



**Aniket Property & Investments Limited v Mwakibibo & 9 others (As Trustees of the Ahfat Trust)
(Environment & Land Case 134 of 2012) [2024] KEELC 4521 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 134 OF 2012
LL NAIKUNI, J
MARCH 20, 2024**

BETWEEN

ANIKET PROPERTY & INVESTMENTS LIMITED PLAINTIFF

AND

HAMADI JUMA MWAKIBIBO 1ST DEFENDANT

VENTURE HOLDINGS LIMITED 2ND DEFENDANT

DAVID K.KANDIE 3RD DEFENDANT

DRIEDRICK ALFONS JOSEY BRINKMAN 4TH DEFENDANT

AMANA ABDALLA 5TH DEFENDANT

KHALFAN MLAI 6TH DEFENDANT

THE LAND REGISTRAR, KWALE 7TH DEFENDANT

THE ATTORNEY GENERAL 8TH DEFENDANT

FARDOSA AHMED ABDULLE 9TH DEFENDANT

MOHAMED AHMED ABDULLE 10TH DEFENDANT

AS TRUSTEES OF THE AHFAT TRUST

RULING

I. Introduction

1. The 1st Defendant/Applicant – Hamadi Mwakibibo moved this Honourable Court for the determination of a Notice of Motion application dated 27th July, 2023 against the Plaintiff and other parties herein. He brought the application pursuant to the provision of Article 159 (b) of *the*



Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 16 Rule 1 of the Civil Procedure Rules and all the enabling provisions of the Law.

2. Upon service, the Plaintiff filed a Replying Affidavit dated 5th September, 2023 while Mr. Stephen Oddiaga Advocate filed the Grounds of Opposition dated 28th August, 2023 and a Replying Affidavit dated 6th November, 2023. The Honourable Court shall be dealing with these responses at a later stage. It is instructive to note that this application is interlocutory instituted while the matter which is part heard is almost at the tail end with the Defence witnesses testifying. If the record serves me right there should be three (3) more witnesses by the Defendants awaiting to tender their evidence whatsoever.

II. The 1st Defendant/Applicant's case.

3. The 1st Defendant/Applicant sought for the following orders:-
 - a. Spent.
 - b. This Honorable Court be and is hereby pleased to issue Witness Summons to compel the attendance of Mr. Stephen Oddiaga T/A Stephen Oddiaga & Company Advocates and Mr. Sanjeev Khagram T/A A.B. Patel & Patel Advocates for examination and cross-examination.
 - c. This Honorable Court be and is hereby pleased to bar Mr. Sanjeev Khagram T/A A.B. Patel & Patel Advocates from further acting for or representing the Plaintiff herein.
 - d. That costs of this application be provided for.
4. The application was premised on the grounds, testimonial facts and the averments made out under the eight (8) Paragraphed Supporting Affidavit of Mr. James Kounahsworn and dated on 27th July, 2023 and the annexures marked as "JOK" annexed hereto. He averred as follows:-
 - a. He was a male adult of sound mind and disposition and an Advocate of the High Court of Kenya and the the advocate on record for the 1st Defendant/Applicant herein, having conduct of this matter and therefore competent to swear this Affidavit.
 - b. Mr. Stephen Oddiaga T/A Stephen Oddiaga & Company Advocates and Mr. Sanjeev Khagram T/A A.B.Patel & Patel Advocates who at some point or the other were in conduct of the transaction in dispute with respect to the suit property known as Kwale/DianiBeach Block/203.
 - c. Further, Mr. Oddiaga and Mr. Khagram are supposedly holding of the balance of the purchase price amounting to a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs.13,500,000.00/-) in a joint interest earning account pursuant to a judgement and decree dated 11th December 2008, in Civil suit No. 315 of 2008. (Attached herewith and marked as annexure "JK-1" is a true copy of the judgement and decree dated 11th December 2008, in Civil suit No. 315 of 2008.)
 - d. From the proceedings and the evidence adduced before this Honorable Court, it is evident that Mr. Stephen Oddiaga T/A Stephen Oddiaga & Company Advocates and Mr. Sanjeev Khagram T/A A.B. Patel & Patel Advocates at the center of the transactions in dispute herein and are seized of material facts which will assist this Honorable Court reach a fair and just determination of the suit.
 - e. He verily believe that Mr. Oddiaga and Mr. Khagram were necessary witnesses in this matter for the production of evidence as to the facts pertaining to the transaction in dispute before this Honorable Court, in order to enable the Court to reach a just determination of the matter.



- f. Therefore, it would be necessary and in the interests of justice to have this Honorable Court issue summons to Mr. Oddiaga T/A Stephen Oddiaga & Company Advocates and Mr. Khagram T/A A.B. Patel & Patel Advocates to appear in Court as witnesses in this matter.
- g. Since they intended to call Mr. Khagram T/A A.B. Patel & Patel Advocates as a witness in this matter, a conflict of interest arises as he was the Plaintiff's advocate.
- h. As such, Mr. Khagram T/A A.B. Patel & Patel Advocates ought to be barred from representing the Plaintiff due to the apparent conflict of interest that arises.

II. The Response by the Plaintiff/Respondent.

- 5. In response to the application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 5th September 2023 and stated that:-
 - a. The 1st Defendant, during his cross - examination, stated that he never had any objection on having Mr. Khagram continuing to represent the Plaintiff/Respondent herein.
 - b. It was on record that Mr. Oddiaga acted for the 1st Defendant in the acquisition of the suit property and at no time did Mr. Khagram represent the 1st Defendant/Applicant. Therefore the issue of conflict of interest never arose in any event.
 - c. The application was only made with the intent of tainting the integrity of the judicial process and delaying the hearing of this matter.
 - d. All the relevant evidence in this matter was before this Honorable Court.
 - e. The 1st Defendant's own evidence and affidavits deal with the question of Mr. Oddiaga's representations and instructions and consequently, the statement by Mr. Kounah that the two advocates was "supposedly holding the balance of the purchase price amounting to a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000.00/=....." lacked in complete candor and was incongruously made.
 - f. That the said deposit was made pursuant to a court order.
 - g. Mr. Khagram Advocate could not be called or summoned to testify on behalf of the 1st Defendant as appears to be the intent.
 - h. Mr. Oddiaga Advocate also filed his grounds of opposition dated 28th August 2023 and subsequent replying affidavit dated sworn on 6th November 2023 raising the following issues:-
 - i. He never conducted the sale transaction between the Plaintiff and the 1st Defendant but only represented the 1st Defendant in the matter known as Civil Case HCCC No. 315 of 2008.
 - j. He was not a witness as he had not made any statement nor had he sworn any affidavit and as such he could not be cross-examined.
 - k. It was not clear from the application who wanted this witness evidence and as such, this Application went against the Court's administrative procedure on summoning witnesses or adducing evidence.
 - l. A witness could only attend court to give evidence when summoned by a party in a dispute before the court and a witness could not be a free for all individual in a dispute.



- m. One never required an application of this nature to obtain a witness summons since the same could be obtained from court administratively and this application was therefore mala fide.
- n. There was a currently suit between himself and the Plaintiff's advocate, seeking the release of the sums in the joint interest earning account held by themselves.

