



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL APPLICATION NO. 6 OF 2010

1. AMINA N. RASO

2. ATHMANI MOHAMED KIPANGA

3. SALIM HUSSEIN KIPANGA

4. ALI JUMA RASO APPLICANTS

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

INTRODUCTION

[1] By an Originating Notice of Motion expressed to be brought under section 65 and 84 of the Constitution of Kenya (now, and hereinafter, called the Former Constitution) dated 30th June 2010 and filed on 2nd July 2010, just under a month before the promulgation of the Constitution of Kenya 2010 on the 27th August 2010, the applicant sought the following specific Orders:

- i. *The order of the Senior Resident Magistrate Court made on 12th February, 2010 in Mombasa Chief Magistrate Court Criminal Case No. 1519 of 2009 disqualifying Counsel for the Applicants from representing them in Mombasa Chief Magistrate Criminal Case No. 1519 of 2009 violates the Applicants Constitutional rights under S. 77 of the Constitution of Kenya and should be discharged and set aside.*
- ii. *The trial of Mombasa Criminal Case No. 1519 of 2009 recommences de novo before another court of competent jurisdiction.”*

[2] The object of the application is to enforce the applicants’ right to counsel, that is to be represented in a criminal case by an advocate of their choice pursuant to fair trial and equal protection of the law provisions of section 77 of the Former Constitution of Kenya. The complainant in the criminal case for obtaining money by false pretences contrary to section 313 of the Penal Code had successfully sought an order for the disqualification of the counsel appearing for accused persons in the case on the ground that the said counsel had acted for him for 10 years and had confidential information relating to the sale of land transaction, which was the subject of the criminal proceedings against the accused persons.

[3] The application was based on grounds containing the Applicants' legal contentions which were set out in the Originating Notice of Motion as follows:

a. *The trial court was in breach of Section 77(1) and 77(2) (d) (e) of the Constitution of Kenya which grants accused persons secure protection of the law and the right to legal representation of the accused persons choice. The right of choice of legal representation and secure protection of the law is expressed in mandatory terms. It is a fundamental right, under the Constitution. The trial court's order to disqualify accused defence counsel is unconstitutional, incorrect, illegal and improper.*

b. *The trial court embarked to hear and determine issues which were not before it contrary to law. The issue before court was the charge of obtaining by false pretences. The defence counsel representing the accused persons was not an issue in the proceedings before court. The court irregularly and unprocedurally embarked on hearing an oral application for disqualification midway the testimony of PW1 who had just completed his evidence in chief and was to be cross-examined.*

c. *The trial court had heard and overruled a similar and identical application by the prosecution on 17th December, 2009. The trial court could not in law rehear a similar identical application on 11th February, 2010 and allow it. The trial court cannot and could not sit on appeal against its decision or order. It was illegal and improper for the trial court to proceed to do so.*

d. *The trial court had no jurisdiction to entertain the prosecutions application for disqualification of the defence counsel representing the accused persons. There were no provisions of law invoked upon which such application could be made and which conferred the trial court with jurisdiction to hear and make orders for disqualification of defence counsel's representation of the accused persons. The order of the court was incorrect and illegal.*

e. *The trial court completely forgot its role as umpire in an adversary system of justice and descended into the arena of conflict. The trial court could not therefore embark upon an inquisitorial function in the proceedings before it. The trial court was clearly biased and prejudiced in its decision and order. The proceedings of the court were consequently rendered irregular, unlawful and unconstitutional.*

f. *The complainant in a criminal case is the Republic and not a witness of the Republic. PW1 (Songoro Kitenge) was a mere witness and the law does not confer upon him authority to elect or select who can and should represent accused persons he testifies against.*

g. *The court in its ruling expressed an opinion and not an order or decision capable of enforcement. This is irregular, improper and contrary to law.*

It is proposed that a consequential order be made to divest the trial court from further presiding in these proceedings in view of the opinion it has formed and expressed in its ruling."

