



Kipkemboi & 4 others v Commissioner Of Lands & 7 others (Environment and Land Case Civil Suit 924 of 2012) [2023] KEELC 18821 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 924 OF 2012**

**LN MBUGUA, J
JULY 13, 2023**

BETWEEN

**DAVID KIPKEMBOI 1ST PETITIONER
JOSEPHINE MOINDI 2ND PETITIONER
DAVID KAMUNYA RUNO 3RD PETITIONER
SINGUO HOLDINGS LIMITED 4TH PETITIONER
TIMOTHY ONDIEKI 5TH PETITIONER**

AND

**COMMISSIONER OF LANDS 1ST RESPONDENT
REGISTRAR OF TITLES 2ND RESPONDENT
DIRECTOR OF SURVEYS 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
MICROTECH ASSESSORIES LIMITED 5TH RESPONDENT
BANGAL TRADING LIMITED 6TH RESPONDENT
MUMTAZZ TRADING AND INVESTMENT LIMITED 7TH RESPONDENT
MUKOWE TRADERS LIMITED 8TH RESPONDENT**

RULING

1. The 5th, 6th and 8th respondents notice of preliminary objection dated February 2, 2022 is for determination. They contend that the Law Firm of Ngunyonyo Munyua & Co Advocates should be barred from representing the petitioners since the said firm was on record for Greystonn Construction Co



- Ltd in ELC No 215 of 2010, [Greystonn Construction Co Ltd v Microtech Accessories Ltd and 5 others](#) and that the said pleadings are a subject of the instant suit.
2. The preliminary objection was canvassed orally on May 23, 2023. Counsel for the 5th, 6th and 8th defendants points out that in ELC No 215 of 2010, [Greystonn Construction Co Ltd v Microtech Accessories Ltd and 5 others](#), the law firm of Ngonyo Munyua & Company Advocates drafted proceedings claiming that the owner of the subject matter herein, LR 209/12666 is Greystonn Construction Co Ltd.
 3. He argues that under rule 9 of the [Advocates Practice Rules](#), the law firm of Ngonyo Munyua is precluded from appearing in this matter as there is a likelihood of being called as witnesses. He adds that at page 1 of the petitioner's bundle, the petitioner has alluded to notices of withdrawal of the said suit while in their bundle dated March 28, 2014, from page 1-86, they have filed pleadings drafted by Ngonyo Munyua & Co Advocates thus the said advocates will be called to shed light on who is the actual owner of the suit property.
 4. Counsel further submits that as officers of the court, Advocates need to help the court to achieve truth on matters of law and facts. He argues that an advocate cannot in one matter claim that the owner of the suit land is Greystonn Construction Limited, withdraw the suit and file the instant suit claiming that the suit land belongs to the petitioners. He relies on the case of [Delphis Bank Ltd v Channan Singh Chatte & 6 others](#) [2005] eKLR.
 5. Counsel for the 1st-4th respondents opposes the preliminary objection, submitting that this court is being called upon to interpret applicability of rule 9 of the [Advocates Practice Rules](#). He urges the court to consider the decision of the court in [Serve in Love Africa \(Sila\) Trust v David Kipsang Kipyego & 7 others](#) [2017] e KLR as well as [Seyanoi v Andrew Stuart and another](#) [2014] e KLR. He submits that the test of whether an advocate should be disqualified is whether real mischief/real prejudice will in all human probability result.
 6. He also argues that it is not the business of the court to consider as to which advocates should/should not act in a particular matter as each party to litigation has a right to choose his/her advocate unless it is shown that the interest of justice shall not be served if an advocate is allowed to act.
 7. The 7th respondent supports the preliminary objection and its counsel associates himself with the applicants' submissions. He urges the court to consider the provisions of rule 8 of the [Advocates Rules](#) whose import is to bar any advocate from appearing before any court or tribunal in a matter in which an advocate will be required to give evidence and in this case, it is clear that counsel for the petitioners will be a witness. He relies on the case of [Ritesh Nandlal Pamnami & another v Dhanwanti Hitendra Hirani & 2 others](#) [2012] eKLR and the case of [Tom Kusienya & others v Kenya Railways Corporation & others](#) (2013) e KLR.
 8. The petitioners are opposed to the preliminary objection, arguing that the same does not fit the definition set in *Mukhisa Biscuit*. She avers that a preliminary objection is based on a point of law, but what the 4th defendants are raising is argumentative. She adds that asking the court to order that the firm of Ngonyo Munyua & Company Advocates lacks *locus standi* to represent the petitioners is a way of making sure that the petitioners don't get redress in court.
 9. She argues that rule 9 of the of the [Advocates Practice Rules](#) falls within ethics of an Advocate and its import is that an advocate cannot act in a matter where there would be conflict of interest in respect of the advocate, and it is what counsel for the 5th, 6th and 8th respondents calls bad manners, unchristian and immoral, yet courts don't rely on morality but the written law.



