



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSES NOS. 1975 AND 2129 OF 2006**

**IN THE MATTER OF THE ESTATE OF BERNARD MARTENS (DECEASED)**

**RULING**

1. I am called upon to determine the summons dated 19<sup>th</sup> May 2016. It is brought at the instance of Ryets Connie Meuldjik, the applicant, who seeks that Mr. Justice Philip John Ransley, and any other partner in the law firm of Messrs. Ransley, McVicker and Shaw, Advocates, be disqualified from acting for Robert Max Mulie, the respondent executor. It is grounded on the matters set out on its face, as well as on the facts deposed in the affidavit of the applicant sworn on 19<sup>th</sup> May 2016. .

2. The applicant avers that she married the deceased in 1966 and divorced him in 1992. During the course of the marriage the parties had acquired a property known as LR No. 8596 Watamu. She asserts that she and the deceased owned the same as joint tenants. During the divorce process the said property was allotted to her as part of the divorce settlement. It would appear that the property had not been transferred to her name as at the date of the deceased's demise in 2015. Upon the demise the applicant expected that the property would devolve to her by the principle of survivorship; however, she discovered that the said property had been transferred by the deceased in 1995 to a company known as Lulumizi Limited. The transfer document indicated that the applicant and the deceased had executed the same before Mr. Philip Ransley, who is partner in the law firm of Messrs. Ransley, McVicker and Shaw, Advocates, who are acting for the executor of the will of the deceased in these proceedings. She asserts that she was not party to the events of 1995 and that she did not even know Mr. Ransley. She states that one of the issues to be determined by the court will be the ownership of the said property and the validity of the transfer. She urges that the continued representation of the executor by the firm of Messrs. Ransley, McVicker and Shaw, Advocates was inconsistent with the provisions of the Advocates (Practice) Rules.

3. The respondent executor swore an affidavit on 10<sup>th</sup> June 2016 in reply. He deposes largely on information from Mr. Ransley and Ms. Shaw. According to him, Mr. Ransley has informed him that he did sign the transfer dated 18<sup>th</sup> December 1995 in the presence of both the deceased and the applicant, but he adds that he never made the alteration by hand which appears on the document. He also states that the said instrument was not used to transfer the title to the company known as Lulumizi Limited. The transfer to the said company was allegedly done in 1997, witnessed by Guy Elms, Advocate, and not Mr. Ransley. He further avers that it was Ms. Shaw handling the matter and not Mr. Ransley, and Mr. Ransley was available to be called as a witness as and when needed by the applicant. In any event, he states the firm of Messrs. Ransley, McVicker Shaw, Advocates was formed in 2006 and was not party to the said transactions which were handled then by the law firms of Daly & Figgis and Archer & Wilcock. He asserts that the property was transferred in 1998 on the strength of the transfer witnessed by Guy Elms, Advocate, on 3<sup>rd</sup> July 1997.

4. To that reply, the applicant swore an affidavit on 23<sup>rd</sup> June 2016 in response. She asserts that she was certain that she was not in Kenya in 1995 when she is alleged to have executed the transfer before Mr. Ransley. It is her case that whether or not the alleged document was the basis for the transfer of the property to Lulumizi Limited there was still a fraud and Mr. Ransley was complicit one way or the other. She avers that she would feel prejudiced by the involvement of the firm of Messrs. Ransley, McVicker & Shaw, Advocates in the matter.

5. The application was argued orally on 20<sup>th</sup> July 2016. Mr. Kuyoh for the applicant stated that Mr. Ransley had witnessed execution of a transfer instrument whose validity is contested and he may be required to be produced for cross-examination. He cited Rule 9 of the Advocates (Practice) Rules to

submit that an advocate is forbidden from appearing in a matter where he may be required to present evidence as a witness. He argued that although Mr. Ransley acted in non-contentious business, allegations of fraud have been raised and the matter has become contentious and he should not act in the circumstances. He submitted that the disqualification of Mr. Ransley should mean that his law firm, including the other partner, Ms Shaw, ought not to act in the matter, arguing that the two are one and the same. He then referred me to the list and bundles of authorities that he had field to buttress his case. Mr. Kuyo's submissions were supported by Mr. Kahonge for Sabine Martens, a daughter of the deceased and the applicant.

6. Ms. Shaw, for the respondent, argued that although the applicant denies signing the disputed transfer document she does not disown the signature that is purported to be hers. She stated that the said document is not the one that was used to convey the title and therefore the said document is of no consequence. She added that there was no proof of existence of a retainer of Mr. Ransley. She asserted that she was not privy to the transaction and therefore there would be no basis for her disqualification and that of the law firm, so that even if the court found that Mr. Ransley was a potential witness there would be no basis for disbarring the other advocates in the law firm from the matter. Mr. Gutto supported the submissions by Ms. Shaw, but added that Rule 9 only applies to an advocate and not the law firm.