II. The Response by Mr. Stephen Oddiaga Advocate.

6. While opposing the application dated 27th July, 2023, Mr. Stephen Oddiaga of P.O Box 88157- 80100 Mombasa did file the Grounds of Opposition dated 28th August, 2023 and a 14th Paragraphed Replying Affidavit dated 6th November, 2023 and three (3) annexatures marked as "SO – 1 to 3 annexed thereto. He stated on oath as follows:-
- a. He was an Advocate of the High Court of Kenya and all other Sub - ordinate courts and thus competent to swear this Affidavit in response to the Notice of Motion herein.
 - b. It was not true that he conducted the sale transaction between the 1st Defendant and Purchasers of his land subject matter of this suit as alleged but only represented him when he was sued by a Mr. Vipin Manganla Shah and Vijay Lakhan a suit for specific performance in the then civil suit HCCC No. 315 of 2008 Mombasa which was now ELC (Kwale) No. 63 of 2021. Annexed and marked as "SO - 1" was the Complaint and subsequent decree.
 - c. He enjoined in the suit as a Defendant for reason that he had attempted to attach the property to recover his fees owed to him by the 1st Defendant. Annexed and marked as "SO - 2" was Order enjoining him in the suit.
 - d. He was executing because he was enforcing his various taxed costs against the 1st Defendant for works done for him which fees had not been paid. He only acted for him out of compassion in the matter since he had not paid his fees and a desires made by him and he promised to pay him after the matter was finalized.
 - e. The amount stated in Paragraph 3 of the supporting affidavit was deposited pursuant to an order of the court and was the balance of the amount in the decree it was still intact after Messrs. A.B. Patel and Patel Advocates declined to release the same to him for reasons not known to him even after releasing the title to them and their giving him a professional undertaking. Annexed and marked as "SO - 3" was the Letter of Undertaking.
 - f. Currently there was a suit pending between his Law firm and that of the law firm of Messrs. A. B. Patel and Patel Advocates as concerned the amount in fixed deposit where he was demanding the same to be released to him.
 - g. He had never been requested to testify in this matter on behalf of any party and he had not made any statement and in the circumstances he was not a witness within the meaning of a witness under the Civil Procedure Rules, 2010.
 - h. There were laid down procedures of calling witnesses to testify and the said procedures never involved making applications of the nature the 1st Defendant/Applicant had made and again this late in the matter and he believed this amounted to fishing for witnesses a practice which should be discharged.
 - i. The 1st Defendant had been his client and he doubted if he should attend and give evidence without first discussing with his current Advocates the nature of evidence he would give for reason that same evidence might be incriminating against him.



- j. However he was ready to attend court if he was invited by the court but he did believe that this need had not arisen now that they were dealing with 1st Defendant's application. He should not be forced to come and testify without following due process on how witnesses testify in court.
- k. The application was a waste of courts time and lacking in condour, professional etiquette and courtesy particularly where a party wanted a witness to come and give evidence to build their case.
- l. This suit had been pending in court for the last Eleven (11) years and it was suspect that after all that time the 1st Defendant/Applicant had decided to call him as a witness this late and by way of an application a procedure he totally disagreed with.
- m. He was opposed to the manner in which the 1st Defendant/Applicant wanted him to come and testify. If anything the Counsel could have gotten the information he wanted about the deposit by simply writing to him and would without doubt briefed him.

II. Submissions

- 7. On 28th July, 2023 while all the parties were in Curt directions were granted to have the Notice of Motion application dated 27th July, 2023 be disposed of by way of written submissions. Pursuant to that the 1st Defendant, the Plaintiff and Mr. Oddiaga Advocate fully complied. Resultantly, the Honourable Court reserved 26th January, 2024 as the date to deliver its Ruling thereof.

A. The Written Submission by the 1st Defendant/Applicant

- 8. On 13th December, 2023, the 1st Defendant/ Applicant through the Law firm of Messrs. Kounah & Company Advocates filed their written Submissions dated even date. Mr. Kounah Advocate commenced his submissions by rehashing to Court that these submissions were made pursuant to this Honorable Court's directions directing parties to dispense of the Application dated 27th July 2023 by way of written submissions.
- 9. The Learned Counsel submitted that the Application was instituted by the 1st Defendant under certificate of urgency through a Notice of Motion brought under the provision of Order 16 Rule 1 of the Civil Procedure Rules, 2010 and Rule 8 of the Advocates (Practice) Rules and Sections 1A, 3 and 3A of the *Civil Procedure Act*, Cap. 21 seeking the orders as already set out herein above. The 1st Defendant/Applicant's application was made on the following grounds:
 - a. Mr. Oddiaga T/A Stephen Oddiaga & Company Advocates and Mr. Khagram T/A A.B. Patel & Patel Advocates were at the center of the transactions in dispute herein and were seized of material facts which would assist this Honorable Court reach a fair and just determination.
 - b. Mr. Oddiaga T/A Stephen Oddiaga & Company Advocates and Mr. Khagram T/A A.B. Patel & Patel Advocates were in conduct of the transaction in dispute with respect to the suit property known as Land Reference No. Kwale/Diani Beach Block/203.
 - c. Further, Mr. Oddiaga and Mr. Khagram were supposedly holding of the balance of the purchase price amounting to a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000.00/-) in a joint interest earning account pursuant to a Judgement and decree dated 11th December 2008, in Civil suit HCCC No. 315 of 2008.
 - d. Mr. Oddiaga T/A Stephen Oddiaga & Company Advocates and Mr. Khagram T/A A.B. Patel & Patel Advocates were therefore necessary witnesses in this suit to adduce evidence as to the



facts pertaining to the transaction in dispute, to enable this Honorable Court reach a just determination of this matter.

10. As such, the Learned Counsel opined that Mr. Sanjeev Khagram T/a Messrs. A.B. Patel & Patel Advocates ought to be barred from representing the Plaintiff due to the apparent conflict of interest that arose. In response to the application, the Plaintiff filed a Replying Affidavit sworn on 5th September 2023 and stated that:-
 - a. The 1st Defendant, during his cross-examination, stated that he never had any objection to Mr. Khagram continuing to represent the Plaintiff.
 - b. It was on record that Mr. Oddiaga acted for the 1st Defendant in the acquisition of the suit property and at no time did Mr. Khagram represent the 1st Defendant, therefore conflict of interest never arose in any event.
 - c. The application was only made with the intent of tainting the integrity of the judicial process and delaying the hearing of this matter.
 - d. All the relevant evidence in this matter was before this Honorable Court.
 - e. The 1st Defendant's own evidence and affidavits deal with the question of Mr. Oddiaga's representations and instructions and consequently, the statement by Mr. Kounah that the two advocates were ".....supposedly holding the balance of the purchase price amounting to a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000.00/=....." lacked in complete candor and is incongruously made.
 - f. The said deposit was made pursuant to a court order.
 - g. Mr. Khagram could not be called or summoned to testify on behalf of the 1st Defendant as appears to be the intent.
11. According to the Learned Counsel, Mr. Oddiaga Advocate also filed his grounds of opposition dated 28th August 2023 and subsequent Replying Affidavit dated sworn on 6th November 2023 raising the following issues:-
 - a. He never conducted the sale transaction between the Plaintiff and the 1st Defendant but only represented the 1st Defendant in the matter known as civil case HCC No. 315 of 2008.
 - b. He was not a witness as he had not made any statement nor had he sworn any affidavit and as such he could not be cross - examined.
 - c. It was not clear from the application who wanted this witness evidence and as such, this Application went against the Court's administrative procedure on summoning witnesses or adducing evidence.
 - d. A witness could only attend court to give evidence when summoned by a party in a dispute before the court and a witness could not be a free for all individual in a dispute.
 - e. One was never required an application of this nature to obtain a witness summons since the same could be obtained from court administratively and this application was therefore mala fide.
 - f. There was a currently suit between himself and the Plaintiff's advocate, seeking the release of the sums in the joint interest earning account held by themselves.



