. The



defendants have a right that is sacrosanct to be represented by an advocate of their choice, of Mr. Jonar Korir's vigour, that can only be taken away in exceptional circumstances thus if the same becomes prejudicial to the other parties and to enable the ends of justice being met a fact that has not been demonstrated by the plaintiffs. The application is not merited and is therefore dismissed with costs."

43. On disqualification the Respondent further states that is the specific advocates who handled the confidential matter that would be disqualified, if at all it was established that the information passed on was confidential and relies on the decision in *British- American Investments Company (K) Limited vs. Njomaitha Investments Limited & Another* [2014] eKLR where the court concurring with the decision in *National Bank of Kenya Limited vs Peter Kipkoech Korat* [2005] eKLR stated;

"...[20] It would therefore imposing a lot of hardship upon the firm of M/S Walker Kontos Advocates not to represent the plaintiff herein just because one of its advocates witnessed an agreement which had been drawn by the 2nd Defendant herein. Indeed, it is not known whether or not that particular advocate was still in the firm of M/S Walker Kontos Advocates bearing in mind that the application herein had been pending hearing and determination for over two (2) years. The position of the court would, however have been different if the firm had a single advocate who was representing the plaintiff herein in court and who was also expected to be called to testify as a touched on the plaintiff herein."

44. It is submitted that the Applicants have not laid a basis for the expunging of the documents filed by the Respondent firm from the record.

Analysis And Determination

45. Having reviewed the pleadings and submissions filed herein I frame the following as the issues for determination: -

- i. Whether the Applicant has met the threshold to warrant the disqualification of the Respondent from acting
- ii. Whether all the documents filed by the Respondent should be expunged from the record
- iii. Who should bear the costs

46. Whether the Applicant has met the threshold to warrant the disqualification of the Respondent from acting

47. The test as enunciated in the case of *William Audi Odode & Anor vs John Yier & Anor* (Supra) is it must be

"..... shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel."

48. In *Supasave Retail Limited vs Coward Chance* (a firm) and others; *David Lee & Co (Lincoln) Ltd Vs Coward Chance* (a firm) and others (1991) 1 ALL ER 668 at 673 *Browne-Wilkinson VC* endorsed the view earlier articulated by *Cozens-Hardy MR* in *Rakusen v Ellis, Munday & Clark* [1912] 1 Ch 831 (CA) where he stated

I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he



cannot clear his mind from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act (Emphasis Supplied)

49. It follows therefore that this Court is obligated to examine the specific facts of the instant case and determine whether the Respondent is a) conflicted b) is a potential witness along with the advocates in his firm.
50. One of the issues raised is that the Respondent is conflicted as he has taken a position with regards to the properties that comprise the estate of the deceased that is at odds with that of his client (the objector) as expressed in letter dated 12th April 2022 addressed to the Applicant by M/S Daud & Associates.
51. The Affidavit in support of the Notice of Objection was sworn on the 27th July 2022, post the letter dated 12th April 2022. It can be safely assumed that having been sworn by the Objector, it is the most reliable reference as to how she intends to challenge the Petition.
52. The Affidavit is sworn by the Objector and drawn by the Respondent's firm it is therefore not accurate to state that the position of the Respondent and his client are in conflict.
53. It is contended that the Respondent will be conflicted as he represented the deceased and may therefore have some confidential information.
54. I have reviewed the pleadings and submissions filed by the parties herein and particularly paragraph 7,8,9, 10 and 11 of the supporting affidavit sworn on the 6th February 2023 and the Affidavit of the Objector sworn on the 27th July 2022 alongside the Notice of Objection to the making of a grant dated 27th July 2022.
55. The Objector is challenging the validity of the will for the reason that it does not provide for the 3 children she bore with the deceased. She does not challenge the assets of the deceased estate as enumerated in the Petition but challenges the value.
56. Going back to the test as spelt out in the William Audi Odode case, I find that the Respondent's representation in the matters enumerated in paragraph 7 of the supporting Affidavit is unlikely to place the Respondent in conflict as envisaged under the Advocates Practice Rules so as to necessitate his disqualification.
57. For the Advocate to be disqualified on accounts of conflict it must be demonstrated that the interests of the other client must be adverse and in a substantially related matter. The subject matter is said to be substantially related if the factual and legal matters are so similar that there is a genuine threat that confidential information revealed in a previous case could be used against the former client in the present case. (Rule 1.9 of the New Hampshire Bar Association; Conflict of Interest in Family Law Matters, 2001)
58. The Applicant also seeks the disqualification of the Respondent and all the lawyers in his firm as they are potential witnesses. The reasons given are that; firstly, he was a friend of the deceased and secondly by virtue of having acted for the deceased the Respondent and lawyers in his firm can give evidence on the factual position as relates to the ownership of the property LR No. 36/ VII/ 533 as well as the flats in the building known as Mabruk



