



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1045 OF 2013

IN THE MATTER OF THE ESTATE OF WILLIAM KIMUTAI MARTIN (DECEASED)

JASMIN MARTIN.....APPLICANT

VERSUS

DAVID COLIN KIPRUTO MARTIN.....1ST RESPONDENT

KIM CHERUIYO MARTIN.....2ND RESPONDENT

RULING

1. The deceased William Kimutai Martin died testate on 29th February 2012. He left a Will dated 20th July 2011 drawn by Advocate Francis Munyororo from the firm of John Mburu & Company Advocates. A grant of probate was made to David Kipruto Colin Martin, Ian Kipkoech Martin and Kim Cheruiyot Martin on 19th July 2013 and confirmed on 19th June 2014. One of the executors, Ian Kipkoech Martin, died on 17th June 2015. The grant of probate was rectified on 20th June 2016 to remove his name leaving two executors.

2. The present application was dated 26th June 2018. It sought the disqualification of the firm of John Mburu & Co. Advocates, including any of the partners or employees therefrom, from acting for the respondents or any other party forthwith in this matter and the expunging from the record of any pleadings, affidavits and submissions filed by the firm in this matter. The application was based on the grounds that:

a) one Mr. Francis Munyororo a partner in the said firm drafted the Will dated 20th July 2011 of the deceased which forms the substratum of this matter;

b) the construction of the various clause of the Will as drafted by the said firm is central to the dispute in court concerning the estate herein and as such the said firm is an integral witness in interpreting the ambiguous clauses of the Will based on its role;

c) under **Regulation 8** of the **Advocates (Practice) rules 1996**, an advocate must not act in any matter where they are likely to be called as a witness;

d) the firm of John Mburu & Co. Advocates, including one of its partners Mr. Francis Munyororo, have previously acted for all the beneficiaries of the estate of the deceased, including Ian Kipkoech Martin (deceased) during his lifetime and thereafter his estate after he passed away on 17th June 2015, Ziana Martin who together with the applicant is a joint administrator of the estate of Ian Kipkoech Martin (deceased) and the applicant;

e) in the course of acting for aforementioned clients the said firm was imparted with knowledge and confidential information material to the matters in contest and the knowledge and information received is privileged by reason of the confidentiality arising from the advocate-client relationship;

f) the said firm is clearly conflicted to act for the respondents or any other party on this matter; and

g) there is real and imminent danger that the applicant shall be heavily prejudiced if the firm of John Mburu & Company Advocates is allowed to continue acting in these proceedings.

The application was supported by the affidavit of Jasmin Martin dated 26th June 2018

3. The application was not opposed.
4. The applicant filed written submissions together with authorities which I have considered.
5. **Regulation 8** of the **Advocates (Practice) rules 1996** states 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 does not prevent an advocate from giving 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.”

In *Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR* where the court held as follows:

“There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result.”

6. In *British-American Investments Company (K) Limited v Njomaiha Investments Limited & another [2014] eKLR*, the court reiterated that existence of conflict of interest must be demonstrated and stated as follows:-

“It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.”

7. **Rule 8 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 the Court. I have considered the evidence on record. I note that Mr. Francis Munyororo, a partner in the firm of John Mburu & Company Advocates, drafted the Will dated 20th July 2011. The firm has also previously acted for all the beneficiaries of the estate of the deceased, including Ian Kipkoech Martin (deceased executor) during his lifetime and thereafter his estate after he passed away on 17th June 2015, Ziana Martin and the applicant herself. The said advocate now acts for the respondents against the applicant whom he has acted for in previous matters.

8. First, if any part of the Will is contested on any point or needs elaboration, Mr. Francis Munyororo is likely to be called as a witness to shed light. This in itself places Mr. Munyororo in a position of conflict.

9. Secondly having acted for all the beneficiaries of the estate, and specifically for the applicant during administration of the estate of her deceased husband Ian Kipkoech Martin who was an executor for the Will dated 20th July 2011, Mr. Munyororo again is conflicted in the present suit where he now acts against his former client the applicant.

10. In view of the foregoing, I allow the application to the extent that Mr. Francis Munyororo and the firm of John Mburu & Company Advocates shall cease acting for the respondents in this matter. The respondents are at liberty to appoint another counsel or law firm to represent them going forward.

11. On the prayer to expunge any pleadings, affidavits and submissions filed by the firm of John Mburu & Co. Advocates from the record, I note that the petition was filed by the firm, and the same led to the grant of probate and the grant was confirmed. I decline to grant the prayer.

12. I ask that the costs of the application be borne by John Mburu & Co. Advocates.

DATED and DELIVERED at Nairobi this 19TH day of NOVEMBER 2018.

A.O. MUCHELULE

JUDGE