



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 24 OF 2016

**IN THE MATTER OF ARTICLES 19(3), 20(2), 21(1), 22(1) AND (2), 23 & 159 OF THE
CONSTITUTION, 2010**

AND

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS
OF THE PETITIONER**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK III/142

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

JOHN NYAMARI MOGAKA T/A OURU HYPER STORES.....PETITIONER

AND

CHARLES MATUNDURA MOGAKA.....1ST RESPONDENT

JOSEPHAT NYACHOTI T/A MINMAX AUCTIONEERS.....2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, KISII/GUCHA.....3RD RESPONDENT

RULING

1. The plaintiff vide a Notice of Motion application dated 12th October 2016 inter alia seeks orders:-

(i) That Mr. Oguttu Mboya and the firm of M/s Oguttu Mboya & Company Advocates be disqualified from acting on behalf of the 1st respondent herein.

(ii) That the pleadings done and/or filed by Oguttu Mboya and the said firm M/s Oguttu Mboya & Company Advocates in respect of this matter be struck out from the record of the court.

2. The application is based on the grounds set out on the face of the application and on the affidavit sworn in support by John Nyamari Mogaka, the petitioner/applicant herein. In support of the application the applicant states:-

1. That he is the elder son of Joseph Mogaka Nyang'au (now deceased) and that the 1st respondent (Charles Matunduru Mogaka) is his brother.

2. That Mr. Oguttu Mboya advocate who has appeared for the 1st respondent herein and prepared and filed pleadings on behalf of the 1st respondent was the attorney and/or advocate for their late father.

3. That the said Oguttu Mboya advocate used to attend family meetings following the death of the petitioner's and 1st respondent's father and was therefore privy to information, facts and circumstances surrounding the suit property and even offered advise to the family members respecting the suit property and even advised on the way forward.

4. That Mr. Oguttu Mboya advocate has conduct of the Succession Cause (Kisii HCCC No. 73 of 2015) relating to the petitioner's and 1st respondent's late father.

5. That Mr. Oguttu Mboya advocate is a potential witness in the instant suit.

6. That the petitioner stands to suffer prejudice if the firm of Oguttu Mboya & Co. Advocates and/or Mr. Oguttu Mboya is allowed to continue to act for the 1st respondent.

3. Mr. Oguttu Mboya advocate swore a replying affidavit dated 18th October 2016 in opposition to the applicant's application for the disqualification of himself and his law firm to represent and act for the 1st respondent in the present matter. Mr. Oguttu deponed that before the death of the petitioner's and the 1st respondent's father, his firm had been retained by the deceased to act for him in a suit relating to land parcels **LR Nos. Central Kitutu/Daraja Mbili/1342 and 1343** which were under threat of sale by public auction for nonpayment of liabilities advanced by Diamond Trust Bank Ltd on the security of charges over the two parcels of land (as per pleadings in HCC No. 56 of 2011 – Kisii annexed as **"JM01 (a) and (b)"**). Mr. Oguttu advocate deponed that after he learnt of the death of Joseph Mogaka Nyangau, he contacted one Zablon Mogambi Mogaka, one of the deceased sons whom he states he advised there was necessity for succession to be undertaken to enable a grant of representation to be made in respect of the deceased estate to facilitate substitution in the pending suit to enable the same to proceed. It is then he depones the son invited him to a family meeting to enable him (Mr. Oguttu advocate) to brief the family members on what is required to be done.

4. Mr. Oguttu advocate states he was invited to a family meeting on 11th July 2014 and avers that he attended the meeting at which his participation was limited to briefing the family members on the pending suit and his brief was captured under Minute 3 of the recorded Minutes of the meeting annexed and marked **"JM03"**. He states he was later instructed by Zablon Mogambi Mogaka to file a succession petition in respect of the deceased estate which he dutifully did as per annexure **"JM0 4(a) and (b)"**. Mr. Oguttu advocate asserts that in the succession cause his instructing client is one Zablon Mogambi Mogaka and not the petitioner and he further avers the property the subject of the instant petition as per the inventory of the deceased 's assets does not form part of the estate as per annexure **"JM05"**. The advocate in the premises states that he has never acted for the petitioner and as such no confidential and/or privileged information could have been passed to him by the petitioner.

5. The parties filed written submissions to ventilate their position in the matter. The petitioner/applicant's

submissions dated 13th November 2016 were filed in court on 7th December 2016 while the 1st respondent's submissions dated 9th December 2016 were filed in court on 14th December 2016. I have carefully considered the application by the petitioner and the replying affidavit filed by Mr. Oguttu Mboya advocate in opposition thereof and the submissions filed by the parties and the issue for determination is whether on the material and information placed before the court a case has been made to enable the court disqualify Mr. Oguttu Mboya advocate and his firm from continuing to act for the 1st respondent.

