



**In re Estate of Arvind Kanji Premji Patel (Deceased) (Succession Cause 336 of 2013) [2023] KEHC 22574 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22574 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 336 OF 2013  
G MUTAI, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**MOZA ABDILLAHI MOHAMED ..... 1<sup>ST</sup> APPLICANT**

**KHALID ARVIND KANJI PATEL ..... 2<sup>ND</sup> APPLICANT**

**KHALIDA ARVIND KANJI PATEL ..... 3<sup>RD</sup> APPLICANT**

**AND**

**HASMUKH KANJI PREMJI PATEL ..... RESPONDENT**

**RULING**

**Introduction**

1. The respondent is the executor of the Kenyan Will, dated January 19, 2013, of his deceased brother Arvind Kanji Premji Patel (hereafter “Arvind”). Vide the said Will Arvind provided for the distribution of his Kenya estate in the event of his demise. The Applicants herein, Moza Abdillahi Mohamed (hereafter “Moza”), Khalid Arvind Kanji Patel (hereafter “Khalid”) and Khalida Arvind Kanji Patel (hereafter “Khalida”) are the beneficiaries named in the said Will. Moza, Khalid and Khalida have, in the proceedings pending before this Court, challenged the validity of the said Will. They contend that the same is a forged and that the Arvind lacked the capacity at the time he is alleged to have executed the Will to do so “in view of the intense chemotherapy he was undergoing”.
2. On May 24, 2023 this Court, at the request of the respondent’s advocates issued Witness Summons to Mr. Francis Kiarie Kariuki, an advocate of the High Court of Kenya practicing in Mombasa, requiring him to attend Court on May 29, 2023 to give evidence on behalf of the Respondent and to produce the letters dated October 29, 2014 and May 19, 2023. The first letter was Written by the said advocate and addressed to the Executive Officer of the Probate and Administration Registry, Mombasa and sought the certificate of confirmation of grant issued in respect of this matter together with the application for confirmation thereof. The respondent raises 5 issues regarding the letter:-



1. It did not identify the name of Mr. Francis Kiarie Kariuki's client;
  2. It identified the specific number of the Court file;
  3. The contents of the said letter shows that the Writer was aware that the confirmation of Grant in respect of the said cause had been issued by this honourable Court;
  4. The letter requested for copies of the certificate of confirmation of Grant and the application for such confirmation; and
  5. The Writer's file reference commenced with letter "M" possibly suggestive of the first initial of the 1<sup>st</sup> Applicant's name.
3. The Respondent's case in the pending objection proceedings is that Moza has all long been aware of this Probate cause and that she lied under oath in her affidavits and also in during her testimony on the 19<sup>th</sup> April 2023.
  4. Mr. Francis Kiarie Kariuki, advocate, appeared before this Court on May 29, 2023. The said counsel declined to testify on the ground that he could not be compelled to give evidence relating to the said correspondence as the same was privileged. He submitted that he could only testify in this matter if his client, whose identity he did not reveal, permitted him to do so. He averred that he had no such permission.
  5. On 2May 9, 2023, having heard all the parties I directed Mr. Kariuki and the counsel for the respondent to prepare, file and exchange Written Submissions so that this Court could decide whether Mr. Kariuki would be compelled to testify for the Respondent and to produce the 2 documents heretofore mentioned.

### **The Submissions of the Respondent**

6. The Respondent submitted that Moza, in her affidavit sworn on February 13, 2023, denied knowledge of the existence of the Will said to have been executed by Arvind. In the said affidavit she deposed that she only became of the alleged will in November 2022 when her advocates carried out a search of the Kenya Gazette and found Kenya Gazette Notice No.15555 dated October 22, 2013 "whereupon he checked the Court file and discovered the said Will". It is the Respondent's case in the pending objection proceedings that Moza knew about the alleged Will, despite her protestations to the contrary, in her oral and affidavit testimonies, having been given a copy of the said Will on 6<sup>th</sup> July 2013, and that she had drawn benefits under the said Will for almost 10 years. The Respondent submitted that it was only once the benefits under the said Will were exhausted that she saw it fit to challenge the Will vide the pending objection proceedings. It was submitted that knowledge by Moza of these proceedings is clearly relevant and a material issue in these proceedings.
7. The Respondent submitted the letter dated 29<sup>th</sup> October 2014, which was produced in the Respondent's Additional List of Documents filed on 23<sup>rd</sup> May 2023, should be considered in light of Moza's admission that she is a friend of Mr. Kariuki's wife, and that of Khalida in her testimony, that he is a friend of Mr. Kariuki's daughter, Josette. It was submitted that the letter dated 19<sup>th</sup> May 2023 vide which Mr. Kariuki responded to the Respondent's counsel request to testify bore the same file reference number as the impugned letter dated 29<sup>th</sup> October 2014.
8. It was submitted that the prior knowledge, or lack thereof by Moza the Will is necessarily material and relevant to the matters in issue in these proceedings. The Respondent submitted that the information sought from Mr. Kiarie is limited to the identity of his client and the reason behind his request for a



