



**Kimaita v County Government of Meru & 2 others; Mitu & 5 others (Interested Parties)  
(Constitutional Petition E006 of 2023) [2023] KEHC 26210 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26210 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CONSTITUTIONAL PETITION E006 OF 2023  
TW CHERERE, J  
NOVEMBER 30, 2023**

**BETWEEN**

**ERNEST KIMAITA ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MERU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, MERU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**MERU COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JULIUS KAINGA MITU ..... INTERESTED PARTY**

**JULIUS KIAMBI ARITHI ..... INTERESTED PARTY**

**HELLEN NKIROTE MUGAMBI ..... INTERESTED PARTY**

**MARTIN MUTUMA KUBAI ..... INTERESTED PARTY**

**JULIUS GITONGA KABUI ..... INTERESTED PARTY**

**MBAABU M'INOTI ..... INTERESTED PARTY**

**RULING**

**Introduction:**

1. Petitioner herein, Ernest Kimaita, is a Kenyan citizen, resident of Meru County and an advocate of the High Court of Kenya.
2. Interested parties are members of Meru County Public Service Board (3<sup>rd</sup> Respondent).
3. By Petition dated and filed on 04<sup>th</sup> April, 2023, Petitioner seeks the following orders:



1. A declaration that whole process of nominating, appointment and approval of the 1<sup>st</sup> to 6<sup>th</sup> Interested parties herein as Chairperson and members of the 3<sup>rd</sup> Respondent herein was flawed, unprocedural and in clear violation of the law and the Constitution of Kenya, 2010 particularly Article 27 (8) and Article 175 (c) of the Constitution.
  2. A declaration that the nomination, appointment and approval of the 1<sup>st</sup> to 6<sup>th</sup> Interested parties as the chairperson and members of the 3<sup>rd</sup> Respondent respectively was also illegal, unprocedural and in violation of the law and particularly for failing to adhere with the provisions of Section 58 A (15) of the County Government Act / Section 58 (2) (now deleted) as then was.
  3. An order that the violation of the Constitution and the provisions of the County Governments Act on procedure for nomination and appointment of members of the 3<sup>rd</sup> Respondents renders the 1<sup>st</sup> to 6<sup>th</sup> Interested parties' nomination and appointment as the chairperson and members of the Meru County Public Service Board (3<sup>rd</sup> Respondent herein) respectively illegal, unlawful and unconstitutional.
  4. An order that this Honorable court do disband and/or dissolve the 3<sup>rd</sup> Respondent and order for fresh nominations and appointments to be made forthwith in accordance with the Constitution and other relevant laws.
  5. Costs of the petition
  6. Such further Orders may deem just and appropriate to grant.
4. Consequently, Julius Kainga Mitu, Julius Kiambi Arithi, Hellen Nkirote Mugambi, Martin Mutuma Kubai, Julius Gitonga Kabui, Mbaabu M'Inoti (1<sup>st</sup> to 6<sup>th</sup> Interested Parties respectively) by notice of motion dated 03<sup>rd</sup> July, 2023 and filed on 06<sup>th</sup> July, 2023 sought the following orders:
1. That this Honourable court be pleased to strike out the petition in its entirety.
  2. That the costs of this Application be borne by the Petitioner.
3. That this Honourable court be pleased to make such other or further orders as it may deem just and fit in the circumstances of the case.
5. The application which is the subject of this ruling is based on the following grounds:
1. That Petitioner Advocate, Ernest Kimaita is a partner at the firm of Wambugu and Muriuki Advocates which is among the firms pre-qualified to offer legal representation services to the county Government of Meru and which is presently in conduct of a matter defending the County Government of Meru and which is presently in conduct of a matter defending the County Government of Meru.
  2. That the Public Service Board was sued alongside the County Government of Meru in “Meru ELRC Petition No. E004 of 2022” and that the firm of Wambugu and Muriuki was appointed to defend the interests of the Meru County Public Service Board in the said matter.
  3. That the Claimant in “Meru ELRC Petition No. E004 of 2022” has since lodged an Appeal in the Court of Appeal in Nyeri. That is “Nyeri Civil Appeal E28 of 2023” which Appeal is still active.