6. The petitioner/applicant's objection to Mr. Oguttu Mboya advocate and his firm acting for the 1st respondent is that Mr. Oguttu Mboya and his law firm used to be his late father's advocate and by extension the family's lawyer such that he was in a position to obtain confidential information which if he was allowed to act for the 1st respondent, he could use to the detriment and prejudice of the petitioner. There is however no averment by the petitioner that he has at any time instructed the firm of Oguttu Mboya & Company Advocates to act for him. The petitioner submits that Mr. Oguttu advocate participated at family meetings notably on 11th July 2014 wherein the dispute touching on the suit property was discussed. The petitioner argues the said advocate is bound by the Advocates' Professional Ethics to step aside since he has participated in a meeting where decisions respecting the subject suit land took place. The petitioner places reliance on Rule 9 of the Advocates (Practice) Rules made under the Advocates Act, Cap 16 which provides as follows:-

9. 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."

7. The petitioner/applicant avers that Mr. Oguttu advocate had substantial involvement in the suit property before the death of the applicant's father which puts him in a position of conflict. The applicant further states that Mr. Oguttu Mboya's firm has the conduct of Succession Case No. HCCC No. 73 of 2015 where he acts on behalf of the family of the deceased and that in the Succession Cause the subject matter is the deceased property which includes the property the subject of this suit. The applicant alleges that Mr. Oguttu Mboya's advocate involvement in the succession cause places him in a position where he has access to confidential information which he is likely to utilize to the prejudice of the applicant in these proceedings. The applicant avers that Mr. Oguttu advocate proceeded to file the petition in the Succession Cause without obtaining the applicant's sanction though the applicant is a beneficiary of the deceased's estate, an act, the applicant avers smacks of bad faith on the part of the advocate.

8. The applicant has further submitted that the participation of Mr. Oguttu advocate in the instant suit will give undue advantage to the 1st respondent and will prejudice the petitioner. In support of this submission the applicant places reliance of the case of **Century Oil Trading Co. Ltd -vs- Kenya Shell Limited [2008] eKLR** where Warsame, J. (as he then was) though holding that Mr. Nelson Havi, the advocate in the matter sought to be disqualified had no confidential information held that:-

"...his presence and participation in the matter would accord a tactical advantage and/or psychological blow to the applicant and a benefit to the respondent. That would have a real prejudicial effect on the state of mind of the applicant."

9. The respondent (Mr. Oguttu Advocate) denied that he was a general family advocate of the deceased family who included the petitioner. The advocate emphatically denied having at any time acted for the petitioner/applicant stating further that although he had acted for the deceased and some of the deceased adult sons, such acting was on the basis of individual client's briefs and never collectively as a family. Mr. Oguttu clarified that his invitation to attend the family meeting on 11th July 2014 was on account of the fact that he was at the time handling some cases on behalf of the deceased which related to some of the assets of the deceased so that he could advise on the way forward. The record of the Minutes of the meeting clearly shows the advocate's participation was limited to addressing the issue of the deceased's

assets tied up in court and after he gave his input he left the family members to deliberate and give him instructions. An abstract of Minute number 3 of the recorded minutes of the meeting captures this aptly thus:-

“Mr. Mboya left the members to evaluate each option and advise him on the way forward. He asked the members to identify an Estate Administrator. This is the person who will go to court to testify in place of Mzee. Once he receives the instructions, he will file court papers to start the process.”

10. On the basis of the Minutes of the family meeting and all the material exhibited by the parties there is nothing to suggest that Mr. Oguttu advocate participated in any discussion relating to the suit property as it is evident he left the meeting before such a discussion took place. Mr. Oguttu advocate argues that the applicant has not furnished any proof that he had acquired any confidential information to place him in a position of conflict and is merely making generalized allegations which would not be sufficient to result in his disqualification as sought. The respondent’s counsel similarly cited the case of **Century Oil Trading Co. Ltd –vs- Kenya Shell Limited [2008] eKLR** in support of his submission where the court held thus:-

“On the issue of whether the solicitor is possessed of relevant information, it is in general not sufficient for the client to make general allegations that the solicitor is in possession of relevant confidential information if this is in issue. Some particularity as to the confidential information is required.”