12. The Learned Counsel relied on the following three (3) issues for determination by Court. Firstly, on whether this application was competent and properly filed before this Honourable Court. The Learned Counsel was guided by the provision of Order 16 Rule 1 of the Civil Procedure Rules, 2010 which provides as follows:-

“At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.”

13. Additionally, the Learned Counsel relied on the decision in the case of:- “Manchester Outfitters Limited – Versus - Pravin Galot 4 others (2021) eKLR where the Court expressed itself as follows:-

“From the foregoing provisions, it is clear that a court suo moto, can summon any person it deems is a necessary witness either for purposes of giving a testimony or for producing a document(s). An application in this regard can also be made by a necessary party.

What this implies is that notwithstanding our finding that no basis has been laid for the summoning of Ms. Latita Galot, the court on its own motion, may summon any person it deems fit as a necessary witness to aid it in arriving at the determination. A witness summoned by the court may also be intended to fill any void identified in the course of the proceedings and which void, if not filled, may undermine a just, objective and concise determination.”

14. A similar determination was reached by the Court in “Dahir Sadik AUSAAD – Versus - Modogashe Construction Ltd. & 3 Others (2016) eKLR, where the Court held that:

“This Court has powers to issue summons to witnesses to attend a trial. That is done on the application of any party. It is also done after the case has been certified ready for hearing.”

From the foregoing, he argued that it was evident that this application was competent. Indeed, this Honourable Court had the powers to grant the 1st Defendant/Applicant's prayers in his notice of motion application dated 27th July 2023.

15. Secondly, on the issue of whether Mr. Oddiaga and Mr. Khagram were necessary witnesses to this suit. The Learned Counsel argued that both Mr. Oddiaga and Mr. Khagram were necessary witnesses to this suit. To buttress his argument, the 1st Defendant/Applicant relied on the case of “Guardian Bank Limited – Versus - Sonal Holdings (K) Limited & 2 Others (2014) eKLR”:-

“The real questions then become: Is the testimony of the Advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by the Counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case.”

16. The Learned Counsel stressed that both Mr. Oddiaga Advocate and Mr. Khagram Advocate were necessary witnesses to the suit. According to him, there were glaring gaps and inconsistencies regarding the transactions and the alleged transactions conducted between the Plaintiff and the 1st Defendant/Applicant with respect to the suit property.

17. It was undisputed that these transaction were spearheaded and overseen by Mr. Oddiaga T/A Stephen Oddiaga & Company Advocates and Mr. Khagram T/A A.B. Patel & Patel Advocates. Indeed, the two advocates acted for the Plaintiff and the 1st Defendant during the negotiations for the sale and purchase



- of the suit property known as Land Reference No. Kwale/Diani Beach Block/203. Evidently, both advocates were involved in the alleged and disputed transfer of the suit property into the Plaintiff's name, including allegedly receiving funds for the said alleged transaction.
18. It was the Learned Counsel's contention that a sum of money was received on Plaintiff's behalf by Mr. Stephen Oddiaga Advocates. The sum of money was paid by the Plaintiff to secure vacant possession of the suit property from the 1st Defendant/Applicant's relatives. However, when he requested for further payments from the Plaintiff, no response was forthcoming for over four years. Thereafter, the 1st Defendant/Applicant decided to rescind the sale agreement and requested Mr. Oddiaga Advocate to stop all dealings with the Plaintiff regarding the sale and purchase of the suit property.
 19. Despite of the foregoing, Mr. Oddiaga Advocate purported to act for the 1st Defendant in HCCC No. 315 of 2008. Mr. Oddiaga Advocate and Mr. Khagram Advocate entered into a consent on 14th June 2010 (annexure and marked as "HJM - 3"), in the said HCCC No. 315 of 2008. The terms of the consent were to deposit the amount of sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000.00) in a joint interest earning account of the parties' advocates before 15th August 2010. However, the terms of the consent were not adhered to. Subsequently, Mr. Oddiaga Advocate purported to agree to extend the deposit deadline to 25th November 2010 (annexure as "HJM - 5"). The status of the alleged joint interest earning account held by both Mr. Khagram and Mr. Oddiaga remained unknown to the 1st Defendant/Applicant to date.
 20. Furthermore, Mr. Oddiaga Advocate and Mr. Khagram Advocate, seemed to have agreed to hold the alleged balance of the purchase price in a joint interest earning account until the determination of the matter known as HCCC No. 211 of 2006 between Sea View Investments Limited and the 1st Defendant/Applicant herein. However, both advocates acted as such despite being aware of the withdrawal of HCCC No. 211 of 2006 through a Notice of Withdrawal of suit dated 10th December 2008 (annexure marked as "HJM 4"). In his Replying Affidavit, Mr. Oddiaga had admitted to the present existence of the said joint interest earning account.
 21. In addition, Mr. Oddiaga Advocate purported to complete the disputed transaction by purporting to forward the disputed certificate of lease of the suit property in the name of the Plaintiff after purportedly transferring the same to the Plaintiff (annexure marked as "HJM - 1"). Despite of the foregoing, Mr. Oddiaga Advocate purported, via his letter to Mr. Khagram dated 14th June 2012 (annexure marked as "HJM - 8"), to discover through clandestine means, the sale of Kwale Diani Beach plot No. 1543 by the 1st Defendant. However, two months prior, Mr. Oddiaga wrote to S. M. Otunga advocates demanding settlement of his alleged pending legal fees from the sale of the same subdivision of the suit property, Plot No. 1543 (annexure marked as "HJM - 7").
 22. It was noteworthy that Mr. Oddiaga Advocate had now procured a Decree against the 1st Defendant/Applicant for instructions carried out in this transaction, as is evident from annexure Marked as "HJM - 6" of the 1st Defendant/Applicant's supplementary affidavit. Mr. Oddiaga Advocate sought to execute against the 1st Defendant/Applicant without accounting for the monies received from the Law firm of Messrs. AB Patel and Patel Advocates as exhibited in the Plaintiff's bundle of documents.
 23. The Learned Counsel averred to this Honorable Court that these gaps and inconsistencies could only be addressed by the direct evidence of Mr. Oddiaga Advocate and Mr. Khagram Advocate. This was due to the fact that they were both directly involved in the aforementioned transactions and of which the 1st Defendant/Applicant had testified that he was not aware of them as he withdrew instructions from Mr. Stephen Oddiaga Advocate. The aforementioned glaring gaps were a hindrance to this Honorable Court's mandate to determine the truth of the matter regarding the transactions between



the parties herein and the alleged transfer of the suit property from the 1st Defendant/Applicant to the Plaintiff. As such, the 1st Defendant/Applicant submitted that these glaring gaps, if not filled, may undermine a just, objective and concise determination of this matter.

24. The Learned Counsel posited that the 1st Defendant/Applicant was guided by the decision in the case of “Manchester Outfitters Limited (Supra) where it was stated that:

“A witness summoned by the court may also be intended to fill any void identified in the course of the proceedings and which void, if not filled, may undermine a just, objective and concise determination.”

