**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. E052 OF 2021**

**DAVID M. MEREKA T/A**

**MEREKA & CO. ADVOCATES.....APPLICANT**

**-VERSUS-**

**COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT**

**RULING**

1. The motion dated 29th January, 2021 by **David M. Mereka t/a Mereka & Co. Advocates** (hereafter the Applicant) seeks to bar the firm of **Koceyo & Co Advocates** by themselves, their partners, servants or agents from representing the County Government of Nairobi (the Respondent) in this suit and that the documents filed herein by the firm of **Koceyo & Co Advocates** on behalf of the Respondent be expunged from the record. The motion is expressed to be brought under Articles 48, 50(1) of the Constitution, Section 1B & 3A of the Civil Procedure Act and Order 51 Rules 1 & 3 of the Civil Procedure Rules, *inter alia*. On grounds, among others, that the continued representation of the Respondent by the firm of Koceyo & Co. Advocates (hereafter the respondent firm) is tainted by conflict of interest and that the Applicant is apprehensive that it will occasion him real mischief and prejudice.

2. The motion is supported by affidavits dated 29th January, 2021 and 23rd February, 2021 sworn by **David Mukii Mereka,** who describes himself as counsel seized of the conduct of the matter, and practicing in the name and style of **M/S Mereka & Co. Advocates**. The deponent amplifies the grounds on the face of the motion by stating that his firm has sued the Respondent in this suit for the recovery of agreed legal fees arising from cases where the respondent firm and other firms filed Advocate/Client bill of costs; that the respondent firm had proceeded in this cause to file a memorandum of appearance, statement of defence and grounds of opposition on behalf of the Respondent despite concerns raised by the Applicant; that there exists manifest conflict of interest as the subject matter of the present suit arises from Advocate/Client bill of costs previously filed by the respondent firm and other law firms and that the respondent firm is privy to facts possibly relevant to the suit and Mr. Koceyo a potential witness; that documents filed on behalf of the Respondent by the respondent firm having been filed in breach of the professional duty to refrain from acting in a situation of conflict of interest ought to be expunged from the record; and that the right to legal representation is not an absolute and the deponent is apprehensive that real mischief and prejudice that will be visited on the Applicant.

3. **Titus Koceyo** swore the replying affidavit in opposition to the motion. To the effect that he is counsel having conduct of this matter on behalf of the Respondent; that the Applicant has not demonstrated how the fact of the concluded taxation proceedings between his firm and the Respondent herein would bring about a conflict of interest in the present matter which is a distinct suit based on a separate cause of action from the taxation proceedings between his firm and the Respondent; and that his firm has no interest in the suit at hand beyond representing the Respondent as its advocate of choice. The deponent finally asserts that the Respondent has a constitutional right to a fair hearing and to choice of preferred counsel.

4. The motion was canvassed by way of written submissions. Starting with the definition of conflict of interest per Black's Law Dictionary, 10th Edition and citing decisions in **Serve in Love (Sila) Trust v David Kipsang' Kipyego & 7 Others [2017] eKLR** and **Thaddaeus Bright Ochanda v Alan Sidonyi Kadima & 6 Others [2020] eKLR** the Applicant's counsel submitted that due to the matters in the supporting affidavit, the respondent firm is caught up in a conflict of interest; that its conduct is unethical and in contravention of the provisions of Rule 8 of the Advocates Practice Rules, as Mr. Koceyo a potential witness in the present suit. Citing a passage from the judgment of the Court of Appeal in Delphis **Bank Limited v Channan Singh Chatthe & 6 Others [2005] eKLR** counsel contended that the respondent firm is privy to crucial facts pertinent to the instant proceedings and that the Applicant will be prejudiced by the presence of the said respondent firm even while affirming the right of the Respondent to a fair hearing and to an advocate of its choice. The Applicant therefore urged that the motion be allowed.

5. In its submissions, the respondent firm reiterated its material in the replying affidavit and argued that submitted that the Applicant has failed to demonstrate how the concluded taxation proceedings between it and the Respondent raise a situation of conflict of interest in the

present suit. As to situations where such a conflict could arise, the respondent firm relies on the **Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, June 2016,** reiterating that in the concluded taxation proceedings the respondent firm was the applicant party as against the Respondent, and not acting for the Respondent and moreover that the respondent firm has no interest in the instant suit, beyond the duty to represent the Respondent. Further citing the case of British-**American Investments Company (K) Limited v Njomaitha Investments Limited & Another [2014] eKLR** counsel submitted that the onus is upon the Applicant to provide evidence of asserted conflict of interest and not merely cite apprehension of possible conflict or prejudice. Finally, the respondent firm emphasized the Respondent's constitutional right to a fair hearing and to an advocate of its choice. The Court was urged to dismiss the motion.