copy of the certificate of confirmation of Grant. It was further submitted on behalf of the Respondent that the parties in this matter have a constitutional right to a fair trial under article 50(1) of the [Constitution of Kenya](#), 2010, which right is non-derogable under article 25(c) of the [Constitution](#). The respondent urged that his application is buttressed by article 35(1) (b) of the [Constitution](#) which provides that “every citizen has the right of access to... information held by another person and required for the exercise or protection of any right or fundamental freedom.” The Court was referred to the case of [ABN Amro Bank NV v Kenya Pipeline Limited](#) [2014]eKLR and [Nelson Kadison v Advocates Complaints Commission & Another](#) [2013]eKLR on the importance of access to information to fair trial.

9. Counsels for the Respondent submitted that section 134 of the [Evidence Act](#) wasn't relevant as the information sought is, in their view, not privileged. They argued that legal professional privilege applies only to the communication made for the purposes of seeking and receiving legal advice. It was submitted that Mr. Kariuki was not being asked to disclose confidential information given to him by his client nor documents received from his client not even any advice he may have given. The said counsels urged, relying on the case of [Bursil v Tanner](#) (1885) vol 55 LJQB 53, that when information is material to any issue in court proceedings an advocate is duty bound upon being called by a witness summons to provide the identity of his client on the ground that such information is not deemed as confidential and thus cannot be privileged. Reliance was also placed on the case of [Loreley Financial Ltd v Credit Suisse Securities Ltd](#) [2023] 1WLR 1425 where the Court stated that “such privilege means that the contents of communication is protected from disclosure, as is secondary evidence which would tend to reveal the content of such communication, but the disclosure of the identity of those giving instructions to solicitors does not generally reveal such content”. It was thus submitted that Mr. Kariuki could be compelled under order 16 Rule 7 of the [Civil Procedure Rules](#) to identify his client.
10. The Respondent submitted that even if it was assumed that the information was privileged the protection accorded to Mr. Kiarie by section 134 of the [Evidence Act](#) was lost the moment he wrote the letter dated October 29, 2014 and thus brought it into the public domain.
11. Relying on the cases of [Sita Steel Roiling Mills Ltd v Jubilee Insurance Co Ltd](#) [2007]eKLR, [DPP v Tom Ojienda](#) [2019]eKLR and [Nelson Kadison v The Advocates Complaints Commission & another](#) (*supra*) the Respondent urged that privilege, where it existed could be waived by the client. The Respondent argued that by writing the letter to the Court, the client, through his advocate, brought the letter to the public domain, and thus waived whatever privilege might have attached to it.
12. Regarding Mr. Kariuki assertion that he could request any information he wanted from the registry it was submitted that the usual practice of the Court is that the advocate must identify his client's interest in the matter and that as an advocate of the Court, Mr. Kiarie had a higher duty to the Court. The Court was referred to the case [Francis Mugo v James Bress Muthee](#) [2005]eKLR where Musinga J (as he then was) stated as follows:-

“... it must be borne in mind that in the discharge of his office, an advocate has a duty to his client, a duty to his opponent, a duty to the Court, a duty to himself, and a duty to the state as was well put by Richard du Cann in “The Art of the Advocate”. As an officer of the Court he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth”.
13. The Court was also referred to the case of [Kenya Revenue Authority v Mount Kenya Bottlers Ltd & Others](#) (Petition No. 41 of 2019) [2021] KESC 26 (KLR) for the proposition that Courts frown upon improper, dishonest or discourteous conduct on the part of advocates.



14. The Respondent thus urged this Court to compel Mr. Kariuki to testify in this cause as a witness for the Respondent so that he could identify his client.

