



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.107 OF 2017

IN THE MATTER OF THE ESTATE OF ANDREW KABERA GACHINI (DECEASED)

A N D –

JAMES MUITA KABERA

JOSEPH MATHENGE KABERA.....APPLICANTS/OBJECTORS

- V E R S U S -

JOHN MAINA KABERA

EVAN NDIRITU KABERA

DAMARIS NJERI KABERA.....RESPONDENTS/EXECUTORS

R U L I N G

The Notice of Motion dated 3/9/2018 and filed in court on 24/9/2018 is brought under the provisions of Sections 1A, B, 3A of the Civil Procedure Act Order 51 Rule 1 CPR and Rule 9 of the Advocates (Practice) Rules. The objectors James Mwita Kabera and Joseph Mathenge Kabera seek the following orders:

(1) That the Hon. Court be pleased to disqualify Mr. Kariuki Mwangi Advocate and the firm of M/S. Kariuki Mwangi & Co. Advocates from representing the Executors in this matter or any other party in this matter;

(2) Costs hereof be in the cause.

The said application is premised on the following summarized grounds:

That the subject matter relates to the Estate of the late Andrew Kabera Gachini; that one of the issues in contention in the cause is the existence of a Will dated 10/1/2018 whereas the Executors contend that the Will exists, the objectors dispute its existence. The said Will is purported to have been drawn by Mr. Kariuki Mwangi Advocate through his firm M/S. Kariuki Mwangi & Co. Advocates; that Mr. Mwangi, who represents the executors in this cause, will therefore be a witness in this matter because he needs to be asked to prove its existence and he will be subjected to cross-examination by the objectors on its existence or otherwise and the authenticity of the said Will; that Mr. Kariuki Mwangi Advocate cannot perform a dual role of an advocate for the Executors as well as being a witness and should be barred from acting in the matter.

The grounds were reiterated in the affidavit of the objectors James Mwita Kabera and Joseph Mathenge Kabera dated 18/9/2018. Mr. Murimi, counsel for the objectors filed submissions on 30/4/2019 and although he was required to come and highlight the submissions, he did not attend court. It was submitted that Rule 8 of the Advocates (practice) Rules, 1966 provides the statutory basis upon which an Advocate can be disqualified from acting in a case. The said Rule provides as follows:

“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 doesn’t prevent an advocate from filing evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

Counsel explained that if an advocate may reasonably be required to be a witness and to give evidence in a contentious matter, then the advocate should not appear before the same court as an advocate for any of the parties.

However, if the matter is not contentious and the advocate gives evidence, he would not be disqualified. In support of that proposition, counsel relied on the decision in *Dorris Kanini Ndunda v Family Bank Ltd (2019) eKLR* and *Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others (2017) eKLR*. Counsel submitted that the issues that arose in the above decisions that need to be determined in such a case are:

1. *Whether there is a contentious matter of fact that the advocate will provide evidence on as a witness;*
2. *Whether the advocate is a viable witness in the instant case;*
3. *Whether the advocate's testimony is relevant, material or necessary to the issues in controversy;*
4. *Whether real mischief will result unless the advocate is disqualified from acting for a party in the cause.*

On the first issue, it was submitted that the purported Will of the deceased, Andrew Kabera Gachini dated 10/1/2008 is a contested issue in the cause; that its existence, and validity is contested through the objection dated 7/3/2016 and therefore this is a contentious fact to which Mr. Mwangi is privy to and will need to give evidence in the cause; that the objectors have raised issue with whether the deceased had legal capacity to make a Will at the time he purportedly did and the circumstances under which it was kept at the firm of Kariuki Mwangi Advocates; that though it is alleged that Mr. Nderitu Komu drafted the Will, Mr. Mwangi as head of the firm must have been privy to information regarding storing of the Will; that Mr. Nderitu Komu left the firm and it was left in the custody of Mr. Mwangi.

On the second issue of viability of Mr. Kariuki Mwangi as a witness, it is contended that though the Will is drawn by Ms. Kariuki Mwangi & Co. Advocate, the one who actually drew it is unknown as it does not bear a stamp or certification yet Mr. Kariuki Mwangi has extensive knowledge and information about the will as can be gleaned from his Replying Affidavit to this application; that the contents of Mr. Kariuki Mwangi's affidavit will go far in establishing the validity of the Will.