6. The court has considered the rival affidavit material and submissions made in respect of the motion. As I understand the genesis of the matter, the Applicant was previously acting for the Respondent in now concluded taxation proceedings, in which the respondent firm had filed advocate-client bills of costs against the Respondent. The matters were determined. However, it appears that the Applicant's advocate's charges arising from its defence of the Respondent in those concluded matters were not settled by the Respondent, hence the filing of this suit by the Applicant against the Respondent. By a turn of events, the respondent firm has now been instructed to defend the present claim. Evidently therefore, the two sets of proceedings are distinct. The Applicant claims that the respondent firm is privy to pertinent facts to this case and indeed Mr. Koceyo is a potential witness, that the respondent firm is conflicted and their presence in the case portends real prejudice and mischief.

7. Regarding conflict of interest and client confidentiality **Halsbury Laws of England 4th Edition** at paragraph 527, page 353 states:

> **"A practicing barrister must not accept any instruction if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients, unless all relevant persons consent to the barrister accepting the instructions.**
>
> **A barrister must also not accept instructions if there is a risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent."**

8. **Black's Law Dictionary Tenth Edition** defines conflict of interest as:

> **"1.A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.**
>
> **2. A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent".**

9. In the same vein, **The Law Society of Kenya** ***Code of Standards of Professional Practice and Ethical Conduct, 2016*** defines *conflict of interest* in Rule 6 paragraph 96 as follows: -

> ***"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."***

10. Rule 6 paragraph 95 of the Code provides that an ad*vocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to both clients and obtains their consent.* Rule 6 paragraph 99 of the 2016 Code enumerates instances in which a conflict of interest might arise. They include: -

> ***"(a) 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;***
>
> ***(b) 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.***
>
> ***(c) 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."***

11. On the material before the court, it is difficult to see how the alleged conflict has arisen. This is because the respondent firm was not representing the Respondent but itself in the concluded taxation proceedings and was in fact seeking its costs from the Respondent for services rendered to it as a client. The Applicant defended the Respondent in those proceedings. The instant matter is a separate cause brought by the Applicant to recover its own costs for defending the Respondent in the concluded taxation matters brought against the Respondent by the respondent firm and other firms. In other words, the respondent firm is currently playing more or less the same role the Applicant played in the concluded taxation proceedings. What are the personal interests of the respondent firm that could possibly adversely impact its representation of the Respondent against the Applicant's claim? To my mind, nothing of the sort has been demonstrated.

12. 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.".**

13. 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."**

14. In the case of **King Woolen Mills Ltd [formerly known as Manchester Outfitters Suiting Division Ltd] v Kaplan and Stratton Advocates [1993] e KLR** (per **Muli JA)** it was held of an advocate who had acted for common clients and who were parties in the subsequent main litigation before the court, that arising from the contractual fiduciary relationship between him and his common clients: -

**"[T]he information imparted to (him) by the individual clients was confidential. [He] owed a duty to his individual clients not to disclose or divulge any confidential or secret information imparted to him in confidence to anyone else including the clients in the (common) transaction without the consent of the client imparting the confidential information… nor do I think for a moment that it can be argued that the duty and obligations imposed on him as a common advocate ceased after conclusion of the transaction for which returns were made."**

15. After considering the English decision in **Supasave Retail Ltd v Coward Chance & Others [1991] 1 ALLER** where the decision in **Rukusen v Ellis, Munday and Clarke [1912]1 ch. 831** was followed, the Court of Appeal stated that:

**"Applying the above tests to the facts in the present case, I must be satisfied that real mischief or real prejudice are rightly appreciated…**

**I have come to the firm conclusion that real prejudice and real mischief are anticipated if the Respondents are permitted to act for the defendants in the main suit.".**

