



**China Sichuan International Cooperation Co (SIETCO) v Odhiambo;  
Zakariah & 4 others (Intended Respondent) (Civil Appeal 272 of 2017)  
[2022] KEHC 14117 (KLR) (Civ) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14117 (KLR)

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

**CIVIL**

**CIVIL APPEAL 272 OF 2017**

**JK SERGON, J**

**OCTOBER 21, 2022**

**BETWEEN**

**CHINA SICHUAN INTERNATIONAL COOPERATION CO  
(SIETCO) ..... APPLICANT**

**AND**

**FELIX OUMA ODHIAMBO ..... RESPONDENT**

**AND**

**JONATHAN OMANGI ZAKARIAH ..... INTENDED RESPONDENT**

**OCCIDENTAL INSURANCE COMPANY ..... INTENDED RESPONDENT**

**UNICORN INSURANCE BROKERS ..... INTENDED RESPONDENT**

**SUNDA KENYA CONSTRUCTION & ENGINEERING GROUP  
LIMITED ..... INTENDED RESPONDENT**

**ABEDINEGO NYAMBATI ..... INTENDED RESPONDENT**

**RULING**

1. The appellant/applicant in this instance has brought the notice of motion dated February 18, 2022 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for orders for
  - a. That Jonathan Omangi, Advocate, the 2<sup>nd</sup> Intended Respondent herein, be stopped, barred, disallowed and/or disqualified from representing Occidental



Insurance Company Limited and Unicorn Insurance Brokers Limited, 3<sup>rd</sup> and 4<sup>th</sup> Intended Respondents respectively, whether by himself or his law firm.

- b. No orders as to costs.
2. When the Motion came up for interparties hearing before the court on June 27, 2022 the parties were directed to file and exchange written submissions. I have considered the grounds set out on the face of the motion dated February 18, 2022 and the facts deponed in the supporting affidavit.
3. In his supporting affidavit, Mr. Fan Bo stated that as an intended respondent in this matter, Mr. Omangi's evidence is relevant, material and necessary, therefore he is barred from representing the 3<sup>rd</sup> and 4<sup>th</sup> Intended respondents or any other party in these proceedings as he will definitely be called as a witness in the matter.
4. The applicant asserts that the 3<sup>rd</sup> intended respondent gave the 2<sup>nd</sup> intended respondent instructions to represent the applicant in CMCC 1270 of 2014 and Civil Appeal 272 of 2017 without the applicant's knowledge, information, or consent because both the 2<sup>nd</sup> and 3<sup>rd</sup> intended respondents are accused of fraudulently misrepresenting the applicant. Given that Mr. Omangi has a personal stake in the outcome of the case, he is ineligible to represent the Insurance Company.
5. The above averments were echoed in the submissions of the applicant, that in the lawsuits he and his firm filed on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Intended respondents, the applicant accuses Mr. Omangi and the firm of Omangi & Associates of violating its constitutional rights, conspiring to defraud the applicant, perjury, fraudulent, misrepresentation, and embezzlement of funds.
6. The applicant has submitted that the 2<sup>nd</sup> intended respondent being party to the applications is a key witness in the fraudulent scheme complained of by the applicant and has already filed his sworn replying affidavit and that the counsel's evidence is relevant, material and necessary and cannot be obtained through other witnesses /parties.
7. On this the applicant has relied on the case *Guardian Bank Limited v Sonal Holdings (K) Limited & 2 Others* (2014) Eklr, the court must determine whether the counsel's evidence is relevant, material and necessary. Citing the Supreme Court of New York In *Hudson Valley Marine Inc. v Town of Courtland* 30 Ad 3d 378 in which it was held,

“The burden of demonstrating the necessity of the attorney’s testimony is on the party seeking his or her disqualification...In determining whether the attorney’s testimony is necessary, the court must consider the relevance of the expected testimony and must “take into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence”.
8. The applicant further relied on the case of *Dorothy Seyanoi Moschbioni v Andrew Stuart & another* (2014) eKLR

“ But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these,



it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. 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.”

9. It is the applicant’s submissions that the applicant herein will be severely harmed if learned counsel Omangi and his law firm continue acting for the 3<sup>rd</sup> and 4<sup>th</sup> intended respondents, in particular because the counsel is legally prohibited from providing the information the applicant requests from the third and fourth respondents. The 3<sup>rd</sup> and 4<sup>th</sup> respondents will not suffer any harm because they are free to choose another advocate or firm of advocates to represent them in this matter.
10. In response, the 2<sup>nd</sup> intended respondent submitted that the applicant has lodged a complaint with the advocate disciplinary committee dated January 10, 2022 and that the affidavit before the tribunal and that one before this court have been sworn by one Fan Bo which is case of jeopardy as a person cannot be accused in two forums over the same subject matter.
11. The respondent submits that once the 2<sup>nd</sup> intended respondent is struck off the roll as per the applicant’s prayer, that automatically disqualifies him from representing any other person or entity as an advocate and that this application was filed after the complaint at the tribunal is therefore an afterthought, malicious and out to subject the counsel into disrepute and humiliation at the altar of ignorance and inept appreciation of the insurance law more the doctrine of subrogation.
12. This application is about rule 8 of the *Advocates (Practice) Rules* which 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:

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 in which he acts or appears.
13. In this case, it was alleged that the 2<sup>nd</sup> intended respondent, who is a party to the applications, is a key witness in the fraudulent scheme that the applicant has accused, that he has already submitted his sworn replying affidavit, and that the evidence from the counsel is pertinent, important, and required and cannot be obtained from other witnesses or parties.
14. 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. Section 134 of the *Evidence Act* which provides concerning the protection of client-advocate communication 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;(2) 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.(b) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.”

15. The 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.”

16. The Court of Appeal in *Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others* [2015] eKLR, following its own precedents earlier considered in this ruling. In that case 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.

17. 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 v 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 v Channan Singh Chatthe and 6 Others* (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.”

18. I think I have said enough to demonstrate that the Applicant’s motion is, devoid of merit and is for dismissal. Accordingly, the motion dated February 18, 2022 is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

**J. K. SERGON**

**JUDGE**



**In the presence of:**

.....for the Applicant

..... for the Respondent

..... for the Interested Party

