

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC APPEAL NO. E020 OF 2025**

**ELIZABETH  
APPELLANT**

**ALWENY.....**

**=VERSUS=**

**BENTER AKINYI  
OPANDE.....RESPONDENT**

**(Being an appeal from the judgment and decree of Hon.  
V. Adhiambo, SRM delivered on 12<sup>th</sup> February 2025 in  
Kisumu MCELC No. E089 of 2024)**

**JUDGMENT**

The Appellant and the Respondent entered into an agreement of sale dated 13<sup>th</sup> October 2022, in which the Appellant agreed to sell, and the Respondent agreed to purchase all that parcel of land known as Title No. Kisumu/Buoye/5164, (hereinafter referred to as “the suit property”) at a consideration of Kshs. 2,550,000/-. The suit property was at all material times registered in the name of the Appellant’s deceased husband, David Midigo Midigo(hereinafter referred to as “the deceased”). The sale was subject to the Appellant obtaining a grant of letters of administration in respect of the estate of the deceased. The agreement of sale was drawn by Olel, Onyango,

Ingutiah Advocates LLP, which acted for the Appellant and the Respondent, and was described in the agreement as “Parties’ Advocates”. The execution of the agreement by the parties was witnessed by Charles O. Onyango, Advocate of the same firm. The firm of Olel, Onyango, Ingutiah Advocates LLP acted not only as the advocates for both parties in the transaction, but also as the advocate for the Appellant in the Kisumu Chief Magistrate’s Court Succession Cause No. E9 of 2023, In the matter of the estate of David Midigo Midigo, alias Onyango David Midigo, in which the Appellant and one, Dennis Owino Midigo, had petitioned for a grant of letters of administration intestate in respect of the estate of the deceased, David Midigo Midigo. The said grant of letters of administration intestate was issued on 25<sup>th</sup> April 2023.

A dispute arose between the Appellant and the Respondent over the sale transaction. The nature of the dispute between the parties is not very clear from the scanty record of appeal filed by the Appellant. Due to the dispute, the sale transaction was not completed. On 27<sup>th</sup> June 2024, the Respondent filed a suit against the Appellant at the Chief Magistrate’s Court at

Kisumu, namely, CMCELC No. E089 of 2024 (hereinafter referred to as “the primary suit”). The primary suit was filed by the Respondent through the firm of Olel, Onyango, Ingutiah Advocates LLP. In the primary suit, which was based on the agreement of sale dated 13<sup>th</sup> October 2022 between the parties, the Respondent sought a refund of the sum of Kshs. 1,250,000/-, which had been paid to the Appellant on account of the purchase price, together with interest, Kshs. 200,000/- being the advocate’s fees in the succession cause, Kshs. 100,000/- being survey fees, Kshs. 45,000/- being rental income due on the suit property from 1<sup>st</sup> December 2022 until payment in full, and the costs of the suit.

The Respondent averred in the primary suit that the Appellant breached the agreement of sale by refusing, and/or failing to hand over vacant possession of the suit property to the Respondent, and to allow the Respondent to collect rent from the property in accordance with the terms of the agreement of sale. The Respondent averred that the Appellant notified him of her decision to rescind the agreement of sale between the parties and refund the payments already made to her. The

Respondent averred that despite having furnished the Appellant with the particulars of the bank account in which to deposit the said refund, the Appellant had failed to do so.

The Appellant filed a defence in the primary suit denying the Respondent's claim. A copy of the defence was not included in the record of appeal, and a hard copy is not in the original file. From a copy of the reply to defence at page 7 of the record of appeal, among the issues raised in the Appellant's defence in the primary suit are the legality and enforceability of the agreement of sale dated 13<sup>th</sup> October 2022, and the competency of the firm of Olel, Onyango, Ingutiah Advocates LLP to act for the Respondent in the primary suit.