16. In the later decision of the Court of Appeal in **Delphis Bank Ltd v Channan Singh Chatthe & 6 Others [2005] eKLR** the objection against the participation of an advocate in representing a party in the matter was on grounds that the former had prepared disputed instruments and was likely to be summoned as a witness. The court stated that:

**"The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise 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 this Court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are King Woolen Mills Ltd & Anor vs. M/S Kaplan & Stratton [1993] LLR 2170 (CAK), (C.A 55/93) and Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654.**

**In the first authority, a partner in the Firm of Kaplan & Stratton, Mr. Keith, participated in negotiations for offshore loan facilities between a Bank and the borrowers and he also went ahead and drew up the loan agreement, the guarantee, the debenture and the legal charge on behalf of the Bank and the borrowers, as their common advocate.**

**When disagreements subsequently arose and litigation commenced in respect of those transactions, the firm of Advocates chose to act for the Bank but the borrowers objected and sued the firm seeking an injunction to stop it from breaching client/advocate confidentiality. It was contended, and the court found, that the borrowers had imparted to Mr. Keith and the bank, confidential information and their secrets in confidence under the retainer to enable Mr. Keith to successfully conclude the loan transaction. The court concluded, per Muli J.A with whom the other members of the court agreed: -**

**"I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit.**

**The result will be that the appellants will not only be confronted with their own confidential information but will suffer great injustice and prejudice during the trial of the main suit". Mr. Keith and any partner in the firm of Kaplan & Stratton were restrained from continuing to act for the Bank in the main suit or in any litigation or proceedings arising from the loan**

**transactions. In so deciding the court cited with approval English decisions in** Rakusen **vs** Ellis Munday and Clerke **[1912] 1 Ch. 831, Re – A Firm of Solicitors [1992] 1 A 11 E.R 353, and Supasave Retail Ltd v. Coward Chance and others [1991] 1 All ER 668. The former two cases were applied in the latter, where Sir Nicolas Browne – Wilkinson V-C summed up the general rule as follows: -**

**"The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rukusen v Ellis, Munday & Clerke (1912) 1 Ch. 831 …The law as laid down there is that there is no absolute bar on a solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (…) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rukusens case itself. Cozens – Hardy M.R. laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability result if the solicitor is allowed to act ……As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated".**

**The King Woolen Mills case (supra) was applied in the Uhuru Highway Development Ltd case (supra) where it was contended in affidavit evidence, and the court found, that the Advocate, Mr. George Oraro, had acted for both the bank and the borrowers and had drawn up the Charge which had become contentious in subsequent litigation.**

**As is clear from those authorities, each case must turn on its own facts to establish whether real mischief and real prejudice will result. In this case, we hardly have any facts to consider in arriving at such conclusion."**

17. In this case, it was alleged that the respondent firm is privy to pertinent facts relating to the instant suit which may be used in the matter to the detriment of the Applicant. The nature and source of the alleged facts and how these may have come into the possession of the respondent firm, is not disclosed. The respondent firm did not represent the Respondent in the concluded taxation matters and has not been shown to have in its prior relationship with the Respondent received any material relevant to the instant matter. It is not enough to make vague allegations without some substantiation. In this instance, given the admitted history and relationships between the parties herein, the assertion of existence of conflict of interest appears tenuous at best. The Applicant had similarly claimed without substantiation that that the alleged "*crucial facts"* in the possession of the respondent firm render their Mr. Koceyo a potential witness and hence the respondent firm ought to be debarred from representing the Respondent pursuant to Rule 9 of the Advocates (Practice Rules) which provides that: -

**"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".**

18. Even if some material had been supplied by the Applicant to prop up the allegations of conflict of interest and allied matters, the test to be applied would be whether real mischief and real prejudice will, in all human probability, result, as stated by 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.

19. 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."**

20. As observed by **O'Kubasu J. A**. (as he then was) **in William Audi Odode & Another v John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004:**

**"…[I]t is not the business of the courts to tell litigants which advocate should or should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in a matter, the parties must be allowed to choose their own counsel."**

21. I think I have said enough to demonstrate that the Applicant's motion is bereft of a factual foundation, devoid of merit and is for dismissal. Accordingly, the motion dated 29th January 2021 is dismissed with costs to the respondent firm.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 21ST DAY OF OCTOBER 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Mr. Mola h/b for Mr Mereka for Applicant**

**Respondent: N/A**

**C/A: Carol**