### **The Submissions of Mr. Francis Kiarie Kariuki's advocate**

15. Mr. Kariuki filed Written Submissions dated July 13, 2023. The said counsel opposed the summons on the ground that the information sought was privileged. He referred the Court to section 134(1) of the *Evidence Act*. In his submissions he argued that the only circumstances under which privilege can be waived is set out in section 134(1) of the said Act and that is where the communication was held in furtherance of an illegal purpose and where any fact shows that the client has committed a crime or fraud. He submitted that the proviso to section 134(1) of the *Evidence Act* does not include disclosure of the name of a client by an advocate.
16. In support of his contention that the advocate client privilege belonged to and could only be waived by the client Mr. Kariuki relied on the case of *Mohamed Salim Balala & Another v Tor Allan Safaris Limited* [2015]eKLR and *Conlos v Conlos* (1952)ALL ER 462. In the latter case, the Court stated thus
- “ what is the rule (as to privilege) and what is the meaning of the rule?... The object and the meaning of the rule is this, that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to his (client) should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent) that he should be enabled properly to conduct his litigation. That is the meaning of the rule.”
17. Counsel also referred to the case of *King Woolen Mills Ltd & another v Kaplan & Stralton Advocates* (1990-1994)EA 24 where the Court held that
- “ the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without the client’s consent. The fiduciary relationship exists even after the conclusion of the matter for which the retainer was created”.
18. He argued that he does not represent any of the parties in this matter. Mr. Kariuki submitted that it would be necessary for the Court to establish whether the evidence sought from him was relevant, material or necessary to the issues in controversy in this matter. He urged that he could not be compelled to identify his client as that would breach advocate client privilege and that he couldn’t do so unless his client waived the privilege.
19. Mr. Kariuki lastly submitted that as an officer of the Court, it was open for him to request any document from the Court file, as a public record “ as is the normal practice”. In his view, there is no legal requirement “for an advocate who is seeking information from a Court, of public record to state the party he/she is representing”. He therefore urged me to find that he cannot be compelled to testify for the Respondent in terms of the witness summons served upon him.



## The Respondent's Supplementary Submissions

20. The Respondent reiterated his previous submissions. In response to the counsel's submissions his advocates submitted further on two issues: -
- i. The extent of the protection afforded by section 134 of the [Evidence Act](#) to the communication between an advocate and his client; and
  - ii. Whether it was improper for Mr. Kariuki to write to the Court registry, seeking copies of the documents in the Court file, without identifying his client.
21. Regarding the first issue the counsels for the Respondent submitted that Mr. Kariuki wasn't being asked, in his capacity as an advocate, to disclose any communication made to him, or to state the contents of any document he had become acquainted with, or to disclose any advice given by him to his client. Rather all that is sought is the identity of his client. Such information, it was submitted isn't privileged. The Respondent's counsel submitted that the holdings in [Mohamed Salim Balala v TOR Allan Safaris Ltd](#) and the [King Woolen Mills Ltd v Kaplan & Stratton Advocates](#) have no bearing on, or are relevant to the instant case.
22. It was submitted that [Conlon v Conlon](#) [1952]2ALLER 462 does not support Mr. Kariuki's argument at all. Counsels submitted that privilege under section 134 of the [Evidence Act](#) is not absolute in any case.
23. The Respondent submitted that Mr. Kariuki must have Written the letter dated 19<sup>th</sup> October 2014 with the concurrence of his client. It was thus urged that "having brought this letter into the public domain upon the instructions of his client, any privilege attaching to it was lost". Relying on [Bursill v Tanner \(supra\)](#) the Respondent submitted that Mr. Kiarie should be compelled to do so. The holding in the said case was that:-
- "there is another ground compelling and disclosure of their names. The solicitor claims this privilege as that of his client. He must then state the names of the persons for whom he claims the privilege".
24. Lastly the Respondent impugned Mr. Kariuki's conduct, in particular that of writing a letter to Court without disclosing his client. It was therefore urged that Mr. Kariuki be compelled to attend Court "on a suitable date to be examined in terms of the Witness Summons issued against him in this matter".

## Analysis of the Applicable Law

25. I must now consider the foregoing submissions and make my decision. In my view, there is only one issue I must determine, which is whether I should compel Mr. Francis Kiarie Kariuki to testify in this Court and reveal the name of his client. In order to make this determination I must examine the law regarding advocate client privilege and determine if, bearing in mind the law, the letter written by Mr. Kariuki on October 29, 2014 is privileged as he submits and whether he may be compelled to disclose the identity of his client.
26. Section 2 of the [Advocates Act](#) defines a client as including "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."



27. Privilege is a special legal right, exemption, or immunity granted to a person or class of persons and an exemption to a duty. Privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that under ordinary circumstances, would subject the actor to liability. In the context of legal practice privilege is the client's right to refuse to disclose and to prevent any other person from disclosing confidential communication between the him and his advocate. The Court of Appeal in *King Woolen Mills Ltd v Kaplan Stratton Advocates* (1990-1994) EA 244 held that "the fiduciary relationship created by the retainer between client and advocate demands that knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without the client's consent. The fiduciary relationship exists even after the conclusion of the matter for which the retainer was created".

28. In Kenya the advocate–client privilege is provided for under section 134(1) of the *Evidence Act* which provides as follows:-

“(1) 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: Provided that nothing in this section shall protect from disclosure—

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client. (2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.”

29. Mr. Kariuki and the Respondent both agree that as a general principle of law advocate-client privilege exists. It is also a common ground that the privilege exists to protect a client and not the advocate. What the parties are unable to agree on is the extent of such privilege and whether the letter dated 29<sup>th</sup> October 2014 written by Mr. Kariuki to the Court, presumably with his client's consent, is privileged, or whether by dint of the said letter, written to a public body, whatever privilege existed was waived.

