



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

Succession Cause 1239 of 2008

IN THE MATTER OF THE ESTATE OF JAMES KANYOTU – (DECEASED)

R U L I N G

Before me is an application dated 5th November, 2009 by way of Notice of Motion filed by M/s Ndemo Mokaya & Company advocates for the applicant Mary Wanjiku Kanyotu. The respondent is named as **JUDY THONGORI** advocate T/a **JUDY THONGORI & COMPANY ADVOCATES**. The application is purported to be filed under section 134(1) and (2) of the Evidence Act (**Cap. 80**) and the Advocates Act (**Cap.16**), as well as the Advocates Practice Rules 2007. The application seeks for four orders, two of which in my view, have been spent, as follows-

1. *(Spent)*
2. *(spent)*
3. **THAT the respondent be disqualified from appearing in this succession cause.**
4. **THAT costs of this application be in the cause.**

The application has grounds on the face of the Notice of Motion. The grounds are as follows-

1. **THAT the respondent was engaged as an advocate for all the proposed administrators from the onset.**
2. **THAT around February, 2009 the applicant changed advocates as one JANE GATHONI had also engaged a different advocate (Mutitu and Thiong’o advocates) for purposes of advancing her cause and as a result the applicant realized the conflict of interests if she was to go on with the respondent in defending herself in the applications lodged by Jane Gathoni.**
3. **THAT since then Jane Gathoni has been represented by the firm of Abuodha Omino Advocates.**
4. **THAT on 28th September, 2009 the applicant received summons drawn and filed by the respondent and her law firm and all the information relied upon in the summons was information that the respondent acquired as a result of her engagement as an advocate of all parties.**

5. ***THAT in the event that the applicant may wish to cross-examine Jane Gathoni in her affidavit filed on 25th September, 2009 the respondent/advocate herein shall no doubt be called as a witness.***
6. ***THAT in consequence the respondent/advocate is a potential witness and as a result she should not continue acting for anyone in this succession cause as her continued appearance is serious conflict of interest.***
7. ***THAT it is in the interests of justice that this application is heard before the application filed in court on 25th September, 2009.***
8. ***THAT based on the issues above, it is only in the interest of justice that the court issues the orders as prayed.***

The applicant also filed an affidavit, sworn by herself on 5th November, 2009. It was deposed in the said affidavit inter alia, that the respondent attended and participated in meetings on the administration of the estate in which minutes were taken; that the respondent had used information obtained as a result of her fiduciary capacity to make an application against the applicant; that the information received by the respondent was privileged and the applicant did not consent to its disclosure by the respondent; and that the respondent's acting against the applicant in the suit was a conflict of interest and the respondent should therefore be disqualified from acting as advocate in the matter.

The applicant's counsel also filed written submissions on 4th February, 2010, to the application. In the submissions the facts and the background of the application were given. It was contended that the applicant and two others John Ngatia Kariuki and Jane Gathoni Muraya had petitioned the court for letters of administration through Judy Thongori & Company advocates and that around 19th December, 2008 Jane Gathoni opted to engage the services of Mutitu Thiong'o & Company advocates and filed an application 19th December 2009; that the application was against Mary Wanjiku and at that point Mary Wanjiku could not proceed with Judy Thongori as her lawyer, as Ms. Thongori would have been in conflict of interest and therefore engaged another firm to act for her; and that the said Jane Gathoni again terminated the services of Mutitu Thiong'o & Company Advocates and engaged the services of Abuodha & Omino advocates to represent her in this succession cause and in Children's Court Case No. 83 of 2009.

It was also contended that on or around 25th September 2009, Jane Gathoni reverted to Judy Thongori advocate who purported to act for her against Mary Wanjiku, and that the said advocate who acted for all parties received information in confidence in accordance with section 134 of the Evidence Act (**Cap. 80**) with a major issue being a farm owned by Kawagwanja Limited, a farm in which the deceased was a shareholder. The said advocate proceeded to disclose the confidential information in the application dated 25th September, 2009.

On the law, it was contended that rule 9 of the Advocates Practice Rules 2007 provided that an advocate should not participate in proceedings in his or her capacity as an advocate where he or she believes that she might be called to give evidence. It was contended that the advocate Judy Thongori will be called to give evidence. Reliance was placed on the case of **KING WOOLEN MILLS & ANOTHER –VS- KAPLAN & STRATON ADVOCATES – CA No. 55** of 1993 wherein the court stated-

“the 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 any one else without that client that client’s consent that.....”