[4] The Application was supported by an affidavit of the 1st Applicant, Amina Raso, sworn on 30th June 2010, setting out the history of the litigation before criminal trial court and the facts establishing their cause of action at paragraphs 3 – 13 as follows:

3. *That the contents of this affidavit are based partly on facts within my own knowledge, which are true, and partly on the information and advice given to me by the Applicants Advocate Mr. Japheth Asige. To the extent that the said contents are based on information or belief, I have disclosed hereunder the source or ground (as the case may be) thereof and I verily believe the same to be true.*
4. *That I and the other three applicants were initially charged with the offence of obtaining by false pretences contrary to S. 313 of the Penal Code in Kwale Senior Resident Magistrate Court Criminal Case No. 2101 of 2007(Annexed hereto is a copy of the charge sheet marked "A").*

5. That PW1 (Songoro Kitenge “Complainant”) gave evidence in chief before the trial court at Kwale. In the middle of cross examination he refused to answer questions put to him. The case was then adjourned. The court ordered that he be remanded in custody in the meantime. A new hearing date was set.
6. That at the resumed hearing before the Kwale Senior Resident Magistrate, the prosecution entered a nolle prosequi and myself and the other three Applicants were discharged.
7. That I and the other three Applicants were immediately thereafter re-arrested and charged with an identical offence in the Chief Magistrate’s Court at **Mombasa in Mombasa Chief Magistrate’s Court Criminal Case No. 1519 of 2009.** (Annexed hereto is a copy of the charge sheet) “B”.
8. That the plea was taken before the Chief Magistrate at Mombasa and myself and the three Applicants pleaded not guilty. Mr. Asige Advocate was retained to represent us. He had also acted for us at the trial in Kwale Senior Resident Magistrate Court.
9. That when the case came up for hearing on 26th November, 2009 before Honourable R. Ondieki Ag. SRM (Court No. 14) at Mombasa the prosecution applied that the defence counsel, (Mr. Asige) disqualifies himself from representing us on the ground that Mr. Asige had been generally legal counsel for (PW1 Songoro Kitenge) for the last 10 years.
10. That on 17th December, 2009 the trial court overruled the objection by the prosecution. The court was re-listed for hearing on 11th February, 2010 before Court No. 14(C.R. Ondieki Ag. SRM).
11. That on 11th February, 2010 at the resumed hearing the prosecution opened their case and PW1 (Kitenge Songoro) completed giving evidence in chief. Before cross examination began the prosecutor once again applied that “the defence counsel to disqualify himself before he has handled the complainants matters over 10 years in the past.. As things stand the witness has no confidence for the Counsel to represent the accused persons”.
12. That on 12th February, 2010 the court delivered a ruling/order in respect of the prosecutions application. The court opinion was that the Defence Counsel should disqualify himself. “The accused persons were at liberty to engage another counsel”.
13. That I and the other three Applicants are aggrieved by the Order and/or ruling of the trial Court made on 12th February, 2010 denying us our Constitutional right of legal representation of our choice.”

[5] The complainant in the criminal case the subject of the constitutional application, Sangoro Kitenge Mtimi, swore a Replying Affidavit on the 23rd August 2010 whose effect was to confirm the allegations that Mr. Japhet Savwa Asige advocate had acted as his advocate for over 10 years and as such held confidential information regarding the transaction for the purchase of plot No. Kwale/Ukunda/1127 which the subject of the criminal case from which the constitutional application arose. The material parts of the affidavit were as follows:

2. That I am known to Japhet Savwa Asige Advocate who has been my advocate for over 10 years.
3. That the said advocate has been advising me on all legal matters all these years.
4. That I consulted him during the transaction involving the purchase of Plot No. 1127 measuring 45 x 72 metres the subject matter in Criminal Case No. 2101 of 2007.
5. That I paid him the sum of Kenya Shillings ten thousand only a fact confirmed by Said Bakari Ndege in his statement of 29th August, 2007 (see annexures marked “SKM 1” and SKM2”).
6. That the said advocate represented my interests in the transaction and cannot thus purport to act for the persons who defrauded me money full facts whereof are within his knowledge.
7. That the advocate having acted for me in the matter can only appear as a witness or an accused person in the matter since he holds crucial information and is privy to the entire transaction.
8. That the advocate has acted for me previously in H.C. Civil Suit No. 48 of 2005 Songoro Kitenge Mtimi & 4 others vs George Njoroge (see annexure marked “SKM3”).
9. That I am advised which advice I verify belief to be true that it is against all known rules of professional ethics for an advocate who has acted for a party in any matter to turn around and purport to represent his client’s adversaries has a professional duty to his client.
10. That Mr. Japhet S. Asige holds confidential information passed over to him by myself regarding the transaction on Plot No. Kwale/Ukunda/1127.
11. That I verily belief that the Learned Honourable Magistrate was perfectly in order in barring

counsel from acting for the accused persons and his order should thus be allowed to stand.”

[6] In reply to the Replying Affidavit of the Complainant, the 1st applicant, Amina Raso, filed a further Affidavit sworn and filed on 7th June 2013 challenging the competency of the replying affidavit of the complainant who is not a party to these proceedings, and responding to the substance of the legal representation dispute in the constitutional application at paragraphs 8-11 of thereof as follows:

8. *That Songoro who is a mere witness in the case before the subordinate court has apparently taken over the prosecution of the case from the State and again now wishes to take over the prosecution of the defence of the accused persons to himself. This is why he can choose which court is to hear his complaint. Annexed hereto and marked “AR3” is a letter written by Songoro to transfer the criminal case from Kwale Senior Resident Magistrate’s Court to the Chief Magistrate Court Mombasa.*
9. *That Songoro cannot choose an Advocate to act for us in the proceedings before the subordinate court and the order of the trial magistrate contravenes our Constitutional fundamental freedom and right to select an Advocate of our choice.*
10. *That my advocate herein informs me which information I verily believe to be true that Songoro’s allegations as contained in his affidavit directed at him are not correct and his representation of us is strictly ethical, professional and legal.*
11. *That I verily believe that the order of the subordinate court denying us our Constitutional right of choice of representation is a gross subversion of the administration of the criminal justice system and should be vacated.”*

[7] Counsel for the parties, Mr. Asige for the applicants and Mr. Muteti for the Director of Public Prosecution (DPP) made oral submissions and Judgment was reserved.

Case for the applicants

[8] Briefly the applicant contended that the complainant in the criminal proceedings was using the criminal proceedings to extract a settlement of a civil claim with respect to alleged sale of land and was able by a letter to the DPP dated 5/5/2008 to have transferred the criminal proceedings originally filed as Kwale SRMC Cr. Case no. 2102 of 2007 transferred to Mombasa on suggestion of bias on the part of the Kwale trial magistrate. In the same letter the complainant had objected that Mr. J.S. Asige advocate who he claimed had acted for him previously and as had intimate knowledge of the case should not be allowed to act for the accused persons. The applicants lamented that in giving an opinion that the said advocate should disqualify himself from acting for the accused upon application by the Prosecution, the trial court in Mombasa Chief Magistrate’s Court Cr. Case no. 1519 of 2009 acted without jurisdiction and it was further evidence that the complainant was controlling the criminal process through the Prosecution. Counsel also argued that the replying affidavit by the Sangoro Kitenge was incompetent as he was just a witness for the state in the case and it was the State that was the complainant and it was not a response to the prayers sought in the Originating Notice of Motion.