25. He also relied on the decision in the case of:- “Jacob Muriungi Mwendwa – Versus - Mbaya M’wendwa (2004) eKLR where it was held as follows:

“It has not been denied that the firms of Kiautha Arithi & Co. Advocates and Mbaabu M’Inoti drew the respective agreements. There is also no dispute that the agreements were for sale of NKUENE/KATHERA/1668 and 1669 which were originally one parcel of land registered in the name of the 1st Defendant who is alleged to have held the said parcel of land in trust for himself and the Plaintiff who is his brother. Though it is not expressly admitted, it is common knowledge that the two firms must have been paid professional fees for the services rendered in drawing up the agreements. It is also not disputed that the Plaintiff has pleaded fraud against all the three Defendants. In my view, this is a case where both Mr. Omayo and Mr. Arithi may be required as witnesses either for the Plaintiff or the Defendants. I expect therefore that it should have been apparent from the outset that they could be required as witnesses to give evidence. Where this reality of being required as a witness becomes apparent, then any Advocate who may be so required to testify shall not continue to appear.”

26. Therefore, the Learned Counsel submitted that he had demonstrated that the two advocates were seized of material facts and as such, were relevant and material witnesses to enable this Honorable Court determine which party was in possession of the original title deed before the alleged transfer to the Plaintiff. It was also necessary to determine whether the Plaintiff procedurally transferred the suit property to its name while the balance of the purchase price of the suit property was still being held by the two advocates. Furthermore, it was material for the two advocates to testify as to how they were able to proceed with the sale and purchase transaction without the 1st Defendant/Applicant’s consent and without the 1st Defendant/Applicant’s instructions to Mr. Stephen Oddiaga Advocate.

27. Finally, whether Mr. Khagram T/A A.B. Patel & Patel Advocates ought to continue to represent the Plaintiff if he was called as a witness in this suit. The Learned Counsel submitted that it was trite law that where an Advocate was summoned to give evidence in a matter, that advocate could not continue acting for a party in that matter. Indeed Rule 9 of the Advocates (Practice) Rules 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.”



28. To buttress on his point, the Learned Counsel reiterated the findings of the Court in the case of:- “Jacob Muriungi Mwendwa – Versus - Mbaya M'mwendwa (supra) that:

“I expect therefore that it should have been apparent from the outset that they could be required as witnesses to give evidence. Where this reality of being required as a witness becomes apparent, then any advocate who may be so required to testify shall not continue to appear. As I have stated earlier, the Plaintiff's claim hinges directly on those two agreements which are alleged to have been fraudulently entered into thereby depriving the Plaintiff of his entitlement to his share of the suit land and in particular to LP No. NKUENEIKATHERA/1669. It is my considered view therefore that it would be unethical and unprofessional for the firms of Mbaabu M'Inoti and Kiautha Arithi & Co. Advocates to continue to appear for the defendants whose interests are at cross - purposes with those of the Plaintiff who may desire to call the advocates from the two firms to testify in his behalf. It would therefore be in the interests of justice that the two firms of Advocates be restrained from appearing for the Defendants in this matter. In this regard, I invoke the provisions of Section 3A of the *Civil Procedure Act* which provides that:-“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

29. Further, the Learned Counsel also guided by the findings in the case of:- “Re - Estate of Bernard Martens (Deceased) (2017) eKLR that:-

“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.....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.”

30. From the foregoing, it was clear that when an advocate was required to give direct evidence in a matter in which that same advocate represents one of the parties, that advocate ought to be disqualified from acting for that party. He averred that in view of the fact that Mr. Khagram T/A A.B. Patel & Patel Advocates was primarily involved in the transactions in dispute from their genesis and had been representing the Plaintiff/Respondent in this suit since its inception, it was only proper and lawful that Mr. Khagram T/A A.B. Patel & Patel Advocates be barred from continuing to appear for the Plaintiff in this matter.
31. In conclusion, the Learned Counsel submitted that the foregoing being the case, the 1st Defendant/Applicant prayed that the application dated 27th July, 2023 be allowed in its entirety with costs to the 1st Defendant/Applicant.

B. The Written Submissions of the Plaintiff/Respondent

32. On 22nd January, 2024, the Plaintiff/Respondent through the Law firm of Messrs. A.B. Patel & Patel LLP filed their written submission dated 19th January, 2024. Mr. Khagram Advocate commenced their submissions by rehashing that an application had been filed in the name of the 1st Defendant/Applicant for issuance of a Witness Summons to compel attendance of Mr. Oddiaga and Mr. Khagram as Witnesses for ‘examination’ and ‘cross-examination’ and for the said Mr. Khagram to cease acting or representing the Plaintiff/Respondent in this matter.



33. The Learned Counsel informed the Court that the said application was supported by the Affidavit of James Kounah, who was also an Advocate appearing for the 1st Defendant/Applicant in this matter. The 1st Defendant/Applicant had not sworn an Affidavit in support of the said Application nor has he authorized the said Advocate, Mr. Kounah to swear the Supporting Affidavit on his behalf. In opposing the said application, the Plaintiff/Respondent filed herein the Replying Affidavit of Irene Njoki sworn on the 5th September 2023 and filed herein on the 7th September 2023.
34. According to the Learned Counsel indeed on the 28th July 2023, when the matter was fixed for hearing, not only was the 2nd Defendant absent on grounds of ailment but there was this application filed by the 1st Defendant/Applicant. It became apparent that this application was filed mischievously with the intent to deter the trial from progressing further. Nonetheless, this Honourable Court refused to be drawn into condoning such abuse of process and directed the trial to proceed. In the absence of the 2nd Defendant's Witness [who had been stood down], the Court directed the 1st Defendant/Applicant, cross-examination pending [who had also previously been stood down] be concluded.
35. In his cross - examination, the 1st Defendant/Applicant conceded that he had never asked his Advocate to file the application in question nor was he even aware of it. In addition, the Court would recollect that he was, in fact, taken a back that an application had been made to compel Mr. Khagram to give evidence in the matter and to cease from acting for the Plaintiff/Respondent. Contrary to the relief sought 1st Defendant/Applicant himself sought, the 1st Defendant/Applicant himself was categorical that the said Mr. Khagram and more particularly the Law firm of Messrs. A. B. Patel & Patel, Advocates had acted for the Plaintiff/Respondent from the inception of this suit in the year 2012 and had every right to continue doing so just like he had his Advocate representing himself. The Learned Counsel contended that the record bore this out and on this account alone, this application ought to be dismissed. The said application was nothing but a frivolous attempt to scandalize the matter for collateral purposes.
36. The Learned Counsel asserted that there were three (3) issues that arose for determination on this particular application. Firstly, whether the Supporting Affidavit of James Kounah was competent or should the same be struck out. The Learned Counsel averred that as was stated by Waki JA in “Gerphas Alphonse Odhiambo – Versus - Felix Adiego [2006]eKLR”-Authority '1';

'An Affidavit, by definition is evidence given on oath and is subject to the Provisions of the [EVIDENCE ACT](#), Cap 80 -Section 2[2].....Ordinarily, an Affidavit should not be sworn by an Advocate on behalf of his client...when the person is available to swear and prove the facts of their own knowledge. In appropriate cases, such Affidavits may be struck out or given little or no weight at all....