11. The advocate further submits that in Kisii HCC Succession Cause No. 73 of 2015 he has been instructed by the petitioner and that though the applicant is a beneficiary, he did not sign the requisite consent as a beneficiary to enable the cause to be filed. Besides, the suit property is not included as part of the assets of the deceased estate.

12. The advocate finally submits the 1st respondent is entitled as of right to be represented by an advocate of his choice and that right cannot be taken away lightly. In the case of **William Audi Ododa & Another –vs- John Yier & Another CACA No. 360 of 2004 (unreported)** the Court of Appeal stated thus:-a

“The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters (Section 77(1) (d) but Section 70(a) guarantees citizens the protection of the law and to enjoy the right fully, the right of representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be a clear and valid reasons for doing so. I can find no such clear and valid reason for depriving the applicants of their rights to be represented by counsel of their choice.”

13. An application for the disqualification of an advocate from acting for a particular client must be evaluated on the principle that a party is entitled to be represented by an advocate of his choice. Such an application ought to be weighted on the potential and/or probability of prejudice to the applicant on account of the advocate sought to be disqualified using such privileged and/or confidential information as may have come into his possession whilst acting for the applicant. I do not suppose there can be any firm and general rule of application and thus each matter must be evaluated on the basis of its own peculiar facts and circumstances with the test being whether on the facts and circumstances a situation of conflict of interest that may result in prejudice to the applicant arises.

14. In the case of **Kamahuha Limited –vs- Winnie Njeri Kariuki & Another [2016] eKLR** this court sitting in Nairobi while considering an application where it was sought to disqualify an advocate on the basis that he had acted for both parties in a sale transaction that generated the dispute the subject of the suit stated thus:-

“In the present case, I am not satisfied the applicant has demonstrated the advocate is placed

in a situation where conflict of interest could arise. He has not shown that the advocate personally handled the transaction and/or that the advocate had any confidential information that could be used to the applicant's prejudice or detriment. I see no evidence or material that could lead me to hold a situation of conflict of interest arises.....

I see no basis of finding a situation of conflict of interest exists and I accordingly decline to grant the application by the 2nd defendant which I find to be devoid of any merit.”

15. In the case of **Charles Gitonga Kariuki –vs- Akuisi Farmers Co. Ltd [2007] eKLR Kimaru, J.** while considering a preliminary objection where the defendant sought the disqualification of the plaintiffs' advocate from acting observed thus:-

“It is trite law that an advocate cannot act for and against a client in a suit or in subsequent suits where he could utilize the information that he acquired in the cause of his work as an advocate to the detriment of that client. In Uhuru Highway Development Ltd –vs- Central Bank of Kenya [2002] 2 E. A 654 at pg 661, the Court of Appeal held that an advocate would not be allowed to act against a client where he could consciously or unconsciously or even inadvertently use the confidential information acquired when he acted for such a client to his detriment. The court held, that where it was established that such a client would suffer prejudice then the court would have no alternative but to order that such an advocate ceases to act for the opposing party. An applicant who is seeking the disqualification of an advocate from acting for the opposing party in the circumstances contemplated above, must establish the existence of such advocate relationship that could lead to such an advocate to be in possession of confidential information which he could use to the detriment of the client seeking the disqualification of an advocate.”

16. In the present matter the petitioner/applicant has not demonstrated a client/advocate relationship exists between him and the law firm of Oguttu Mboya & Company Advocates. The firm of Oguttu Mboya & Co. Advocates acted for the petitioner's father in distinct and separate matters not related to the suit property. I see no basis to hold that Mr. Oguttu Mboya advocate had any access to confidential and/or privileged information relating to the suit property the subject matter herein when he never dealt with it during the lifetime of the applicant's deceased father. The fact that the suit property is not included as part of the deceased's assets in the succession cause means that at the time the deceased died the suit property was not in his name and could therefore not be included as part of the deceased's estate. It is therefore my holding that there has been no demonstration that Mr. Oguttu Mboya advocate and/or his firm holds any confidential information relating to the pending suit or the property the subject matter of the suit obtained by them by virtue of having acted for the applicant and/or the applicant's deceased father. No position of trust and/or fiduciary relationship as between the petitioner and the said advocate and his law firm has been shown to have existed that would give rise to a situation of conflict of interest.

17. I accordingly find no merit in the petitioner's application dated 12th October 2016. I dismiss the same but I make no order for costs and each party will bear their own costs for the application.

18. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 30th day of June, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the petitioner/applicant

..... for the 1st respondent

..... for the 3rd respondent

..... court assistant

J. M. MUTUNGI

JUDGE