



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT BUSIA**

**CIVIL CASE NO. 35 OF 2019**

**THADDAEUS BRIGHT OCHADA**

(Suing in his capacity as Administrator of the Estate of

MUSA MASIKHE KADIMA – Deceased) .....**PLAINTIFF**

**VERSUS**

**ALLAN SIDONYI KADIMA .....1<sup>ST</sup> DEFENDANT**

**AMOS OPADIA KADIMA.....2<sup>ND</sup> DEFENDANT**

**MICHAEL KADIMA .....3<sup>RD</sup> DEFENDANT**

**WALTER NACHAKI KADIMA .....4<sup>TH</sup> DEFENDANT**

**GEORGE BIRIKO KADIMA..... 5<sup>TH</sup> DEFENDANT**

**JOSEPH ONYANGO KADIMA.....6<sup>TH</sup> DEFENDANT**

**EDWARD WERE KADIMA .....7<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. The plaintiff brought the notice of motion application dated 26<sup>th</sup> June 2019 under the provisions of Section 1A, 1B & 3A of the Civil Procedure Act and Rule 9 of the Advocate Practice Rules. The plaintiff (hereinafter referred to as the applicant) sought for orders;

**a) That the firm of J. V. Juma & Co. Advocates currently acting for the defendants herein be disqualified from acting for the defendants in view of conflict of interest prevailing.**

**b) That costs of the application be in the cause.**

2. The application is supported by the 3 grounds listed on its face that;

***(i) That the advocates currently on record for the defendants has previously undertaken instructions on behalf of the applicant herein over the same subject matter currently prevailing before this Court by registering restriction on the properties giving rise to this suit.***

***(ii) That while taking instructions from the applicant the advocates appearing for the defendants obtained information in confidence given the advocate-client privilege which information the said advocates are likely to use to the detriment of the applicant thus occasioning the applicant prejudice.***

***(iii) That considering that the subject matter giving rise to this suit has to do with trespass and interference of the applicants right to ownership of property, with the registration of restrictions on the suit properties the defendants advocates are potential witnesses in this suit.***

3. The application is further supported by the affidavit sworn by Thaddeus Ochada. Mr Ochada deposed that the law firm of J. V. Juma &

Co. Advocates did undertake instruction on their behalf to register a Caution on the suit titles **Samia/Bukang'ala 'B'/477 & 478**. That while giving instruction to the said advocate, Mr. Ochada provided and shared all information relevant to be in confidence and was privileged communication which may be used against him to the detriment of his Case. That the registration of the restrictions also make the advocate a potential witness.

4. The application is opposed by Mr. J. V. Juma advocate's replying affidavit dated 31<sup>st</sup> July 2019. Mr. Juma took up the issue with the plaintiff's signature on the supporting affidavit which he deposed is different from the signatures appearing on the verifying affidavit; witness statement and petition for letters of administration. Counsel confirmed that his office assisted the plaintiff to lodge a Caution against title No. **Samia/Bukang'ala 'B'/477 & 478** in December 2017. He also confirmed that he is the one who processed the limited grant of the plaintiff's father's estate. However he deposes that the two matters were not contentious. Mr. Juma continued that he did not know the defendant at the time of carrying out those instructions. He denied sharing information with the plaintiff regarding this Case as his instructions did not involve recording any statements from the plaintiff.

5. The plaintiff filed a further affidavit in which he confirmed signing the supporting affidavit at the date and place indicated. The plaintiff said he has more than one signature. The applicant deposed that the replying is merely an evasive tactic of skirting around the grounds raised in his application. It is his contention that the said law firm was approached to register a Caution because there was a dispute between the plaintiff and the defendant and he had to share the contents of the dispute with the advocate.

6. The parties filed written submissions in prosecuting the application; the applicant filed his on 27/11/2019 while the respondent filed theirs on 29<sup>th</sup> November 2019. I have read and considered the submissions as rendered. Both parties cited the Case of Eldoret **Serve In Love (SILA) Trust Vs David Kipsang Kipyego & 7 others (2017) eKLR** in support of their submissions. In the said case, both parties quoted Gikonyo J where the Judge stated thus;

*“Conflict of interest can arise broadly where an Advocate acts for both parties in a matter 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 in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his Client's, such as where he may be a material witness in his Client's matter”.*

7. The Counsel for the defendants further relied on the Cases of **Yusuf Abdalla Ibrahim Vs Ibrahim Noor Hillowly (2017) eKLR; Delphis Bank Limited Vs Chatthe & 6 others (2005) 1 KLR 766 and RE a firm of Solicitors (1995) 3 All E.R. 482**.

In the Yusuf Abdalla Ibrahim, the Court stated that;

*“In considering this matter I find that the Law on disqualification of counsel on allegation of conflict of interest is now established. A conflict of interest exists, if there is a substantial risk that the counsel's representation of the client would be materially and adversely affected by the counsel's own interests or by the counsel's duties to another current client, a former client, or a third person. The key issue is whether the counsel's exercise of independent professional judgment is likely to be unduly influenced by other interests”.*

In **RE a firm of Solicitors** the court held that;

*“... on the issue of whether the solicitor is possessed of relevant information, it is in general not sufficient for the client to make general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required”.*

8. The Cases cited do set out the principles to be considered before disqualifying an advocate from acting for a party in a matter. The core principle being the fiduciary relationship that exists between an advocate and a client. The question raised by the applicant is that the instructions given to the advocate during the registration of the Caution on the suit titles relates to the dispute the subject matter of this suit. In a rejoinder, the counsel stated that the information given was not contentious nor did he share with applicant information regarding this case.

9. In a copy of the certificate of official search for L.R. No. 477 annexed, there is a restriction registered on 22/12/2017 pursuant to a letter written by J. V. Juma & Co. Advocates. This letter was written on behalf of the applicant. The letter was unfortunately not annexed by both parties but the Court can infer that Mr. Juma cannot have written the said letter without being given a background by the plaintiff of the dispute to necessitate the registration of a Caution. Further and in the event that the registration and or existence of the Caution is disputed during the hearing, the law firm of J. V Juma will definitely become a potential witness. The registration of the Cautions to the extent that it relate to the titles in dispute between the same parties does in my opinion amount to a contentious issue.

10. It is indeed true that a party should not be denied a right to representation of Counsel of his choice but that right should not be exercised to the detriment of another party in the same dispute/suit. Consequently it is my considered view that the information given to J. V. Juma in the cause of registration of the restrictions on the suit title precludes him from acting for a party on the opposite side. To do so would allow him to breach the advocate/client fiduciary duty to the detriment of the plaintiff. The plaintiff has indeed given the particulars of the information. It is inappropriate to make the applicant disclose the exact instructions he gave Mr. Juma advocate when the hearing of the case has not commenced.

11. In conclusion, I am satisfied that there is merit in the application dated 27<sup>th</sup> June 2019. The same is allowed in terms of prayer (a) with costs in the cause.

**Dated, signed and delivered at BUSIA this 13<sup>th</sup> day of February, 2020.**

**A. OMOLLO**

**JUDGE**