37. The Court of Appeal reiterated and reinforced the principles against Advocates swearing Affidavits in contentious matters where the client is available to swear to the facts in “Veronica [Ngina Kanja T/ A M/S Ventone Enterprises – Versus - Public Procurement Administrative Review Board & Another; Cantban Logistics Limited \[Interested Party\] \[Civil Appeal E513 of 2021\]](#)[2022] KECA 61[KLR]”- Authority '2' in which it held:-

'...we are of the considered view that the learned Judge was correct in holding that the Appellant's application was fatally defective on account, inter alia, of support by an Affidavit sworn by her Advocate without her express authority, and without exceptional reasons for doing so. To find otherwise would be to constitute the Advocates a prospective Witness of fact in the proceedings and, at the same time, legal Counsel for the Appellant. The impropriety of this dual role need not be over emphasized. The Court of Appeal further



agreed with the decision in Samuel Kinoti – Versus - Erastus Kithinji M'magiri In the Matter of The Estate of M'magiri M'mugira [2005] eKLR where the Judge held that:

'...an Advocate does not become authorized to swear an Affidavit merely because, by virtue of his representation, he becomes knowledgeable of the relevant facts...and even where he finally finds that he indeed has to swear such Affidavit...he nevertheless, must at, the head of the Affidavit, clearly reveal that he has been authorized by his client to do so preferably through a short Affidavit by his client to that effect'

38. According to the Learned Counsel, Mr. James Kounah's Affidavit was fatally defective for want of authority and also fell foul of the rule that Advocates ought not to swear Affidavit's in contentious matters [as this is] where their clients were available to swear to the facts and ought to be struck out. On this account alone, the said application ought to be dismissed and a costs order ought to be made personally against the Advocates, Kounah and Company.
39. Secondly, in view of the 1st Defendant/Applicant's evidence on record, has the application been properly brought or is it simply a malicious attempt to scandalize this matter? has any or any proper basis been laid for the issuance of the relief sought?. In view of the 1st Defendant's evidence on record, has the application been properly brought or was simply a malicious attempt to scandalize this matter, the Learned Counsel submitted that the 1st Defendant has testified on oath that he had not authorized the filing of the application nor was he actually aware of this application made and that he had no objection to the Law firm of Messrs. A. B. Patel & Patel. Advocates or the said Mr. Khagram continuing to represent the Plaintiff/Respondent having done so since the year 2012 [for over 10 years].In view of this alone, the present application could only be said to be a malicious attempt by Mr. Kounah to prevent Mr. Khagram from acting in the matter, in a trial in which he had acted for close to 12 years and which was now virtually concluded.
40. The Learned Counsel submitted that it was also on record and had been confirmed by the 1st Defendant/Applicant in his testimony that it was Mr. Oddiaga who acted for the 1st Defendant and not Mr. Khagram. No issue of conflict could, in the circumstances, arise or be alleged as was sought to be done in the said application. It was noteworthy that no further allegations or facts had been asserted against Messrs. A. B. Patel & Patel, Advocates or, indeed, Mr. Khagram.
41. The test as to whether an Advocate ought to be barred from continuing to act had been laid down severally by the Court of Appeal and more particularly in the case of:- "Delphis Bank Ltd – Versus - Channan Singh Chatthe & 6 Others [2005] eKLR"-Authority-'3', in which it was re-stated as:-

'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.'
42. In so far as Mr. Khagram and the Law firm of Messrs. A. B. Patel & Patel, Advocates was concerned, no mischief nor prejudice had been alluded to or asserted neither could any be possibly so asserted. The 1st Defendant/Applicant accepted that at no time did Mr. Khagram or Messrs. A. B. Patel & Patel, *Advocates act* for him in so far as the Suit Property was concerned. He could not in the circumstances be called to testify or produce any documents on behalf of the 1st Defendant/Applicant and vis-à-vis the Plaintiff/Respondent, his position was privileged. Consequently, on this ground too, the application brought before this Honourable Court was misconceived and untenable and only intended to maliciously scandalize the matter.



43. Even the authorities cited in support of the application never supported its purport. Whilst the principles of law alluded to in these authorities could not be faulted, the facts herein do not justify the application itself. As was stated in the “Delphis Bank Case” above as well as the “Guardian Bank Case” relied upon, each case was to be considered on its individual merits. Looking at the facts here and submissions made:
- i. the 1st Defendant as acknowledged on oath he has never instructed nor authorized such application to be made as against Messrs. A. B. Patel & Patel Advocates or Mr. Sanjeev Khagram and he has no objection to the continued representation of the Plaintiff by them;
 - ii. the 1st Defendant had closed his case;
 - iii. the only ground alluded against Messrs. A. B. Patel & Patel, Advocates and Mr. Sanjeev Khagram is the escrow account funds of Kshs.13,500,000.00 and that Mr. Sanjeev Khagram was at the centre of the transactions in dispute herein and are allegedly seized of material facts [none of these are stated in the Affidavit];
 - iv. documentary evidence has been placed before this Honourable Court establishing that the said escrow account funds were placed in a joint account by an Order of the Court given that another suit was pending pertaining to the Suit Property Kwale/Diani Beach Block/203;
 - v. there is sufficient evidence of fraud and contempt of Court on the part of the First Defendant on record;
 - vi. all the relevant evidence has been placed before this Honourable Court and has been extensively referred to in the testimony of the Plaintiff and Defendants’ Witnesses and the supposition now made by Mr. Kounah can only be speculative with the sole intent of tainting the integrity of the judicial process herein; and
 - vii. this application has been made some 12 years after the suit was filed and right at the conclusion of the trial.
44. Given this set of facts, the Learned Counsel humbly submitted that there was no or no proper basis laid for the exercise of this Honourable Court’s discretion in the matter to grant the prayers now sought nor was there any justification for this. The contents of Paragraph 12 of the Written Submissions filed on behalf of the 1st Defendant about alleged ‘... glaring gaps and inconsistencies.....’ Could not constitute or take place of evidence as reiterated by the Court of Appeal in the case of:- “Robert Okeri Ombeka – Versus - Central Bank of Kenya [2015] eKLR”-Authority ‘4’. Even the Statement made at Paragraph 13 of the Written Submissions filed on behalf of the 1st Defendant/Applicant were misleading and could not constitute evidence or be a justification for the grant of the relief sought. The evidence on record was clear-neither Messrs. A. B. Patel & Patel, Advocates nor Messrs. Stephen Oddiaga were involved when the Agreement for Sale was drawn up and it was only when the litigation arose that Messrs. A. B. Patel & Patel got engaged. It was incongruous for submissions to be filed purporting to alter the factual evidence on record given by the 1st Defendant/Applicant himself.
45. The Learned Counsel asserted that with reference to the question of the Supplementary Affidavit of the 1st Defendant/Applicant directed against his Advocate, Mr. Oddiaga, with all due and tremendous respect, it seemed to be raising disputes as regards Mr. Oddiaga’s fees and taxation of bills for work carried out by an Advocate. With due respect, that had nothing to do with the issues in this matter and particularly whether the 1st Defendant/Applicant could have sub-divided and obtained purported Title documents to the alleged Sub-division when he had already transferred the property to the



Plaintiff/Respondent and the original Title documents and Lease were in possession of the Plaintiff/Respondent.