[9] On the primary question of the court to order disqualification of counsel for an accused person, Counsel for the applicant submitted as follows:

“The question is whether a Resident Magistrate has jurisdiction to make an order for disqualification on the request of the prosecutor. The Resident magistrate has no jurisdiction to order disqualification of counsel appearing for an accused person on the request of a complainant before him. The complainant made a request which was transmitted by the prosecutor. The application for disqualification had been made before the same court by the same prosecutor and rejected. On the second application the court changed its mind and granted the application. The application was not based on any law. No law was cited. The order of disqualification by the Magistrate was a violation of the accused’s fundamental rights and freedoms under Section 77 of the former Constitution. Article 25 of the New Constitution the right to a fair trial cannot be limited. See also Article 50. A fair hearing is a fundamental right and freedom entailing on the right of an accused person to choose an advocate to represent him. An accused person’s right to

counsel cannot be limited by a court on the request of a complainant that he has no confidence in the accused's advocate. The complainant is deciding for the accused who should represent them. It offends Section 77 of the former Constitution and Article 50(2) of the New Constitution. The trial court had no jurisdiction to attempt to infringe and deny the accused person's their right to choose an advocate of their choice. In view of the violation, the order of the trial magistrate should be quashed and vacated as sought in the Originating Motion."

Case for the Respondent

[10] For the DPP, counsel submitted that the court must have power to make the order for disqualification of a counsel for the accused in the interest of due administration of justice. On the merits of the application, Counsel submitted that:

"The court in administration of criminal justice was within the law to make the order that it made;

- 1. It is not denied that counsel for the applicant has been acting as counsel for the deponent Mr. Sangoro since 1978. It is shown in annexures AR3 letter. The relevance of the statement is to be seen in the light of the annexures in Sangoro's affidavit. It is that the Counsel acted for both parties involved in the matter. He was therefore possessed of privilege information given to him by the complainant who was his client and also by the accused persons. The averment in paragraph 7 of Replying Affidavit that the accused counsel could only come into the matter as a witness for one of the parties or an accused.*
- 2. Section 77 of former Constitution on the right to a fair trial is replicated in Article 50 of the Constitution. A party such as Sangoro is also entitled to a fair hearing. If his own counsel were to act against him, the applicant would benefit from confidential instructions given by the complainant. There is conflict of interest, and the trial court could not have done justice if it allowed counsel to continue.*

The right to counsel does not mean that once counsel is instructed, he has no choice but to take those instructions. He has a duty to the court and to his client. The present situation as presented would not allow counsel to remain faithful in the discharge of his duty without prejudicing the complainant in the course of the trial.

*The complainant is entitled to fair and administrative action, which demands that the Director of Public Prosecutions is under a duty to consider any representation made by a complainant in the criminal trial. Section 26 of the former Constitution, the Attorney General was the head of prosecution and there was nothing wrong with the complainant seeking the transfer of the case. The Criminal Procedure Code permits the Director of Public Prosecutions to seek transfer of the case. The nolle prosequi was entered in good faith and was not calculated to advance the of any party but to ensure that justice was done. I refer to annexures **SKM1** a statement by Said Bakari Ndenge and **SKM2** a statement by one of Applicants that the counsel presided over the matter the subject of the charge. The position of the counsel is not tenable.*

The applicant should have appealed or applied for review. There is no provision for Originating Motion in criminal procedure. The court may consider the merits. If the court finds that the magistrate had no jurisdiction, the matter may be referred to Disciplinary Committee."

[11] Counsel for the applicant responded that there was nothing unethical about a counsel who may have acted for a party previously to subsequently act against that other party for another party unless conflict of interest could be shown and that, in any event, professional ethics could not prevail over a fundamental right such as the right of an accused to counsel under Article 50 (2) (g) of the Constitution of Kenya 2010.

ISSUES FOR DETERMINATION

[12] As the constitutional application falls to be determined after the coming into effect of the Constitution of Kenya 2010, the issues for determination must be considered in the light of the law as it exists at the time of judgment. This is in consonance with the Transitional and Consequential Provisions of Schedule 6 of the Constitution of Kenya 2010 which provides as follows:

“7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

(2) If, with respect to any particular matter—

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.”

