



**John Nyamari Mogaka t/a Ouru Hyper Stores v Mogaka & another (Civil Appeal 96 of 2017) [2022] KECA 1039 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KECA 1039 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 96 OF 2017  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
SEPTEMBER 23, 2022**

**BETWEEN**

**JOHN NYAMARI MOGAKA T/A OURU HYPER STORES ..... APPELLANT**

**AND**

**CHARLES MATUNDURA MOGAKA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR KISII ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Ruling and Order of the Environment and Land Court of Kenya at Kisii (J.M. Mutungi, J.) dated 30th June, 2017 in ELC Petition No. 24 of 2016)*

**JUDGMENT**

**Judgment Of Kiage, Ja**

1. The appellant, John Nyamari Mogaka and Charles Matundura Mogaka, the 1<sup>st</sup> respondent are step-brothers born to one Joseph Mogoka Nyang'au (deceased) who died on June 20, 2014. At the time of his death, the deceased had filed suits relating to two of his parcels of land through his advocate, Joseph Mboya Oguttu of Ms. Oguttu-Mboya & Co. Advocates. By virtue of this, Counsel was invited by the family to a meeting held on July 11, 2014 to discuss the way forward concerning the said suits. Among other resolutions, the deceased's family agreed to proceed with the succession proceedings and have Counsel handle the matter on their behalf.
2. Subsequent to the meeting, the appellant filed a Petition against the 1<sup>st</sup> respondent but since this is not the crux of this appeal, we shall not delve into the merits of it. In a nutshell, the appellant claimed that the 1<sup>st</sup> respondent, in collusion with the 2<sup>nd</sup> respondent, fraudulently and unlawfully caused the transfer of a property known as LR. No. Kisii/municipality/block III/142 (suit property) which was duly and lawfully registered in their deceased father's name. The appellant, who was in occupation of the suit property, among other prayers sought for a permanent injunction restraining the respondents, their agents or servants from interfering with his right to occupation of the property.



3. By a memorandum of appearance dated September 5, 2016, the firm of M/s Oguttu-Mboya came on record for the 1<sup>st</sup> respondent. The firm filed an answer to petition and averred that the deceased voluntarily transferred the suit property to the 1<sup>st</sup> respondent as a gift. The 1<sup>st</sup> respondent denied the allegations levelled against him by the appellant and urged the court to dismiss the petition.

Then came the Notice of Motion dated October 12, 2016 that forms the basis of this appeal. In it the appellant sought the following orders in the main;

- a. That Mr. Oguttu Mboya and the firm of M/s Oguttu Mboya & Company Advocates be ordered to disqualify itself from acting on behalf of the 1st respondent herein.
  - b. That the pleadings done and/prepared by Mr. Oguttu Mboya and the said firm M/s Oguttu Mboya & Company Advocates in respect to this matter be struck out from the face of (sic) record before this court.
4. The application was based on 13 grounds on the face of it and was supported by an affidavit sworn by the appellant. He deposed that Mr. Mboya was the family lawyer as he was retained by their deceased father at the time of his death. During the aforementioned family meeting, issues concerning the suit property were raised in his presence, and he also addressed them on the pros and cons of the options available to the family concerning some properties that were subject to court cases.
  5. Further, it was resolved in the meeting that Mr. Mboya would file the succession cause on behalf of the family. The Succession Cause was filed at the Kisii High Court *vide* Succession Cause No. 73 of 2015. The appellant complained that the same was filed without his input or involvement. He contended that Mr. Mboya has knowledge of the suit property at a family level and therefore may use it against him in the suit. He therefore urged the court, in the interest of justice, to disqualify Mr. Mboya from representing the 1<sup>st</sup> respondent as he, the appellant, stands to be prejudiced if he continues to do so.
  6. Mr. Mboya filed a replying affidavit and conceded that he represented the deceased in two suits in court, one against Diamond Trust Bank Limited and Credit Bank Limited and another against one Simon Mogaka Nyang'au. However, the deceased passed away before the matters could proceed to hearing, which necessitated the procurement of a Grant to facilitate his substitution in order for the matters to proceed.
  7. The invitation to the family meeting was made by one Zablon Mogambi Mogaka (Zablon), a brother to the appellant and 1<sup>st</sup> respondent. His address to the family strictly pertained to the fate of the pending cases in court over the deceased's properties namely LR No's. Central Kitutu/daraja Mbili/1342 & 1343. He categorically stated that he did not delve into any issue concerning the suit property. He continued to state that the said suit property did not form part of the estate of the deceased and therefore was not captured in the Petition documents. In fact, Zablon, the petitioner, is the one who instructed Mr. Mboya, and not the appellant, who also declined to sign the consent document.
  8. Mr. Mboya averred that it is inconceivable for the appellant to allege that he was the family lawyer in respect of the Succession proceedings yet the instructing client is Zablon. Even though he acted for the deceased, that did not make him the "family lawyer" since every member of the family is an independent entity at liberty to procure the services of any advocate of their choice. Counsel maintained that he has never acted on behalf of the appellant and that no confidential information was ever committed to him which can be used to prejudice the appellant. He concluded that the appellant was interfering with the 1<sup>st</sup> respondent constitutional right to representation and urged the court to dismiss the application.
  9. Mutungi, J. considered the application, the reply thereto and the submissions filed, and held that the appellant had failed to demonstrate that an advocate-client relationship existed between himself, Mr.