The principle equally applies where an advocate acts for two or more clients in the same transaction or subject matter because the retainer is specific between the individual client and the common advocate.

The corollary to this principle is that the advocate having acted for two or more clients should be wary to act for one client against the other or other clients in a subsequent action or litigation concerning the original transaction or subject matter for which he acted for the client as a common advocate.”

It was contended that the above case was relied upon in the case of **CARNEVALI FAUSTO & ANOTHER – VS- GIANLUIGI CERNUSHI & 2 others [2008] eKLR**. It was contended that Ms. Judy Thongori advocate should be disqualified.

In response to the application, the respondent filed written submissions on 8th February 2010. It was contended that the respondent had acted for the administrators Mary Wanjiku Kanyotu, John Ngata Kariuki and Jane Gathoni Kanyotu. It was contended that in December 2008 the applicant changed advocates to Ndemo Mokaya & Company advocates, and that the respondent had always and up to date represented John Ngata Kariuki.

It was contended that the firms of Justice Mutitu and Abuodha Omino advocates only came in for Jane Kanyotu’s children. Therefore the contention that the said firms acted for Jane Kanyotu was untrue. It was also contended that infact the respondent convened meetings in her office where all parties counsel attended, and Mr. Mutunga for the applicant actively participated in those meetings.

On the law, it was submitted that the case of **KING WOOLEN MILLS -VS- KAPLAN & STRATON ADVOCATES (supra)** was distinguishable as it related to acting in subsequent proceedings. Reliance was also placed on, inter alia, the case of **H.F. FIRE AFRICA –vs- A MR. GHARIB 2005 eKLR** wherein Emukule J. declined to disqualify an advocate from acting. It was contended that the issue of sale of Kawakanja Farm was completely non contentious as that issue had been agreed upon.

On the hearing date I was addressed by Mr. Mutunga for the applicant, and Ms. Thongori the respondent.

I have considered the application, documents filed, the submissions, as well as the authorities cited. Section 77 of

the Constitution of Kenya grant people involved in litigation the right to be represented by counsel of their choice. That applies to criminal proceedings, but in my view it applies to all litigation. Therefore, the right to representation by counsel of one's choice is of paramount importance. With that, of course, goes the right to withdraw instructions from an advocate and appoint another advocate.

The position in our present case is that at the beginning, one counsel represented all parties, one or some of whom moved to other advocates. That is their right. The applicant herein now claims that her previous advocate be disqualified because she is using confidential information to file an application against her.

I certainly do not see what confidential information there was. The facts placed before me do not disclose any confidential information. It is agreed that meetings were held where the defendant was present with the litigants. Meetings which are attended by all litigants are not confidential to any of them. They all know, or are presumed to know about what was discussed in those meetings.

The case of ***KING WOOLEN MILLS – VS- KAPLAN & STRATTON ADVOCATES (supra)***, relied on by the applicant is good law. It states that an advocate can be disqualified from acting for one of several parties for whom he has acted in a case, to protect the legal requirement of confidentiality. This is because the confidentiality applies individually to each client. However, in my view, that case does not hold that if a party (litigant) has withdrawn instructions from an advocate in the same matter and instructed another advocate, then the previous advocate should also be disqualified for acting for other parties in the same case. If that were so, in my view, it would cause a great deal of hardship both to practitioners, and litigants. It would delay cases and also hold the court to ransom, because progress of cases would be greatly affected. It would also be very expensive to litigants who would be forced to pay new advocates because a party has chosen to appoint fresh advocates.

The case of ***KING WOOLEN MILLS*** only prohibits advocates from acting against a former client in subsequent proceedings. If the applicant would have come to complain in other proceedings, she would have a valid claim to be considered. However, this is the self service case. There is no basis for disqualifying the advocate.

I therefore find no merits in the application and it is for dismissal.

Consequently, I dismiss the applications. As this is a family matter, and the litigation is still on, I will reluctantly order that costs be in the cause.

Dated and delivered at Nairobi this 10th day March, 2010.

GEORGE DULU
JUDGE.

In the presence of-

Mr. Mutunga for applicant Margaret Kanyotu

Mr. Kariuki holding brief for Judy Thongori for respondent

David Mutisya Court clerk.