7. The applicant's list of authorities, dated 15<sup>th</sup> July 2016, has three (3) decided cases, being *Delphis Bank Ltd vs. Channan Singh Chatthe & 6 others* (2005) eKLR, *British-American Investments Company Limited vs. Njomaita Investments & Another* (2014) eKLR and *Jacob Muriungi Mwendwa vs. Mbaya M'Mwendwa* (2004) eKLR. The Advocates Act, Cap 16, Laws of Kenya is also listed.

8. The relevant statutory provision which provides the background to the objection is not the Advocates Act itself, but the subsidiary legislation known as the Advocates (Practice) Rules. Its Rule 9 states as follows:-

*'No advocate may appear as such before any court or tribunal in any manner 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 matters in which he acts or appears.'*

19. In the *Delphis* case the point was made that the bar to counsel appearing as a potential witness was not subjective. The court appeared to suggest that the nature of the evidence the advocate would be required to tender before court ought to be disclosed to assist the court decide the matter. It was said that where the evidence was merely formal and non-contentious the proviso would apply and the advocate would be at liberty. The court in the *British-American Investments Company (K) Limited* case, held that it would work hardship on a law firm to disbar it from a matter merely because one of its advocates witnessed an agreement to which one of the parties to the dispute was privy. In the *Jacob Muriungi Mwendwa* case, two law firms that had drawn sale agreements the subject of the proceedings were barred from acting for some of the parties in the dispute on the grounds that they were potential witnesses.

10. The executor on his part cited seven (7) authorities. In *King Woolen Mills Ltd and another vs. Kaplan & Stratton Advocates* (1990-1994) EA 244, the court dealt with the circumstances where an advocate may not act for several clients where conflict of interest is likely to arise as between the clients. *Supasave Retail Limited vs. Coward Chance (a firm) and others* (1991) 1 All ER 668 too deals with conflict of interest situations. The court in *Francis Mugo & 22 others vs. James Bress Muthee & 3 others* (2005) eKLR, disqualified an advocate from acting for plaintiffs on the grounds that he was the one who had drawn the leases the subject of the suit, and he could be called as a witness in the proceedings. The court, in that case, was guided by the earlier decision of the Court of Appeal in *Uhuru Highway Development Lt & others vs. Central Bank of Kenya & 4 others* (2003) eKLR, where an advocate had been barred from conduct of a matter on similar grounds. In *Oriental Commercial Bank Limited vs. Central Bank of Kenya*

(2012) eKLR, it was held that a party has a constitutional right to legal counsel of his choice, which has to be balanced against right of a party to confidentiality from his counsel. The right to confidentiality only outweighs the right to counsel of one's choice where there is real mischief or prejudice, and the advocate, in the absence of such mischief or prejudice, ought to be allowed to act in the matter. A similar point was made in *HF Africa vs. AMR Gharib* (2005) eKLR and *Kiragu Holdings Limited & 6 others vs. Minister for Finance & 5 others* (2012) eKLR.

11. It is common ground that Mr. Ransley drew and witnessed the transfer in question. The applicant states that she shall be raising issues relating to the said transfer and Mr. Ransley may be called as witness in the circumstances. Mr. Ransley himself has stated, through the executor, that he is ready to testify in the matter if so required. The only issue to determine here is whether the firm of Messrs. Ransley, McVicker and Shaw, Advocates, in which Mr. Ransley is a partner, ought to be disqualified from representing the executor in this cause. The only ground being advanced in that behalf is that Mr. Ransley is likely to be called as a witness.

12. My reading of Rule 9 of the Advocates (Practice) Rules is that it targets an individual advocate, the one likely to be called as a witness. A firm of advocates is an artificial entity, it has no capacity to attend court and give evidence. Ideally, the transaction, the basis of the disbarment, would have been handled by an individual advocate or two or three of them: it is the natural person or persons who personally handled the brief who ought to be barred rather than the law firm where he or they operate from. I have carefully gone through all the authorities cited, and others, but found none that states a principle to the contrary. In the circumstances of this case the person to disqualify should be Mr. Ransley, the advocate who handled the transaction impugned. Mr. Ransley was then operating from a law firm other than Messrs. Ransley, McVicker and Shaw, Advocates. It would appear that Messrs. Ransley, McVicker and Shaw, Advocates did not even exist as at the time of the alleged transaction. Ms. Shaw, who has been appearing in the matter for the executor, has not been shown to have been party to the said transaction or to have been working at the time in the law firm then handling the matter. From the facts placed before me she cannot possibly be a potential witness in this cause so as to subject her to Rule 9 of the Advocates (Practice) Rules.

13. The order that I am persuaded to make in the circumstances is that Mr. Justice Philip John Ransley is hereby disqualified from acting for Robert Max Mulie, the respondent herein, for he is a potential witness. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>TH</sup> DAY OF MARCH, 2017.**

**W. MUSYOKA**

**JUDGE**