Mboya and the firm of Oguttu Mboya & Company Advocates. The said firm acted for the appellant's deceased father in separate and distinct matters not related to the suit property. The learned judge therefore saw no basis to hold that Mr. Mboya or the law firm had access to any confidential or privileged information relating to the suit property. He dismissed the application as he found it to be unmeritorious.

Aggrieved by the ruling, the appellant filed the instant appeal containing 9 grounds which, abridged, are that, the learned judge erred by;

- a. Failing to find that indeed Mr. Mboya was the appellant's family lawyer.
  - b. Failing to disqualify the firm of Oguttu Mboya & Company Advocates and Mr. Mboya in particular even after appreciating that he attended the family meeting and was instructed to file the Succession proceedings on behalf of the family.
  - c. Failing to acknowledge Mr. Mboya's presence in that meeting where the suit property was discussed in depth gave him a tactical advantage over the appellant.
  - d. Failing to appreciate that there existed an advocate-client relationship between the appellant and Mr. Mboya.
10. In this appeal, the firm of Mainga & Company Advocates is on record for the appellant, while the firm of Oguttu Mboya & Company Advocates is on record for the 1<sup>st</sup> respondent.
  11. It was submitted that an advocate is deemed to be in conflict when he attempts to serve or to honour two or more interests that cannot be served consistently. By Mr. Mboya representing the 1<sup>st</sup> respondent, he and his firm were attempting to serve two incompatible interests which created a conflict. Contrary to the assertions made by Mr. Mboya, Zablun was not the instructing client, the family was. Zablun was merely a representative of the family since it would have been cumbersome for Mr. Mboya to deal with each member individually. He therefore acted on behalf of all the beneficiaries of the estate when he filed the succession proceedings.
  12. As a result, Mr. Mboya and by extension his law firm owed a fiduciary duty to all beneficiaries of the estate as he had an advocate – client relationship with all of them. For that reason, Mr. Mboya cannot act for one beneficiary against the other as this constitutes a clear conflict of interest and a breach of fiduciary duty to the appellant.
  13. Additionally, Mr. Mboya was privy to crucial information concerning the suit property as it was extensively discussed during the family meeting. This, coupled with his involvement in the succession proceedings puts the appellant at risk since Mr. Mboya may use the confidential information at his disposal against him in the suit to the benefit of the 1<sup>st</sup> respondent. Moreover, he may be called upon as a witness to testify to the proceedings of the said family meeting and as such is estopped from acting in the matter as dictated by Rule 8 of the *Advocates (Practice) Rules*. The only remedy to such breach is the disqualification of Mr. Mboya from acting in the suit. We were urged to allow this appeal.

In opposition, it was submitted that Mr. Mboya's participation in the family meeting was limited to briefing the family on the status of the matters that were pending in court. Even the learned Judge affirmed this fact when he found that there was nothing on record to suggest that Mr. Mboya participated in anything concerning the suit property as the minutes showed that he left as soon as he concluded his presentation.

14. It was contended that the appellant failed to demonstrate the existence of an advocate-client relationship. The firm of Oguttu-Mboya acted on behalf of the deceased where the parcels of land involved were distinct from the suit property. Further, the suit property was already in the name of the



1<sup>st</sup> respondent hence did not form part of the deceased's estate. Lastly, the instructing client was Zablon and as such, there was no fiduciary relationship between Mr. Mboya, his firm and the appellant. We were urged to dismiss the appeal as it seeks to deprive the 1<sup>st</sup> respondent of his right to have an advocate of his choice represent him in the suit.

I have evaluated the record of appeal and the submissions by Counsel, cognisant of our role as a first appellate Court, which is to re-evaluate and re-assess the evidence and arrive at our own independent conclusions. See *Selle Vs. Associated Motor Boat Co. Ltd & Others*[1968] E.A 123.

15. The twin issues for consideration are whether there existed an advocate-client relationship between the appellant, Mr. Mboya and by extension his law firm and whether the learned Judge erred by declining to disqualify him from representing the 1<sup>st</sup> respondent in the suit in light of the alleged conflict of interest.