30. I must point out the purpose of the advocate- client privilege. In the *City & County of San Francisco v Superior Court* 231 P 2d 26, 30 (Cal 1951), it was held that:-

“the privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression or relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all facts the advice which follows will be useless, if not misleading; the lawsuits will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. Thirdly unless the client knows that his lawyer cannot be compelled to reveal what is told to him, the client



will suppress what he thinks to be unfavourable to the facts. Given such privilege, a client may make such disclosure without fear that his attorney may be forced to reveal information confided to him. The absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent”.

31. I wholeheartedly agree with the above holding.
32. Is the identity of the client privileged and can an advocate be compelled to disclose who he is acting for? I have looked at the authorities, in particular that *Bursill v Tanner* (1885) vol 55 LJQB and *Loreley Financial Ltd v Credit Suisse Securities Ltd* [2023] 1WLR 1425. In the latter case the Court state that  

“such privilege means that the content of communication is protected from disclosure, as is secondary evidence which would tend to reveal the content of such communications; but the disclosure of the identity of those giving instructions to solicitors does not generally reveal such content” (emphasis added).
33. Loreley Financial Ltd decision would appear to me to do two things; Firstly, to set out a general rule and secondly to provide for exception to that general rule.
34. I deduce from the authorities that I have considered that the Courts have generally declared that it is the subject matter of the brief, not the fact of the retainer that is privileged. There have been instances where Courts, utilizing the exception I have previously alluded to, have protected the identity of advocates’ clients. The exceptions have been in respect of cases where revealing the client’s identity would reveal so much of the confidential relationship between the advocate and his client that a literal application of the general rule would bring about an unsound result.
35. I have looked at the cases in which the Court compelled an attorney/solicitor/advocate to reveal the identity of the client. Broadly they arise in three situations. Firstly, the decision being based on the general rule that communication between an advocate and his client in furtherance of future crime is not privileged. Secondly, decisions grounded upon the general proposition that the parties in litigation are entitled to know who their opponents are. And thirdly decisions where the confidence is necessary for ascertaining whether privilege was present or not.
36. On the other hand, the Courts have determined that where a client has a reason to believe that his name would be confidential his identity would not be revealed. This is especially relevant where the revelation of the client's identity would have the collateral effect of revealing the previous connections conduct or transactions of the client. This was the holding of the US Supreme Court in the case of *Chirac v Reinecker*, 24 US (11 Wheat) 280 (1826) where it was found that disclosing the identity of the client would reveal not only the fact of the employment (of the attorney) but the reasons for the employment.
37. I have looked at the Summons in light of what I have stated in paragraph 35 above. I note that no crime is alleged to have been committed in this matter. Secondly, and as rightly put by Mr. Kiarie, he does not represent any party in this matter. it cannot therefore be said that compelling Mr. Kiarie Kariuki would enable Mr. Hasmukh Patel, the Respondent herein, to know the identity of his opponent. Thirdly determining whether privilege exists in this matter does not, in my view, call for, or require identification of Mr. Kariuki’s client.
38. In my view requiring Mr. Kariuki to reveal his client and would ultimately demand that the confidential/privileged information shared by Mr. Kariuki and his undisclosed client be revealed. To do so would therefore result in breach of section 134 of the *Evidence Act*.



39. I must also comment on applications of this kind. It is my opinion that Courts should be most reluctant to compel advocates to reveal the names of their clients, and only do so in the clearest of cases. Allowing such applications liberally will weaken the right to fair trial granted by article 50 of *Constitution of Kenya, 2010*. If litigants are unable to confer with their advocates freely, in the full knowledge that counsels will not turn against them in due time and be the prosecution/opposing parties' witnesses, the right to representation by counsel of one's choice would be a mirage. Consequently, the status of the right to fair trial, whose lynchpin the right to representation by counsel of one's own choice is, as a right in the Bill of Rights that cannot be derogated from would be neutered. I cannot think of something more dystopian.
40. I do not agree with counsel for the Respondent that the letter dated 29<sup>th</sup> October 2014 amounts to waiver of privilege. Although waiver can be explicit or implicit. I do not see how in the circumstances of this case the Mr. Kariuki's client can be said to have waived the privilege implicitly.
41. The upshot of the foregoing is that I find no merit in the summons. I find and hold that although Mr. Kariuki is a competent witness, he cannot be compelled to reveal the identity of his client. I therefore decline to compel Mr. Kariuki to attend Court to be examined in terms of the Summons issued against him.
42. Due to the nature of this matter each party shall bear own costs.
- Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023 VIA MICROSOFT TEAMS.**

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**GREGORY MUTAI**  
**JUDGE**