The Appellant brought an application in the primary suit by way of a Notice of Motion dated 2nd September 2024, seeking an order restraining the firm of Olel, Onyango, Ingutiah Advocates LLP and/or any of the advocates in the firm from acting for the Respondent in the primary suit. The application, which was brought under, among others, Rule 9 of the Advocates (Practice) Rules and Rules (sic) 92 to 95 of the Law Society of Kenya's Code of Standards of Professional Practice and Ethical

Conduct 2016, was brought on the grounds that the Appellant was a former client of the firm of Olel, Onyango, Ingutiah Advocates LLP, the firm having acted for the Appellant in the preparation of the agreement of sale dated 13<sup>th</sup> October 2022 and in the Succession Cause No. E9 of 2023, In the matter of the estate of David Midigo Midigo(hereinafter referred to as “the succession cause”). The Appellant contended that, while acting for her as aforesaid, the firm of Olel, Onyango, Ingutiah Advocates LLP received confidential information that it could use against the Appellant if permitted to continue representing the Respondent in the matter. The Appellant contended that the advocates in the firm of Olel, Onyango, Ingutiah Advocates LLP were also potential witnesses and could be called to give evidence in the matter. The Appellant averred that the firm of Olel, Onyango, Ingutiah Advocates LLP did not notify her that it intended to act for the Respondent against her. The Appellant averred that the firm of Olel, Onyango, Ingutiah Advocates LLP was conflicted and could not act for the Appellant or the Respondent in the matter. The Appellant averred that it was in the interest of justice that the orders sought be granted.

The Appellant's application in the primary suit was opposed by the Respondent. The Respondent averred that the Appellant's application was misconceived, bad in law, and amounted to an abuse of the court process. The Respondent averred that Olel, Onyango, Ingutiah Advocates LLP were her advocates. The Respondent averred that the firm had acted for her for a very long time before the parties entered into the agreement of sale dated 13<sup>th</sup> October 2022. The Respondent averred that the firm of Olel, Onyango, Ingutiah Advocates LLP acted for the Appellant and the Respondent in the sale transaction at the request of the Appellant, who did not want to appoint her own advocate to save money. The Respondent averred that it would be unjust to deny her the right to use the services of her advocate of choice simply because she accommodated the Appellant's request that they use a common advocate in the sale transaction. The Respondent averred that the succession cause was also handled by the firm of Olel, Onyango, Ingutiah Advocates LLP at the Appellant's request. The Respondent averred that the Appellant did not pay the legal fees for the preparation of the agreement of sale, and for her representation in the succession cause. The Respondent

averred that, in the circumstances, there was no basis for the Appellant's claim that the firm of Olel, Onyango, Ingutiah Advocates LLP was also her advocates. The Respondent averred that she had a constitutional right to be represented by an advocate of her choice, which right could only be curtailed in very exceptional circumstances. The Respondent averred that the Appellant had not demonstrated the existence of circumstances that would warrant the grant of the orders sought. The Respondent averred that the Appellant's application was intended to delay the final hearing of the primary suit.

### **The decision in the primary suit**

The lower court considered the Appellant's application and found it to have no merit. The application was dismissed in a ruling delivered on 12<sup>th</sup> February 2025 by Hon. V.Adhiambo SRM. The lower court found that the Appellant did not demonstrate that there was a likelihood of real mischief and prejudice being occasioned to her if the firm of Olel, Onyango, Ingutiah Advocates LLP was permitted to act for the Respondent. The lower court stated that the Appellant had

failed to disclose the nature of the confidential information that she gave to the firm of Olel, Onyango, Ingutiah Advocates LLP, which could be used against her. The court held that the mere fact that the firm of Olel, Onyango, Ingutiah Advocates LLP prepared the agreement in dispute and the execution thereof was witnessed by one of the advocates in the firm was not, by itself, evidence of prejudice or mischief.

### **The appeal**

The Appellant was dissatisfied with the decision of the lower court in the primary suit and filed this appeal on 7<sup>th</sup> March 2025. In her memorandum of appeal, the Appellant challenged the decision of the lower court on the following grounds;

1. That the learned magistrate erred in law and fact by ignoring the admissions by the firm of Olel, Onyango, Ingutiah Advocates LLP that it acted for both the Appellant and the Respondent in the preparation of the impugned agreement of sale, and that the same was witnessed by an advocate in the said firm.