4. That the Petitioner Advocate, Earnest Kimaita continues to be the Advocate on record for Meru County Public Service Board under the County Government of Meru in “Nyeri Civil Appeal E28 of 2023”.
  5. That notably, the same advocate, Earnest Kimaita is now the Petitioner in this matter where he has intrinsic knowledge of the Board ‘privileged and confidential information having previously represented the Board as intimated above thus rendering it completely vulnerable and helpless.
  6. That the aforementioned conduct of the Petitioner contravenes the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct as Counsel.
  7. That the Petition is scandalous, frivolous and vexatious and the continued pendency of these proceedings are an abuse of the process of this Honourable court.
6. The application is supported by an affidavit sworn on 03<sup>rd</sup> July, 2023 by Julius Kainga Mitu (1<sup>st</sup> Interested Part) on behalf of himself and the 5<sup>th</sup> to 6<sup>th</sup> Interested Parties with their authority marked JKM 1 in which he reiterates the grounds on the face of the Application. Annexed to the supporting affidavit is copy of list of prequalified service firms among them Wambugu & Muriuki Advocates JMK2, notice of Appointment of Advocates filed by Wambugu & Muriuki Advocates acting for the 3<sup>rd</sup> Respondent in Meru ELRC Petition No. E004 of 2022 JMK3, proceedings in Meru ELRC Petition No. E004 of 2022 JMK4 and a copy of record of appeal in Nyeri Civil Appeal No. E028 of 2023 JMK5 showing that Wambugu & Muriuki Advocates are acting for the 3<sup>rd</sup> Respondent.
  7. It is the Applicants’ case that Petitioner’s has intricate knowledge of the Board’s privilege and confidential information to its detriment thus rendering the Board completely vulnerable and helpless. It is also the Applicants’ contention that Petitioner has contravened the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct out of which the 3<sup>rd</sup> Respondent has filed a complaint JKM6 with the Advocates Complaints Commission.
  8. Applicants hence urge the court to find that the Petition is scandalous, vexatious and an abuse of the court process and to order it be struck out.
  9. In support of their contention, Applicants by their submissions filed on 24<sup>th</sup> October, 2023 contend that Petitioner by virtue of having represented the 3<sup>rd</sup> Respondent in Meru ELRC Petition No. E004 of 2022. On that basis, Applicants submit that Petitioner is privy to facts possibly relevant to this suit and that there exists a conflict of interest in the Petitioner acting for and against the 3<sup>rd</sup> Respondent in Meru ELRC Petition No. E004 of 2022 and in this suit respectively.
  10. Respondent did not file any response to the application but did file written submission on 25<sup>th</sup> October, 2023.
  11. I have considered the application in the light of the supporting affidavit and annexures thereto. Concerning the Petitioner’s submissions, I wish to state that whereas parties can submit, in the ordinary sense of the word, various documents for the court's consideration, submissions are legal arguments, not evidence. This position was well canvassed by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR and the court held as follows:
 

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is



the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

12. The foregoing notwithstanding, I have considered whether the Applicants have demonstrated conflict of interest on the part of the Petitioner.
13. In *King Woolen Mills Ltd* (formerly known as *Manchester Outfitters Suiting Division Ltd & Another v M/s Kaplan & Straton Advocates* [1993] eKLR, the court of Appeal ruled that conflict of interest had been demonstrated arising from the fact that an advocate who had acted for a borrower was also acting for the lender.
14. The Court of Appeal in *Delphis Bank Ltd v Chnnan Siggh Chatte & 6 others* (2005) 1 KLR, stated that:

“The right to counsel of one’s choice may only be limited where there is a conflict of interest and where the principle of confidentiality in advocate/client fiduciary relation is endangered or where the advocate would double up as a witness.”
15. The court observed that:

“There is no general rule that an advocate cannot act for one party and then act for the opposite party in subsequent litigation and that the test is whether real mischief or real prejudice will in all human possibility result.”
16. The *Law Society of Kenya [LSK] Code of Standards of Professional Practice and Ethical Conduct 2016* Part IV is headed “Guidance On The Interpretation Of The Standards”, more particularly on the Standard dealing with Conflict of Interest and it may be apt to examine three paragraphs namely Paragraphs 96, 97 and 99 which elaborate on situations where conflict of interest may arise;

Para 96 provides;

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.