10. She urges the court to interpret rule 9 vis a vis section 134 of the [Evidence Act](#) as far as this matter is concerned and find that she should not be called as a witness by the Respondents.
11. She submits that she represented Greystone Construction in case No 215/10 but Greystone was not registered owner of the land for which reason the suit was withdrawn. She adds that as an Advocate who minds decorum, she could not agitate a case for a client whose keepers of records (AG) found that it was not the registered owner of the subject land, hence the case was withdrawn on March 9, 2012 and there is a decree to that effect.
12. She submits that any information obtained from a client in furtherance of advocate-client relationship is privileged information as set out under section 134 of [Evidence Act](#), unless there are exceptions, that is “if information is for illegal purpose” and that protection works even after the end of advocate client relationship so she pleads privilege under section 134 of the [Evidence Act](#); that this court cannot summon her to testify about her current and former clients and there are no exceptions.
13. She submits that the applicants do not state what role she will play as a witness, save for pleadings which are public information falling under judicial notice, so they can be produced not necessarily by the maker, they can be produced by the Deputy Registrar but any further information they would want from her is privileged.
14. Counsel also submits that no prejudice would be suffered by the 5th, 6th and 8th Respondents as there are no orders sought against them, so they would not have any right to demand her removal.
15. She adds that an advocate who presents a case remains a representative, he/she is not the owner/the maker of the evidence so the authorities presented by opposing counsel are different since they refer to advocates who participated in those transactions.
16. She argues that defendants in case no 215/10 were represented by the Attorney General, Ahmed Nassir and Issah & Company Advocates, and since the same parties are in this matter, it does not mean that the said advocates should also be disqualified from acting for their clients.
17. She submits that under article 49, 50 and 159 (2) of the [Constitution](#) and order 9(1) of the [Civil Procedure Rules](#), citizens have a right to legal representation by an advocate of their choice so the only caveat is for the advocate to be qualified. She submits that the 5th, 6th and 8th respondents have never been her clients and she does not owe them any fiduciary duties since rule 9 is only about privileged communication between advocate and client. She relies on the case of *Delphis Bank (Supra)*, [Tom Kusienya & others v Kenya Railways Corporation & others](#) [2013] eKLR, as well as the case of [David M Meraka t/a Meraka & Co Advocates v County Government of Nairobi](#) [2021] eKLR.
18. In rejoinder, Counsel for the 5th, 6th and 8th respondents urges the court to consider the decision in [Tom Kusienya & others v Kenya Railways Corporation & others](#) [2013] eKLR as well as the case of [Ritesh Nandlal Pamnami & Another v Dhanwanti Hitendra Hirani & 2 others](#) [2012] eKLR where the court stated instances where an advocate can be barred from representing a client.
19. He submits that the question herein is whether the Advocate for the petitioner acted for the petitioners as against the defendants who are also the defendants herein and the answer is yes. As regards the argument that the preliminary objection does not raise points of law, he submits that they have met the threshold for grant of a preliminary objection having cited the law, rule 8 and 9 of the [Advocates Practice Rules](#).
20. On the petitioners’ submission that the court should see current and former client as change of position, counsel submits that there is indeed change of position that is, “who is the owner of the



suit land?” which question the firm of Ngonyo Munyua & Co Advocates will be called to answer. He further submits that even if pleadings are public documents, the drafter is the same person who filed this case.

21. On the Petitioner’s plea that no orders have been sought against the 5th 6th and 8th respondents thus there is no prejudice against them, it was argued that there are allegations against them and that is why they were made parties to this suit.
22. Counsel for the 5th, 6th and 8th respondents also argue that the firm of Ngonyo Munyua & Company Advocates can represent parties who are on one side but in the current case, Greyston and petitioners are claiming ownership of the suit land so they can’t be on the same side.
23. On the petitioner’s submission that the case filed for Greystone was withdrawn because Munyua Maina Advocates realized that it did not own the suit land, he submits that the firm needs to testify to those issues.
24. As regards the submission that the Constitution provides for the right to representation, he submits that it is for that reason that they are not asking for striking out of pleadings.