2. That the learned magistrate erred in law and fact in failing to find and hold that the Appellant was a former client of the firm of Olel, Onyango, Ingutiah Advocates LLP.
3. That the learned magistrate erred in law and fact in holding that there were other advocates in the firm of Olel, Onyango, Ingutiah Advocates LLP who could handle the primary suit, disregarding the fact that the firm prepared the impugned agreement and also represented the Appellant in the succession cause.
4. That the learned magistrate erred in law and fact in failing to appreciate that much more confidential information was imparted to the firm of Olel, Onyango, Ingutiah Advocates LLP than was envisaged, mainly due to the role played by the firm and its advocates in drawing the impugned agreement and also representing the Appellant in the succession cause.
5. That the learned magistrate erred in law and fact in imposing an unknown threshold and burden upon the Appellant, and erroneously holding that the Appellant had failed to disclose the privileged information given to the firm of Olel, Onyango, Ingutiah Advocates LLP thereby

allowing them to continue acting in blatant disregard of their admission of having acted for both parties in the agreement of sale of the suit property.

The Appellant prayed that the appeal be allowed, the ruling of the lower court set aside, and substituted with an order disqualifying the firm of Olel, Onyango, Ingutiah Advocates LLP from acting for the Respondent in the primary suit. The Appellant also prayed for the costs of the appeal.

### **The submissions**

The appeal was argued by way of written submissions. The Appellant filed submissions dated 21<sup>st</sup> October 2025. The Respondent did not file submissions. Instead, the Respondent filed in this court a copy of a notice of change of advocates dated 30<sup>th</sup> July 2025, which she had filed in the primary suit changing her advocates in that matter from the firm of Olel, Onyango, Ingutiah Advocates LLP to Odongo Awino & Company Advocates. The said firm of advocates also took over the conduct of this appeal from the firm of Olel, Onyango, Ingutiah Advocates LLP through a notice of change of advocates filed herein on 10<sup>th</sup> September 2025. Mr. Odongo advocate from the

said firm, appeared before this court on 27<sup>th</sup> October 2025. It is not clear why none of the parties informed the court of the new development regarding the representation of the Appellant in the primary suit (lower court). The firm of Olel, Onyango, Ingutiah Advocates LLP ceased to act for the Respondent in the primary suit once the firm of Odongo Awino & Company Advocates came on record in the matter. That means that it is no longer necessary to bar the firm of Olel, Onyango, Ingutiah Advocates LLP from acting for the Respondent in that suit. In view of the changed circumstances, the parties should have attempted to settle this appeal.

### **Analysis and Determination**

I have considered the application that was filed in the lower court seeking to bar the firm of Olel, Onyango, Ingutiah Advocates LLP from acting for the Respondent in the primary suit. I have also considered the response by the Respondent to the application and the ruling of the lower court on the same. I am of the view that whether to bar an advocate or a firm of advocates from acting for a party in a suit is at the discretion of the court. In Murgor & Murgor Advocates v. Kenya Pipeline Co.

Ltd.[2021]eKLR, the High Court, after reviewing several authorities, some of which were cited by the Appellant herein, stated as follows:

**“41. From the foregoing, the following are some of the general principles guiding the disqualification of Advocates from appearing for a client**

**in a matter: -**

**(i) The basis upon which a Court disqualifies an Advocate from acting arises from the need to protect the interests of administration of justice. Whereas it is understood that choice of Counsel is an entitlement of a party, such Counsel must always bear in mind that he/she becomes an officer of the Court and as such owes an allegiance to a higher cause (justice and truth) than serving the interests of the client.**

**(ii) Disqualification of an Advocate is only desirable in contentious matters and where there is or was an Advocate-Client relationship;**

**(iii) It must be apparent that the Advocate sought to be disqualified will be required as a witness to give evidence in the matter;**

**(iv) It is desirable that when the principle of confidentiality in an Advocate/Client fiduciary relationship will be prejudiced or where there is a**

**possibility of real conflict of interest, then an Advocate sought to be disqualified ceases to appear in the matter;**

**(v) The fact that an Advocate acted for a litigant does not, *per se*, lead to a situation of conflict of interest;**

**(vi) Conflict of interest is an issue of fact which must be proved by way of evidence;**

**(vii) It is not a requirement that in a situation where a firm of Advocates acted for the opposite party all the Advocates in the firm be disqualified from the matter. In such an instance, only the Advocates who are in possession of confidential information relevant to the matters in issue before Court or Tribunal may be called upon to cease from appearing in the matter;”**

It is common ground that the firm of Olel, Onyango, Ingutiah Advocates LLP acted for both the Appellant and the Respondent in the agreement of sale of the suit property dated 13<sup>th</sup> October 2022, and that the execution of the agreement by the parties was witnessed by an advocate from the firm. It is expressly stated in the agreement that the firm was “Parties Advocates”.

