



REPUBLIC OF KENYA



KENYA LAW
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**Kitui & another v Namachanja & another (Miscellaneous Case
845 of 2018) [2024] KEHC 7816 (KLR) (Civ) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CASE 845 OF 2018

MA ODERO, J

JUNE 28, 2024

BETWEEN

ROSE POLLY KITUI 1ST APPLICANT

JOANNE NORAH KITUI 2ND APPLICANT

AND

LYDIA KITUI NAMACHANJA 1ST OBJECTOR

CLAUDINE UMUTONI 2ND OBJECTOR

RULING

1. Before this court for determination is the Notice of Motion dated 22nd September, 2022 by which the Petitioner/Applicants Rose Polly Kitui And Joanne Norah Kitui seek the following orders:-

“(a) a) Spent

(b) That the firm of Owaga & Associates LLP Advocates, their partners or servants and/or agents be and are hereby barred from acting for the 1st Objector, any beneficiary or any person with vested interest in the Estate of Tom

Kitui Khakame (deceased) in the suit or any other proceedings therefrom by virtue of having represented the deceased and the 1st Petitioner/Applicant at various times before his death.

(c) That all the pleadings filed by Owaga & Associates LLP Advocates, their partners or servants and/or agents be and are hereby struck out of the record as the said firm has no capacity to plead and appear on behalf of the 1st Objector.



- (d) That an order be and is hereby issued to summon Mr. Walter Owaga – Advocate to attend court during the hearing of this suit to tender evidence regarding monies in respect to transactions within the Estate of the late Tom Kitui Khakame.
- (e) That the court be and is hereby pleased to grant such or further orders as it deemed fit.
- (f) That costs of the application be borne by the Respondents.”
2. The application which was premised upon Rule 8 of the Advocates(Practise) Rules, the Advocates Act, Cap 16, Laws of Kenya, Article 50 of the Constitution of Kenya 2010, sections 1A, 1B, 3, 3A of the Civil Procedure Act and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the 1st Applicant.
3. The application was opposed by Walter Owaga an Advocate of the High Court of Kenya who filed a Replying Affidavit dated 14th March, 2023. The matter was canvassed by way of written submissions. The Applicants filed the written submissions dated 5th May, 2023 whilst the Objector/Respondents relied upon their written submissions dated 10th May, 2023.

Background

4. This succession cause relates to the estate of the late Tom Kitui Khakame (hereinafter the Deceased) who died intestate on 14th November, 2017 at the M.P Shah Hospital in Nairobi. A copy of the Death Certificate serial number 406067 is annexed to the supporting Affidavit dated 23rd July, 2018.
5. On 9th September, 2020 Grant of Letters of Administration intestate was made to the two Applicants. The Objectors Lydia Kitui Namachanja and Claudine Umotoni through their Advocate Owaga and Associates filed a Summons for revocation of Grant dated 5th April, 2022.
6. The Applicant’s then filed this present application seeking to bar the firm of Owaga & Associates LLP Advocates from acting for the 1st Objector or any party in this succession cause on grounds that the said firm of Advocates had represented the Deceased at various times before his death.
7. The Applicants further prayed to have all pleadings filed by the said law firm expunged from the record. Lastly that Mr. Walter Owaga Advocate be compelled to attend court in order to tender evidence regarding monies relating to transactions within the estate of the Deceased.
8. In opposing the application Mr. Walter Owaga Advocate cited Article 50 (2) of the Constitution of Kenya 2010, which gives all litigants the right to be represented by an Advocate of their choice. He pointed out that the Applicants have themselves changed Advocates several times in these proceedings.
9. Counsel further submitted that no evidence has been presented to show that the firm of Owaga & Associates LLP have acted in any manner prejudicial to the estate of the Deceased. That the current application is frivolous, vexatious and ought to be dismissed.

Analysis And Determination

10. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The only question for determination is whether the firm of Owaga & Associates LLP ought to be barred from acting for the 1st Objector in this matter.
11. The Applicants submit that the said law firms represented the Deceased during the acquisition of a number of the assets which now form the estate. That in the circumstances there existed an Advocate –



- Client relationship between the said law firm and the Deceased which involved sharing of confidential information.
12. The Objectors deny that there has been any conflict of interest and there has been no breach of fiduciary trust. That the Advocates have at all times acted within the confines of the law in the representation of their client.
 13. Article 50 (2) (9) of the Constitution of Kenya 2010 grants to every person the right
 - “(a) to choose and be represented by an advocate and to be informed of this right promptly.”
 14. Likewise a litigant in a civil matter has the right to choose an Advocate of his choice to represent him/her.
 15. Rule 8 of the Advocates (Practice) Rules 1966 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, where appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter which he acts or appears”
 16. It is obvious that where there exists a conflict of interest an Advocate may not represent one party in a suit. In the case of King Wollen Mills Ltd & Another v Kaplan & Stratton Advocates (1990-1994] EA 244 the court of Appeal observed as follows:-

“An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate.”
 17. In laying down the test for disqualification of an Advocate, the court of Appeal in the case of Pelphis Bank Limited v Channan Singh Chattbe & Others [2005] eKLR stated as follows:-

“.....there is 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 the Court of Appeal is whether real mischief or real prejudice will in all human probability result-----“ [own emphasis]
 18. The Applicants claim that the Advocate now representing the 1st Objector acted for the Deceased in the purchase /acquisition of some of the estate properties. This is not a Civil Suit. This is a succession cause and the question of the acquisition and/or ownership of the estate property is not in issue.
 19. The firm of Owaga & Associates LLP are representing the 1st Objector who is seeking to revoke the grant issued to the Applicants on grounds that some of the dependants of the Deceased were left out.
 20. I do not see the possibility of any conflict of interest with respect to previous work done by the Advocates for the Deceased. I also do not see what prejudice the Applicants stand to suffer if this law firm continues to represent the 1st Objector.



- 21. The Applicants have in their motion inserted a prayer seeking to have Mr. Walter Owaga attend court to give evidence regarding various transactions of estate property. I reiterate that this is not a civil suit. It is a Succession matter and the only issue in controversy is whether some of the Deceased’s dependants were excluded. The question of how, when or for how much estate property was acquired is not a matter in issue. The inclusion of the prayer was obviously a ploy and an attempt to portray some conflict. No proper basis has been laid to persuade the court to have the said Advocate called as a witness.
- 22. Accordingly I find no merit in the present application. The same is dismissed in its entirety. Each party to bear their own costs.

DATED IN NYERI THIS 28TH DAY OF JUNE, 2024.

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MAUREEN A. ODERO
JUDGE