As to the relevance of Mr. Kariuki's testimony to the issue in controversy, counsel invoked the provisions of Section 5 of the Evidence Act as to when the counsel's evidence is relevant to the fact in issue. It was reiterated that the facts in issue are whether this was the Will of the deceased and whether it is Nderitu Komu Advocate who drafted the Will as it was not certified or stamped.

On the last issue of whether any prejudice will be suffered unless Mr. Kariuki Mwangi is disqualified, counsel was of the view that the objectors will be prejudiced if Mr. Kariuki Advocate acts for any of the parties and counsel relied on the decision of *British-American Investment Co. (K) Ltd v Njomaiha Investments Ltd & another (2014) eKLR* where J. Kariuki held inter alia that where a party alleges conflict of interest, he must provide sufficient evidence to prove that indeed the said conflict exists.

Counsel urged that justice should not only be done but be seen to be done and if Mr. Kariuki is not disqualified from the case, justice will not be seen to be done. Counsel also relied on the decision *Uhuru Highway Devt Ltd & 3 others v Central Bank of Kenya & 4 others (2003)* where the court observed that the counsel under a retainer may have more confidential information than was apparent on the charge which could be used against the other parties who were his former clients. The same was applied to this case, that Mr. Kariuki's knowledge of the Will may be more than they know and may be prejudicial to the objectors whom he does not represent. He urged that the firm of Kariuki Mwangi be disqualified from the case.

Mr. Kariuki Mwangi advocate swore an affidavit in opposition dated 22/11/2018 in which he deponed that the application is bad in law, incompetent and an abuse of the court process and should be struck out because it does not meet the principles for disqualifying an advocate from acting for a client and hence lacks merit; that the executors of the said estate appointed the firm of Kariuki Mwangi & Co. Advocates to file this cause which was formerly *Nakuru H.C.Succ.Cause No.631/2013*, in respect to the deceased's estate; that the objectors and executors are beneficiaries of the estate and the 1st objector signed, while the 2nd objector declined to sign the consent to confirmation of grant of Probate of written Will, form 37 (JKM.1). He also deponed that in January, 2018, the deceased took a book to his office in which he had stated his wishes regarding his estate upon his death whereby instructions were given to Mr. Nderitu Komu Advocate, who then worked at his firm to translate the Will; that neither him nor Nderitu were attesting witnesses nor did they have any personal interest; that after the testator died on 28/3/2008, he had a meeting with the family on 7/6/2008 when the Will was read and explained to the beneficiaries and there was no dispute as to the distribution of the estate or validity of the Will and that this application is therefore an afterthought (JKM.2). It is counsel's contention that he has no personal interest in the matter nor is he an executor or beneficiary and that neither him nor any advocate in his firm will be called upon to testify. He denied having acted unprofessionally or having any information that may be detrimental to the estate.

Counsel filed submissions in support of their positions which were highlighted by Ms. Wanjiru Advocate.

Counsel maintained that the deceased took a book to their office for translation from Kikuyu to English and that what was within there is never changed; that the advocate who translated the Will never witnessed it and there is no time he expressed interest in the Will; that in light of the applicable law, that is, the *Law Society of Kenya (LSK) Code of Conduct and Ethics for Advocates 2016 Rule 6 paragraph 87-91*, deal with issue of conflict of interest. Paragraph 87 – 88 thereof defines, what conflict of interest entails while Section 89 gives the rationale for the rule against conflict of interest. Paragraph 91 cites the incidents where conflict of interest may arise:

“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.”

Reliance was also made on paragraph 8 of the Advocates (Practice) Rules which I have already referred to earlier.

The respondent relied on the decision of *Serve in Love Africa (Sila) Trust (Supra)* where the court held that each case must be considered on its own peculiar facts and that the court will intervene to stop counsel from representing a client if satisfied that real prejudice is likely to be caused to the former client. The court also considered representation by an Advocate of their own choice as being a Constitutional right which can only be taken away in exceptional circumstances. Counsel urged that the counsel has never acted for the objector which information he could use negatively against him. Counsel submitted that a conflict of interest could only arise where an advocate acted for the opposite party and gathered information that may be used against the other which has not happened in this case.