It is common ground that the agreement was not completed and that the primary suit was brought by the Respondent to enforce the terms of the agreement. The firm of Olel, Onyango,

Ingutiah Advocates LLP also acted for the Appellant in the succession cause. The succession cause was to facilitate the completion of the sale agreement dated 13<sup>th</sup> October 2022. As stated earlier in the judgment, one of the issues in contention in the primary suit is the legality of the said agreement of sale dated 13<sup>th</sup> October 2022. To be able to act for the Appellant in the agreement of sale dated 13<sup>th</sup> October 2022, and in the succession cause, the firm of Olel, Onyango, Ingutiah Advocates LLP must have received instructions from the Appellant. The communication between an advocate and a client is confidential, and the advocate can only disclose the same with the permission of the client. I agree with the Appellant that the firm of Olel, Onyango, Ingutiah Advocates LLP, having acted for the Appellant and the Respondent in the agreement of sale dated 13<sup>th</sup> October 2022, the firm cannot choose to act for one of the parties against the other in a dispute between the parties on the legality and enforceability of the agreement. I agree with the Appellant that there is a risk of the firm using the confidential information obtained from the Appellant against her while acting for the Respondent in the primary suit. From the fact that the firm of Olel, Onyango,

Ingutiah Advocates LLP acted for the Appellant in the sale of the suit property to the Respondent, it could be inferred that the firm obtained confidential information from the Appellant. For that reason, the Appellant did not need to give the particulars of the instructions that she gave to the firm of Olel, Onyango, Ingutiah Advocates LLP. The firm could not have acted for the Appellant without instructions. That instruction was confidential. It is my finding that the lower court erred in its finding that the Appellant had failed to demonstrate that there was a real prejudice or mischief that would be occasioned to the Appellant if the firm of Olel, Onyango, Ingutiah Advocates LLP continued to act for the Respondent in the primary suit. The chances of the firm of Olel, Onyango, Ingutiah Advocates LLP using the information given to it by the Appellant to her prejudice were high. I also agree with the Appellant that due to the nature of the dispute in the primary suit, the advocates in the firm of Olel, Onyango, Ingutiah Advocates LLP, who prepared and witnessed the sale agreement between the Appellant and the Respondent, are potential witnesses. Rule 8 of the Advocates (Practice) Rules (Legal Notice 19 of 1967) 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 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.”**

Standard No. 92 of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct provides as follows:

**“Conflict of interest:**

**92. SOPPEC-6: The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to both clients and obtains their consent”.**

It was not permissible for the firm of Olel, Onyango, Ingutiah Advocates LLP to act for the Respondent in the primary suit, not only due to a conflict of interest but also on account of the

advocates in the firm being potential witnesses in the primary suit. I find merit in all the Appellant's grounds of appeal.

## **Conclusion**

In conclusion, I allow the appeal, and set aside the ruling and orders of the lower court made on 12<sup>th</sup> February 2025. I substitute the same with an order barring the firm of Olel, Onyango, Ingutiah Advocates LLP from acting for the Respondent in Kisumu MCELC No. E089 of 2024 (the primary suit). Since the Respondent had appointed another firm of advocates to represent her in the primary suit in place of the firm of Olel, Onyango, Ingutiah Advocates LLP before the appeal was argued, I will award the Appellant half (1/2) the costs of the appeal.

**Written and signed at Kisumu by**

**S. OKONG'O**

**JUDGE**

**Delivered, dated and countersigned at Kisumu on this  
17<sup>th</sup> day of February 2026**

**E.ASATI**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Platform in the presence of:

for the Appellant

for the Respondent

-Court Assistant

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