46. Whatsoever the matter might be between Mr. Oddiaga and Mr. Mwakibibo ought not to be allowed to cloud the matter herein as the 1st Defendant/Applicant was now attempting to do here in order to deflect the Court's attention away from his clear fraudulent conduct. The Learned Counsel invited this Honourable Court not to exercise its discretion as sought by the 1st Defendant/Applicant and to hold that this was nothing but an attempt to maliciously scandalize this matter for collateral purposes. The record would show that the 1st Defendant/Applicant had since the year 2021, attempted to delay and frustrate this trial from being concluded.
47. Thirdly, whether any proper basis been laid for issuance of the relief sought. The Learned Counsel submitted that this issue ought to be answered only in the negative. The Application had been brought under the provisions of Order 16 of the Civil Procedure Rules, 2010 which required a request for a Summons to be made prior to the Trial Conference. This matter had been ongoing since the year 2012. It was questionable why the 1st Defendant/Applicant had to wait until the trial was almost concluded to make the application.
48. The Learned Counsel reiterated the case by this Honourable Court of "Aspire Limited – Versus - Zedeka Technical Services Limited & 2 Others [2021] eKLR", Authority '5', that:-

“...the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice;...The real questions then become: Is the testimony of the Advocate relevant, material or necessary to the issues in controversy or is there other evidence which will serve the same purpose as the evidence by Counsel. Eventually each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances-of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of Counsel will not be ordered.
49. The Counsel held that Mr. Kounah, in his Affidavit documents not stated what the nature of evidence sought to be given was, let alone the fact that the deposit was made by Order of the Court on account of another dispute involving the Suit Property and, thereafter, on account of the 1st Defendant/Applicant's fraudulent conduct herein. The evidence on record clearly proved the factual position.
50. In conclusion, the Learned Counsel prayed that this Honourable Court held that no or no proper basis had been laid for the issuance of the relief sought.

C. The Written Submissions of Mr. Stephen Oddiaga

51. On 16th January, 2023, Mr. Stephen Oddiaga filed his written Submission dated even date. Mr. Oddiaga himself being an Advocate of the High Court commenced the submission by stating that he would be relying entirely on his Replying Affidavit and the Grounds of opposition filed in court. He averred that the 1st Defendant/Applicant had not shown that he was a witness to testify in support of his case. The provision of Order 7 Rule 5 of the Civil procedure Rules, 2010 provides for things which should accompany a Statement of Defence. One of the requirements was that there must be;
 - a. A list of witnesses to be called at trial.
 - b. Witness statement signed by the said witness except for an expert witness.



52. Thus, he submitted that he was not in the list of witnesses and had also not made any statement. He could not be called as a witness. He did not know what he was am coming to court to say. As a witness he needed to prepare and know what was his role in these proceedings. To him he was of the belief that parties in this matter complied with pre-trial requirements as provided for under and Order 11 of the Civil Procedure Rules. The witnesses listed and statements filed in court were confirmed as the only ones to give evidence and relied upon respectively by the Applicant. He could not now seek to make additions and more so Eleven (11) years later!
53. He had gone through the supplementary affidavit by the Applicant. The same contained different issues and which never stated why he should be called to testify and this late in the day. He had also seen the submissions by the 1st Defendant/Applicant, and he saw nothing compelling to persuade the court to order his attendance to testify. He asserted that, just out of respect and courtesy, the 1st Defendant/Applicant Advocate, should have reached him for a discussion on what issues relating to this suit he wanted him to answer and/or explain. But the approach taken by the Applicant was not only impolite but impudent and more so to a professional colleague! He urged Court to dismiss this Application and proceed to finalize this matter which had been pending in court for a long time.
54. He stated that the Court should find this Application lacking in merit and dismiss it with costs. He urged that the costs of this outrageous application to be paid by Mr. James Kounah Advocate personally.

V. Analysis and Determination

55. As indicated above, I have keenly considered the pleadings filed by all the parties, the elaborate and robust written and oral submissions by the Learned Counsels, the relevant provisions of the law and the cited authorities. I have also perused all the orders that have been mentioned in this application.
56. This Honourable Court has framed three (3) broad salient issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 27th July, 2023 by the 1st Defendant/Applicant has any merit whatsoever.
 - b. Whether parties are entitled to the orders sought.
 - c. Who bears the costs of the Notice of Motion application dated 27th July, 2023?

IssueNo. a). Whether the Notice of Motion application dated 27th July, 2023 by the 1st Defendant/Applicant has any merit whatsoever

57. Under this sub – title, the main substratum is two – fold. First, whether the Court should issue summons compelling the attendance of two Advocates who supposedly were in conduct of the instant matter at some point during both the litigation and Conveyancing stage. Secondly, whether the Honourable Court should issues orders baring one of the Advocates from further acting for or representing the Plaintiff/Respondent herein allegedly on grounds of conflict of interest particularly after having been summoned and testified in the case.
58. The Court will deal with each of these two limbs separately. On the issue of summoning any person to give evidence, provide any information or as the Court may deem necessary are governed under several provisions of the Law. I wish to make reference the provision of Sections 173 (1) and (2) (a), (b) and (c) of the *Evidence Act*, Cap. 80; Section 22(b) of the *Civil Procedure Act*, Cap. 21 as read together with Order 16 Rules, 1, 5, 6, 7 & 8 of the Civil Procedure Rules, 2010.They provided as follows:-

Section 173 (1) Extended powers of Court for purpose of obtaining proper evidence:-



1. A Judge or Magistrate may, in order to discover or obtain proper evidence, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact whether or not it is otherwise admissible; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to object to any such questions or order, nor, without leave of the Court, to cross – examine the witness upon any answer given in reply to any such question;

Provided that Judgement shall be based only upon facts which are otherwise admissible and which have been duly proved.

2. Sub – section (1) of this Section shall not authorize a Judge or Magistrate:-
 - a. To compel a witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under the provisions of Part II of this Chapter, if the question were asked or the document was called for the adverse party; nor
 - b. To ask any questions which would be improper for any other person to ask under Section 157 or 158 of this Act; nor
 - c. To dispense with the primary evidence of any document, except in the cases excepted by the provisions of this Act.

Section 22 (b) Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party issue of Summons to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid”.

59. The Court holds that these provisions of the law are straight forward and self explanatory. Further to this, I have sought refuge from case law commencing from the case already cited by the Learned Counsel for the 1st Defendant/Applicant of” “Manchester Outfitters Limited (Supra)” where the Court expressed itself as follows:-

“From the foregoing provisions, it is clear that a court suo moto, can summon any person it deems is a necessary witness either for purposes of giving a testimony or for producing a document(s). An application in this regard can also be made by a necessary party.

What this implies is that notwithstanding our finding that no basis has been laid for the summoning of Ms. Latita Galot, the court on its own motion, may summon any person it deems fit as a necessary witness to aid it in arriving at the determination. A witness summoned by the court may also be intended to fill any void identified in the course of the proceedings and which void, if not filled, may undermine a just, objective and concise determination.”

60. Be that as it may, I have also noted that the provision of Section 134 of the *Evidence Act*, Cap. 80 prohibits the 1st Defendant’s attempts to summon the said lawyers.



61. Section 134 of the *Evidence Act* stipulates as follows: -

“(1) No advocate shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure–

- (a) any communication made in furtherance of any illegal purpose;
- (b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

62. For the rationale of the Advocate/Client confidentiality, reference, was made to the Canadian Supreme Court case of “R – Versus - McClure [2001] SCC 14(36)” where it was held that:-

“The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself. The Solicitor-client relationship is a part of that system, not ancillary too it. The prima facie protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the system.”

63. On the same issue, I also wish to cite the case of: “Baker – Versus - Campbell (1983) 153 CLR 52, 128”(Per Dawson J) where the High Court of Australia expressed itself in similar terms that:-

“Whilst legal privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which could not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice. This is why the privilege does not extend to communications arising out of other confidential relationships such as those of doctors and patient, priest and penitent or account and client...The restriction of the privilege to the legal profession serves to emphasize that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself.”