Para 97 provides;

Rationale for the Standard: The Advocate’s ability to represent the client may be materially and adversely affected unless the Advocate’s judgment and freedom of action are as free as possible from compromising influences and the relationship between the Advocate and the client is not materially impaired by the Advocate acting against the client in any other matter.

Finally, Para 99 provides thus; Situations in which a conflict of interest might arise include:

  1. 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;
  2. 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.
  3. 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.



17. [\*Halsbury's Laws of England\*](#), Vol 3 at page 626 addresses the issue of conflict of interest as follows: "Counsel ought not to appear for two clients whose interests may conflict and should refuse to accept a brief if he has advised another person on the same matter or if he is in possession of confidential information relating to the opposing party or by reason of his relationship with a party to or a witness in the proceedings, or if it is likely that he will be a witness in the same proceedings." (Emphasis added).
18. From the foregoing excerpts, it is apparent that the duty to prove the conflict of interest lies on the person that alleges.
19. In *Re A Firm of Solicitors* [1995] 3 All ER 482 Lightman J of the Chancery Division considered in detail the duty owed by a solicitor to a former client. At pages 488 – 489 Lightman J after considering the duty not to act when possessed of confidential information gives the following compromise to the general rule: Firstly, the basis of the court's intervention is not a possible perception of impropriety but the protection of confidential information. Secondly the court is sensitive to the need to afford the fullest special protection to such confidential information. Thirdly the confidential information passing between solicitor and client and otherwise acquired by a solicitor on behalf of his client may subsequently cease to be confidential in which case the protection does not apply. Fourthly a solicitor at one time retained by a client but not in possession of relevant confidential information, is not by reason of the fact of such past retainer precluded from subsequently acting against him. Lastly the issue whether the solicitor is possessed of relevant confidential information cannot be decided on the basis of a general allegation that the solicitor is in possession of relevant confidential information if it is in issue without sufficient particularity as to the confidential information. (Emphasis added).
20. I find the judgment persuasive for the reason that it considers the same principles embodied in Paragraph 106 of the [\*Law Society of Kenya \[LSK\] Code of Standards of Professional Practice and Ethical Conduct\*](#) 2016 which provides that:

"Communication between the Advocate and client is protected by the rule on confidentiality of Advocate-client communication. Consequently, the Advocate has a duty to keep confidential the information received from, and advice given to, the client."
21. From the foregoing, it is apparent that the court does not act on mere allegations but moves to protect confidential information and the likelihood of prejudice ought to be based on concrete materials.
22. The subject matter Meru ELRC Petition No. E004 of 2022 and Nyeri Civil Appeal No. E028 of 2023 relates to dismissal of an employee by the 3<sup>rd</sup> Respondent whereas the subject matter in this suit relates to the constitutionality of the composition of the 3<sup>rd</sup> Respondent.
23. The Applicants have not demonstrated by concrete evidence any confidential information that was disclosed to the Petitioner in Meru ELRC Petition No. E004 of 2022 that has the likelihood of prejudicing the 3<sup>rd</sup> Respondent in this matter. The averment that Petitioner is privy to facts possibly relevant to this suit falls short of the threshold for demonstrating conflict of interest.
24. Additionally, I find the alleged conflict of interest is farfetched in that the subject matter in this suit and in the previous ones are different and Petitioner is therefore not precluded from subsequently acting against the 3<sup>rd</sup> Respondent in this matter.
25. Consequently, all the orders sought in notice of motion dated 03<sup>rd</sup> July, 2023 and filed on 06<sup>th</sup> July, 2023 are unmerited and the application is thus dismissed with costs to the Petitioner.
26. Mention 29<sup>th</sup> February, 2024 to confirm filing of submissions on the Petition



**DATED AT MERU THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistants - Kinoti/Munene

For Applicant - N/A for B.N.Mbuthia & Co. Advocates

For Respondent - Mr. Ngwele for Ngwele & Co. LLP. Advocates