I have considered the application and the rival arguments. There are various decisions cited to this court which considered the issue of disqualification of advocates. The only issue for determination at this stage is whether the firm of Kariuki Mwangi should be disqualified from representing the executors of the deceased's estate for likely conflict of interest.

I do not think at this stage it matters that the objectors did not raise objection soon after the will was read. At the time of reading, the contents were new to the parties and they needed time to consider the will and get instructions to enable them agree or challenge the will.

The reasons why the objectors want the counsel to disqualify himself is first, that the will which was prepared and executed by the firm of Kariuki Mwangi is contested and it is questioned whether the document before the court (will) is the deceased's last will; that the will was neither certified nor stamped and it is unknown when counsel prepared it. There is an issue of the storage of the will in that though Mr. Mwangi claims that Nderitu Komu Advocate prepared it, Mr. Mwangi has critical information on the will and hence a viable witness.

So far, no lists of witnesses have been filed for this court to ascertain whether indeed Mr. Kariuki Mwangi would be listed as one, but having intimated that the objectors intend to call him as a witness, I believe nothing would stop them from including counsel in their list of witnesses.

The proviso to Rule 8 of the Advocates (Practice) Rules does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matters of fact in any matter in which he acts or appears.

This is however a contentious matter because of the reasons I have stated above.

In *William Audi Odode & another v John Yier & another, the Court of Appeal Nairobi Application No.360/2004*, stated as follows:

“I must state on 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 a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interest 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.”

The above reasoning stems from the fact that legal representation is a Constitutional right that cannot be taken away on flimsy grounds. There must be valid reasons for a court to deprive a litigant of the said right.

The issue of disqualification was also considered by J. Gikonyo in *Dorothy Seyanoi Moschoni v Andrew Stuart & another (2014) KLR* where the Judge said:

“[12]. I will not re-invent the wheel. All the cases which have been quoted by counsel are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that “these advocates participated in the drawing and attestation of the Deeds in dispute”; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant says “I intend to call them as witnesses”. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be obvious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy” Or is there other evidence which will serve the same purpose as the evidence by counsel. Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a

disqualification or counsel will not be ordered.

[23] In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the applicant by representation of the 1st respondent by the said firm of advocates. And I so hold fully aware of the applicant's desire to call them as witnesses and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious."

I am guided by the above decisions. The rule on disqualification guards against the question of conflict of interest. A conflict of interest involves breach of the fiduciary duty to an Advocate's client or former client. Examples of conflict of interest to include where an advocate acts for both parties in matters such as more parties to a conveyancing or commercial transaction, for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company which he is an associate is involved or has an interest; or where for some other reason, his own interest or an associates' may conflict with his clients' such as where he may be a material witness in his clients' matter.

In the instant case, the firm of Kariuki Mwangi was neither counsel for the objector nor the executors. The firm however prepared and or executed the will under challenge. At this stage, this court is not charged with determining the validity of the will but whether the firm of Kariuki Mwangi should continue to represent the executors and other beneficiaries of the deceased's estate.

Mr. Mwangi deponed that it is Mr. Nderitu Komu who worked for the firm then, who prepared the will. It is not known when Mr. Nderitu left the firm and but the firm had custody of the will till it was read. Besides, the copy of the will is not certified by any counsel. In my view, it is Mr. Nderitu who prepared the will who is better placed to be as a witness to clarify the issues raised, i.e. whether the deceased made a will; whether the deceased had the capacity to make one; Whether the will made by the deceased is the one before court. Mr. Kariuki Mwangi may not be in a position to answer to some of the above questions. I believe that the evidence of Mr. Nderitu would be relevant and material in the dispute over the validity of the will more than Mr. Kariuki Mwangi. No good grounds have been shown why the executors should be denied their Constitutional right to appoint counsel of their choice.

The upshot is that, there are no good reasons why Mr. Mwangi should be disqualified from representing his clients the executors, when Mr. Nderitu Komu can be summoned as a witness to answer all the issues raised regarding the will. The application is dismissed. Costs to abide the determination of the cause.

Dated, Signed and Delivered at NYAHURURU this 12th day of May, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Murimi for the Objector/Applicant

Ms. Wanjiru for the Respondent

Soi – Court Assistant