64. According to the 1st Defendant the persons in respect of whom Witness Summons are sought, were at some point in the center of the legal transactions in form of the conveyancing or litigation of the suit property. Thus, for that primary reason, they were seized of material facts which will assist the Court to reach a fair and just determination. The Learned Counsel for the Plaintiff/Respondent on



the other hand has on an umpteenth times reiterated that the Honourable Court would recollect that the 1st Defendant conceded that he had never asked his Advocate to file the application in question nor was he even aware of this. On the same breath, he indicated he never had any problem whatsoever in having Mr. Khagram appearing for the Plaintiff/Respondent. (I shall be dealing on this aspect later on). In addition, the Court will recollect that he was, in fact, taken a back that an application had been made to compel Mr. Khagram to give evidence in the matter and to cease from acting for the Plaintiff/Respondent. Contrary to the relief sought 1st Defendant/Applicant himself sought, the 1st Defendant/Applicant himself was categorical that the said Mr. and more particularly the Law firm of Messrs. A. B. Patel & Patel Advocates had acted for the Plaintiff/Respondent from the inception of this suit in the year 2012 and had every right to continue doing so just like he had his Advocate representing himself.

65. Essentially, I have taken notice to the fact that the 1st Defendant/Applicant enumerated the facts in respect of the participation of summoned witnesses in the transactions that took place as pertaining the subject matter of the instant suit. The 1st Defendant/Applicant argued that the said witnesses were at the center of the transactions and are seized of material facts which will assist this Court reach a fair and just determination of the case. Therefore, the 1st Defendant/Applicant maintained that the said persons were competent and compellable witnesses within the ambit and meaning of the provision of Section 125 and 128 of the Evidence Act, Cap. 80.
66. My quick reading of the above provision of Section 134 of the Evidence Act, Cap. 80, the Advocate/Client confidentiality is not absolute, There are instances, stated in the proviso, where the Advocate may be required, for the stated compelling reasons to disclose communication or content and condition of documents. In the instant case, I stress having noted that the 1st Defendant/Applicant has explained that the summoned advocates were at the center of the transactions that are the subject of this suit. Therefore, they were seized with material facts that may assist the court arrive at a just determination of the dispute.
67. Additionally, I find that the prohibition under the provision of Section 134 of the Evidence Act, Cap. 80 is specifically in respect to the disclosure of communication made to an Advocate by his or her client or divulgence of information regarding documents that come to his/her attention in the course of employment as the client's Advocate. Thus, the prohibition is for the protection of the client and not of the Advocate. The bottom line of it all is that all that an Advocate gets is the privilege on non-disclosure.
68. Having stated this, it is my findings that considering the nature of this case, the advocates law firm are and should not be the ones on trial over the dealings in land dispute before this Honourable Court. Far from it. The only issue was because the said advocates at some point allegedly handled the matter. Indeed, further, it is alleged that there may have been some outstanding balance of the purchase price amounting to a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs.13,500,000.00/-) in a joint interest earning account pursuant to a Judgement and Decree dated 11th December 2008, in Civil suit No. 315 of 2008, cross examining them would be like prosecuting another claim inside this instant case, the 1st Defendant.
69. Suffice it to say, it will be necessary to have the in-put of the said advocates in the matter but only limited to Mr. Stephen Oddiaga being that they were both in conduct of Civil Suit No. 315 of 2008. I have noted and its common knowledge that Mr. oddiaga is no longer on record in the instant case. Hence, the issue of conflict of interest may not arise at all. In any case, only one of the Advocates would be sufficient to shade some light into the matter. Having both of them appear as witnesses would over – crowding and suffocating the already complex proceedings likely to tantamount to a trial within a trial. From the onset, I repeat it will be unnecessary. And of course in such a case, the said advocate



may and will still be within their rights not to divulge confidential information regarding their client. Therefore, I discern that the 1st Defendant/Applicant has made out a case for the summoning of Mr. Oddiaga who participated in the transactions that are now under dispute. For the sake of sustaining the Core Values of the Rule of law, human dignity, honesty, truthfulness, openness, transparency and accountability well enshrined under Article 10 (2) of *the Constitution* of Kenya, 2010 and other statutes and for avoidance of being ambushed, Mr. Oddiaga Advocate should be furnished with all the relevant documents that the Learned Counsel for the 1st Defendant/Applicant intend to rely on during the examination and cross examination at least seven (7) days before the hearing taking place.

70. On the second issue regarding Mr. Khagram Advocate and his representation of the Plaintiff/ Respondent. This has been such a broad and well deliberated subject within the Courts for obvious reasons. It is an issue that do frequently occur due to the thin membrane of Advocates rendering professional services to their clients. It is from this background, this would not want to re – invent the wheel. But all said and done, the starting point is, the provision of Article 50 (2) (g) and (h) of *the Constitution* of Kenya, 2010, of course bestows that most valued constitutional right to a litigant – on the right to a legal representative or advocate of his choice in all disciplines be it under the Criminal, Civil or Conveyancing umbrella. Procedurally, under Civil matters, once served with pleadings filed in Court. A litigant or party (ies) have a right to appoint an Advocate of his choice under Orders 6 and 9 of the Civil Procedure Rules, 2010 to render them professional legal services accordingly.
71. In the instant case, this Honourable Court observes that the Plaintiff/Respondent is represented by the Law firm of Messrs. A.B. Patel & Patel Advocates. It was the submissions of the Plaintiff that the 1st Defendant accepted that at no time did Mr. Khagram or Messrs. A. B. Patel & Patel, *Advocates act* for him in so far as the Suit Property is concerned. He cannot in the circumstances be called to testify or produce any documents on behalf of the 1st Defendant and vis-à-vis the Plaintiff, his position is privileged. Consequently, on this ground too, the application brought before this Honourable Court is misconceived and untenable and only intended to maliciously scandalize the matter.
72. Regarding conflict of interest and client confidentiality Halsbury Laws of England 4th Edition at paragraph 527, page 353 states:

“ A practicing barrister must not accept any instruction if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients, unless all relevant persons consent to the barrister accepting the instructions.

A barrister must also not accept instructions if there is a risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent.”

8. Black’s Law Dictionary Tenth Edition defines conflict of interest as:

1. A real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.
2. A real or seeming incompatibility between the interests of two of a lawyer’s clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent”.



73. In the same vein, The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016 defines conflict of interest in Rule 6 paragraph 96 as follows: -

“A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interests or by the Advocate’s duties to another current client, former client or a third person.”

74. Rule 6 paragraph 95 of the Code provides that an 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. Rule 6 paragraph 99 of the 2016 Code enumerates instances in which a conflict of interest might arise. They include: -

- “(a) Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;
- (b) Where the nature or scope of representation of one client will be materially limited by the Advocate’s responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.
- (c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.”

75. On the material before the Court it is difficult to see how the alleged conflict has arisen. This is because Mr. Khagram T/A A.B. Patel & Patel has not and never represented the 1st Defendant/Applicant. According to the 1st Defendant/Applicant the only reason as to why the conflict of interest would arise was because they intended to summon Mr. Khagram Advocate as a witness in this matter. On that front, the 1st Defendant held that it was trite law that where an advocate was summoned to give evidence in a matter, that advocate could not continue acting for a party in that matter. Indeed Rule 9 of the Advocates (Practice) Rules 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.”

76. The question of conflict of interest is almost invariably tied to the equally weighty matter of client confidentiality entailing the advocate’s duty not to disclose or misuse privileged information obtained in a Client - Advocate relationship. I wish reiterate the contents of the provision of Section 134 of the *Evidence Act*, Cap. 80 as stated above and proceed to state that an Advocate is bound to a duty of confidentiality in relation to privileged information arising out of his communication with a client. The advocates duty to his client according to Halsbury’s Law of England 3rd Edition Vol. 3 para 67 is a:

“Duty not to disclose or misuse information: The employment of counsel places him in a confidential position and imposes upon him a duty not to communicate to any third person



the information which has been confided to him as counsel to his client's detriment. This duty continues after the relationship of counsel and client has ceased."