Analysis

25. The 5th, 6th and 8th Defendants argue that the firm of Ngonyo Munyua and Co Advocates lacks the *locus standi* to file and appear in the instant matter since it represented Greystonn Construction Co Ltd in ELC No 215 of 2010, Greystonn Construction Co Ltd v Microtech Accessories Ltd and 5 others, which was claiming ownership of the subject matter herein, LR 209/12666 and in this matter, they argue that the suit land belongs to the petitioners.
26. This Court appreciates that it is the right of every person to have a dispute resolved by a court of law. Equally, a litigant has the right to legal representative or advocate of his choice. Further, an Advocate has responsibility to accept all briefs. In Rondel v Worsley cited by the Supreme Court of Appeal of the Republic of South Africa in Van der Berg v General Council of the Bar [2007] SCA 16 (RSA), the court stated that;

"A barrister has a monopoly of audience in the higher courts. No one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end."
27. While an advocate cannot pick a client, Rule 9 of the Advocates Practice Rules bars Advocates from appearing in some matters. It 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.....” Emphasize added.
28. The question for this court to determine is whether the firm of Ngonyo Munyua Advocates is barred by Rule 9 of the Advocates Practice Rules from representing the Petitioners herein. While the firm admits that it represented Greystonn Construction Co Ltd in ELC No 215 of 2010, it argues that the suit was



withdrawn and that there is no prejudice at all, since it cannot be called to testify on the matter as any information obtained at the time would be privileged. It also argues that the pleadings in ELC Case 215 of 2010 are public documents which could be produced by the Deputy Registrar of the Court and not particularly the firm.

29. In *Delphis Bank Ltd v Channan Singh Chatthe & 6 Others* [2005] eKLR, the Court of Appeal stated that:

“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”.

30. The Court of Appeal in *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* (supra) being mindful of a litigant’s right to legal representation counsel stresses that a court must be satisfied that real mischief and real prejudice is likely to occur if it is to debar counsel.

31. After considering the facts herein, I do not see any mischief that would warrant this court to debar the firm of Ngonyo Munyua & Co Advocates from acting for the petitioners. No real mischief was established by the petitioners save to argue that it would be immoral for the firm to act. Further, the petitioners should not be impeded from accessing justice by removing a counsel of their choice from these proceedings.

32. Courts have therefore applied the test as to whether there would be mischief in determining whether to debar counsel. In *British-American Investments Company (K) Limited v Njomaitba Investments Limited & another* [2014] eKLR, the court stated that;

“It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.”

33. I have considered that the case filed by Greystonn Construction Co Ltd, Ngonyo Munyua & Co Advocate’s former client was withdrawn. Greystonn Construction Co Ltd is not a party to this suit, thus Ngonyo Munyua & Co Advocates is not acting against its former client. I have also considered that that under section 134(1) of the *Evidence Act*, an advocate is expressly prohibited from disclosing communication made to him in the course of employment as the client’s advocate. That privilege has not been waived by Grestonn Construction Co Ltd to allow Ngonyo Munyua Advocates to testify in this matter.

34. In *King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & another v M/s Kaplan & Straton Advocates* [1993] eKLR, it was held that;

“... 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 anyone else without that client’s consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created.”



35. In *Simba Hills Farm Limited v Sultan Hasham Lalji & 5 others* [2006] eKLR, the Court stated as follows;

“It is trite that counsel should never enter into the arena by adducing evidence in a matter in which he has acted for either party for that would amount to conflict of interest.....”

36. It is worthy to note that on February 1, 2022, this court conducted a pre trial exercise where parties were required to indicate upfront the nature of their pleadings, witness statement and documentary evidence they would rely on. The proponents of the preliminary objection never indicated that they desired to call someone from the law firm of Ngonyo Munyua to testify. Equally the said law firm did not intimate to this court that they had reason to believe that they would testify in this case.

37. Finally, I find that court cases though often filed by advocates belong to the parties and not to the advocates. Thus the filing of pleadings by the firm of Ngonyo Munyua Advocates in another case does not in any way make them eligible to become witnesses.

38. All in all, I find that the preliminary objection raised by the 5th, 6th and 8th defendants is not merited, the same is hereby dismissed with costs to the petitioner.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mbatai holding brief for Mrs. Ahamo for 7th Respondent

Court Assistant: Eddel