The appellant argues that the advocate-client relationship existed by virtue of Mr. Mboya being the family lawyer. Since Mr Mboya obtained confidential information and may be called upon as a witness, the learned Judge erred by declining to disqualify him from representing the 1<sup>st</sup> respondent. This will give the 1<sup>st</sup> respondent undue advantage over the appellant which is detrimental. The appellant has therefore called on us to ensure that he gets a level playing field at the High Court in the interest of justice.

In *Delphis Bank Limited (now Oriental Commercial Bank Limited Vs. Channan Singh Chatthe & 5 Others*[2014] eKLR this Court, referring to confrontive jurisprudence expressed itself 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.” Emphasis added

16. I wholly concur with the foregoing reasoning and shall proceed with the necessary caution in this matter. It is trite that everyone has a right to have Counsel of their choice represent them in any matter. Although the right has been enshrined in Article 50 (2) (g) of *the Constitution* as relating to an accused in a criminal trial, it applies in equal measure to all litigants as it expressly affects their access to justice as espoused in Article 48. For that reason, courts cannot take away such a fundamental right unless certain that failure to do so will be prejudicial to a party in the proceedings and as a result interfere with or compromise the integrity of the proceedings in some crucial manner. Only then can the drastic and extraordinary measure of advocate-disqualification be justified.

The preliminary question to answer is whether the appellant was a client of Mr. Mboya. Section 2 of the *Advocates Act* defines a client as;

“client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs;”



17. This Court has held that a retainer is proof of the existence of an advocate-client relationship. This was elucidated in *Kings Woolen Mills Ltd (formerly Known As Manchester Outfitters Suiting Division Ltd & Another Vs. M/s Kaplan & Straton Advocates* [1993] eKLR as follows;

“The retainer created a contractual relationship between the advocate and the client... [T]he fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client’s consent.”

18. Also, in *Uhuru Highway Development Ltd & 3 Others Vs. Central Bank Of Kenya & 4 Others* [2003] eKLR it was held that payment of fees serves a proof of the existence of an advocate-client relationship;

“(b) Even if payment of fees was made pursuant to a provision in the charge, this does not exclude the person making payment being a client. This follows from the definition of “client” as provided in section 2 of the *Advocates Act*, as set out above.”

19. From the foregoing, I find justified the holding of the learned Judge that the appellant failed to demonstrate that there existed an advocate-client relationship between him and Mr. Mboya. He did not present an iota of evidence to show that he had ever given instructions to Mr. Mboya, entered into a retainer agreement or paid any fees to him. The mere fact that the deceased, retained him did not make him a “family lawyer”, a term of some indistinctness that is neither here nor there. I further note that it is Zablou, as the one who instructed Mr. Mboya on behalf of the estate of the deceased, that would be the client not the entire family. Section 2 of the *Advocates Act* is clear that a client can retain an advocate on behalf of another but there is no indication that Zablou instructed Mr. Mboya on behalf of the appellant.

20. I would hold that since no advocate-client relationship existed between the appellant and Mr. Mboya, no fiduciary duty arose in favour of the appellant. Therefore, there was no conflict of interest or risk that the appellant may be adversely affected by Mr. Mboya representing the 1<sup>st</sup> respondent in the suit.

21. On whether Mr. Mboya possessed confidential information concerning the suit property, I cannot fault the reasoning of the learned Judge. There was no basis for the supposition that Mr. Mboya had access to any confidential information concerning the suit property. The minutes of the said meeting showed that Mr. Mboya left before the suit property was discussed. Additionally, the suit property was not part of the estate of the deceased, and there is no evidence that Mr. Mboya ever interacted with it during the succession proceedings or at any time before that. Hence there was no risk that Mr. Mboya could, wittingly or unwittingly, use any information against the appellant since he did not possess any.

22. Consequently, and quite inevitably, I find that the learned Judge correctly applied his mind to the matters at hand and there is not sufficient ground to warrant our interference with his decision. I reiterate that given the implications it would have on the rights of litigants and on the right and privilege of advocacy and the attendant effect on the purses and livelihoods of advocates, disqualifying an advocate from representing a client should only occur in the clearest, most compelling of cases. Just because a party alleges that there is a conflict of interest without solid, unmistakable proof will not do. To hold otherwise would set a dangerous precedent with pernicious effect.

23. In the result, I would hold that this appeal lacks merit and dismiss it with no order to costs.

As Mumbi Ngugi and Tuiyott JJ.A agree, it is so ordered.



**Judgment Of Mumbi Ngugi, JA**

I have had the advantage of reading in draft the judgment of my Brother, Kiage, JA., with which I concur. I have nothing useful to add.

**Judgment Of Tuiyott, JA**

I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022.**

**O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