77. In the later decision of the Court of Appeal, cited by the Learned Counsel for the Plaintiff/ Respondent, the case of:- "Delphis Bank Limited (Supra) the objection against the participation of an advocate in representing a party in the matter was on grounds that the former had prepared disputed instruments and was likely to be summoned as a witness. The court stated that:

"The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in Advocate/Client fiduciary relationships or where the Advocate would double up as a witness. 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. The authorities we allude to are King Woolen Mills Ltd & Anor – Versus - M/s. Kaplan & Stratton [1993] LLR 2170 (CAK), (C.A 55/93) and Uhuru Highway Development Ltd & others – Versus - Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654.

In the first authority, a partner in the Firm of Kaplan & Stratton, Mr. Keith, participated in negotiations for offshore loan facilities between a Bank and the borrowers and he also went ahead and drew up the loan agreement, the guarantee, the debenture and the legal charge on behalf of the Bank and the borrowers, as their common advocate.

When disagreements subsequently arose and litigation commenced in respect of those transactions, the firm of Advocates chose to act for the Bank but the borrowers objected and sued the firm seeking an injunction to stop it from breaching client/advocate confidentiality. It was contended, and the court found, that the borrowers had imparted to Mr. Keith and the bank, confidential information and their secrets in confidence under the retainer to enable Mr. Keith to successfully conclude the loan transaction. The court concluded, per Muli J.A with whom the other members of the court agreed: -

"I have no doubt in my mind that the Respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the Appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit.

The result will be that the Appellants will not only be confronted with their own confidential information but will suffer great injustice and prejudice during the trial of the main suit". Mr. Keith and any partner in the firm of Kaplan & Stratton were restrained from continuing to act for the Bank in the main suit or in any litigation or proceedings arising from the loan transactions. In so deciding the court cited with approval English decisions in Rakusen – Versus - Ellis Munday and Clerke [1912] 1 Ch. 831, Re – A Firm of Solicitors [1992] 1 A 11 E.R 353, and Supasave Retail Limited - Versus - Coward Chance and others [1991]



1 All ER 668. The former two cases were applied in the latter, where Sir Nicolas Browne – Wilkinson V-C summed up the general rule as follows: -

“The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in *Rukusen – Versus - Ellis, Munday & Clerke* (1912) 1 Ch. 831 ...The law as laid down there is that there is no absolute bar on a solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (...) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in *Rukusen's* case itself. *Cozens – Hardy M.R.* laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability result if the solicitor is allowed to actAs a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated”.

The *King Woolen Mills* case (supra) was applied in the *Uhuru Highway Development Ltd* case (supra) where it was contended in affidavit evidence, and the court found, that the Advocate, Mr. George Oraro, had acted for both the bank and the borrowers and had drawn up the Charge which had become contentious in subsequent litigation.

As is clear from those authorities, each case must turn on its own facts to establish whether real mischief and real prejudice will result. In this case, we hardly have any facts to consider in arriving at such conclusion.”

78. In the instant case, the Plaintiff/Respondent’s advocate is alleged to be privy to pertinent facts relating to the instant suit which may be used in the matter to the detriment of the 1st Defendant/Applicant. The nature and source of the alleged facts and how these may have come into the possession of the Respondent firm, is not disclosed. Even if some material had been supplied by the 1st Defendant/Applicant to prop up the allegations of conflict of interest and allied matters, the test to be applied would be whether real mischief and real prejudice will, in all human probability, result, as stated by the Court of Appeal in the case of:- “*Albert Chaurembo Mumba & 7 Others – Versus - Maurice M. Munyao & 148 Others* [2015] eKLR”, where the Court reiterated that the burden is upon the party seeking to bar an Advocate from acting in a matter to prove the existence of factors such as conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct giving rise to the anticipation of real mischief or real prejudice. In other words, to establish the factual basis for such apprehension or anticipation.
79. The removal of an advocate from representing a client is not to be taken lightly as the litigant who appointed such advocate enjoys the constitutional right to be represented by an advocate of his choice and the right to a fair hearing. Thus, in “*Jopa Vilas LLC – Versus - Overseas Private Investment Corp &*



2 Others [2014] eKLR” the Court of Appeal in emphasizing the gravity of the matter quoted a passage from the judgment in “Delphis Bank Limited (Supra)” before stating as follows:

“The Supreme Court of Samoa in *Apia Quality Meats Limited v Westfield Holdings Limited* [2007] 3 LRC 172 held on the subject of removal of an Advocate from proceedings that such an application had to be considered under the relevant legal principles on the courts exercise of inherent jurisdiction to control the conduct of the proceedings and those who appeared before it as counsel. The factors to be considered were such factors as conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct. It was further held that removal of an Advocate from acting for a party in proceedings was an extraordinary and drastic remedy to be contemplated only in the most extraordinary circumstances, requiring misconduct so serious that removal was the only way of safeguarding the future integrity of the proceedings.”

80. As observed by O’Kubasu J. A. (as he then was) in the case of:- “William Audi Odode & Another – Versus - John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004”:

“...[I]t is not the business of the courts to tell litigants which advocate should or should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in a matter, the parties must be allowed to choose their own counsel.”

81. For these reasons, on the second limb whereby the 1st Defendant sought to have the Plaintiff/ Respondent’s Advocate be barred from this proceedings and specifically appearing for the Plaintiff/ Respondent, I hold that neither cogent reasons, factual foundation nor grounds have been demonstrated to justify granting the orders. Thus, the prayer fails in totality. Like a doddle, its dead on arrival.

Issue No. b). Who bears the costs of the Notice of Motion application dated 27th April, 2023

82. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus - Barclays Bank of Kenya Limited, eKLR (2014).

83. In this case, taking that the matter is still proceeding on for hearing, and that the application by the 1st Defendant/Applicant has partially succeeded, this Honourable Court holds that there shall be no orders as to costs.

VII. Conclusion & Disposition

84. The Upshot of this is that the has made put a case to have partially and thus, for avoidance of doubt, I therefore proceed to make the following findings:

- a. That the Notice of Motion Application dated the 27th April, 2023 be and is hereby found to partially have merit and is allowed in respect to the 2nd prayer.
- b. That this Honourable Court be and hereby issues witness summons compelling the attendance of Mr. Stephen Oddiaga T/A Stephen Oddiaga & Company Advocates for



examination and cross-examination while it declines to summon Mr. Khagram nor to direct that he ceases from acting for the Plaintiff herein as its Advocates.

- c. That an order be and is hereby made directing the 1st Defendant/Applicant to serve Mr. Oddiaga Advocate with all the relevant documents they intend to rely on during his testimony at least seven (7) days before him appearing in Court as stated.
- d. That this Honourable Court recommends that the expeditious running these proceedings being that this is a fairly old matter. The case for the Defence hearing to be on 2nd and 3rd April. 2024 as scheduled therebefore.
- e. That there shall be no orders as to costs.

It is ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF MARCH 2024.

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**HON. JUSTICE L.L. NAIKUNI,
ENVIRONMENT & LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Sanjiv Khagram Advocate for the Plaintiff/Respondent.
- c. Mr. Kounah Advocate for the 1st Defendant/Applicant.
- d. Mr. P. C Onduso Advocate for the 2nd and 4th Defendants/Respondents.
- e. Mr. Ondambu Advocate for the 3rd & 5th Defendants