59. To the extent that the discomfort of the Applicant is based on the letter dated 12th April 2022 I hold once again that this is not a sufficient basis upon which to disqualify the Respondent as the Objector has since filed an affidavit in support of the Objection that enumerates the grounds upon which she intends to contest the Petition. The affidavit does not refer to the assets mentioned in paragraph 7 of the supporting affidavit.
60. For the reason that no reference has been made to those properties in the pleadings filed by the Objector, I would find the averments by the Applicant speculative and therefore not a basis upon which to disqualify the Respondent or the Counsel in his firm.
61. It is further contended that the Respondent may be called as a witness on account of his close relationship with the deceased to testify as to the acrimonious relationship between the deceased and the objector. The closeness is deduced from the fact that the deceased and the respondent were members of the same gym.
62. It is the Respondent who disclosed that he went to the same gym with the Applicant, the pertinent question is whether the this on its own would amount to such a close relationship, that it would be safe to infer that the Respondent was therefore privy to personal affairs of the Deceased, particularly the state of the marriage with the objector and dealings in family property.
63. Apart from the inter action at the gym and the provision of professional services there is nothing to show that the relationship between the Respondent and deceased went beyond that of advocate client limited to the transactions in paragraph 7 of the supporting affidavit.
64. Given that the active dispute is that of the validity of the will, it is not evident as to how the Respondent or the counsel in his office would be material witnesses. I am persuaded by the decision of the Court in the Sila Trust case (Supra) and find that the ownership of the cited properties, the nature of the marriage between the deceased and the Objector and the Objectors role in the management of the properties are not among the contested issues.
65. As to whether the Applicant has made a case for the disqualification of all the counsel in the Respondent's firm I am on all fours with the decision British- American Investments Company (K) Limited vs. Njomaitha Investments Limited & Another (Supra) and find that in the particular context of this case this would be a draconian and unreasonable order to make.
66. The Applicant has not identified the specific lawyers in the firm and satisfied the court that the firm of Issa & Co. is unable to erect internal Chinese walls.
67. As stated by Mumbi J (as she then was) in the Tom Kusienya Case (supra), the right to legal representation is a constitutional right and is sacrosanct.
68. The Human Rights Committee in General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights which like Articles 48 and 50 of *the Constitution* of Kenya provides for Rights to Equality before courts and tribunals and to a fair trial at paragraph 2 recognises the right to a fair trial as a key element of human rights protection and serves as a procedural means to safeguard the rule of law.
69. By elevating an individual's choice of counsel to a constitutional right the bar for disqualification of Counsel has been set high. This means that the Court can only intervene in the clearest of cases where it is satisfied that the continued representation would cause a miscarriage of justice and make a mockery of laid down professional ethical standards.



70. In the instant case the Applicant has not succeeded in crossing this threshold, in demonstrating that the Respondent is conflicted or likely to be called as a material witness to issues that are in contention.

Whether all the documents filed by the Respondent should be expunged from the record?

71. I have reviewed the Applicants Affidavit and submissions and observe that no basis has been laid for seeking this order. The Applicant does not identify it as an issue to be determined in court in both the submissions and supplementary submissions filed.

72. I can only presume that it was assumed that if the 1st issue was determined in the affirmative then this would be a natural consequence of that order. Having determined that the threshold for disqualification was not met, I likewise hold that no satisfactory basis has been laid for expunging the documents as prayed.

73. On account of the foregoing the application dated 6th February 2023 is dismissed in its entirety.

74. As this is a matter that involves family members there shall be no order as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF MAY, 2023.

P M NYAUNDI

JUDGE

In the presence of:

..... **Advocates for the Applicant**

..... **Advocates for the Respondent**

Karani Court Assistant