[13] From the pleadings, affidavits and submissions by counsel for the parties, the central issues for determination are as follows:

a. Whether there is a right to counsel in criminal cases protecting an accused’s right to be represented by counsel of his choice.

b. Whether the right of an accused to counsel of his choice, if it exists, may be limited by an order of the court in proper cases.

Peripheral issues

[14] Peripheral issues of procedure for approaching the court by way of Originating Notice of Motion and whether the court could make an order for disqualification of counsel may be determined shortly. First, the Originating Notice of Motion was the procedure prescribed under the applicable Rules **the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice And Procedure Rules, 2006 made by Chief Justice J. E, GICHERU** (hence Gicheru Rules) on the 16th February, 2006, as Gazette Notice No. Legal Notice No.6 of 2006 which provided as follows:

*“2. Unless a matter is specifically provided for under section 67 or section 84 of the Constitution or any other law, a party who wishes to invoke the jurisdiction of the High Court under section 65 of the Constitution, shall do so by way of **Originating Notice of Motion** (hereinafter referred to as “the Motion”).”*

These **Gicheru Rules** were saved by the Constitution of Kenya 2010 under the Transitional and Consequential Provisions of Schedule 6 as follows:

“19. Until the Chief Justice makes the rules contemplated by Article 22, the Rules for the enforcement of the fundamental rights and freedoms under section 84 (6) of the former Constitution shall continue in force with the alterations, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with Article 22.”

NB. The Chief Justice made Rules under Article 22, called Constitution of Kenya (Protection of Rights and Fundamental Freedoms) High Court Practice and Procedure Rules, 2013 of 28th June 2013.

[15] Secondly, on whether the Court can disqualify Counsel for an accused from acting for such accused in criminal cases, it is clear that the Court has jurisdiction over advocates appearing before it under

sections 55 and 56 of the Advocates Act, which provide as follows:

“55. Advocates to be officers of Court

*Every advocate and every person otherwise entitled to act as an **advocate** shall be **an officer of the Court and shall be subject to the jurisdiction thereof** and, subject to this Act, to the jurisdiction of the Disciplinary Tribunal:*

Provided that the persons mentioned in section 10, other than those included in paragraph (c) of that section, shall not be subject to the jurisdiction of the Disciplinary Tribunal.

56. Savings of disciplinary powers of Court

*Nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the judges of the Court to deal with **misconduct** or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.”*

The Court has, therefore, jurisdiction to enforce professional conduct of advocates appearing before it in any matter.

DETERMINATION

[16] The provisions of section 77 (2) (d) of the Former Constitution and Article 50 (2) (g) of the Constitution of Kenya 2010 are similar in declaring for an accused the right of to counsel of his own choice as part of the right to fair trial. Further, as pointed out by Counsel for the applicants herein, the right to fair trial is one of the rights of the Bill of Rights under the Constitution of Kenya 2010, which cannot be limited under Article 25 of the Constitution.

[17] An accused’s right to legal representation was entrenched under section 77 (2) (d) of the former Constitution on provisions to secure protection of law, as follows:

“2. Every person charged with a criminal offence –

(d) shall be permitted to defend himself before a court in person or by a legal representative of his own choice;”

[18] In similar terms Article 50 (2) (g) of the Constitution of Kenya 2010 provides:

“(2) Every accused person has the right to a fair trial, which

includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;”

[19] In addition, Article 1 of the **United Nations Basic Principles of the Role of Lawyers, 1990**, which is made part of Kenya law under Article 2 (5) of Constitution of Kenya 2010 provides that:

“1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”

What is the meaning of the right to counsel of one’s choice?

[20] Does it mean that an accused can chose any one to be his counsel? No; it can only be a right to choose a qualified person as counsel. For one to practice as counsel, there are statutory and common law requirements on qualifications, licensing and professional ethics which entitle one to practice as counsel.

The Advocates' Act cap. 16 Laws of Kenya requires a person to be qualified and licenced to practice as an advocate, and in doing to comply with the provisions of the Advocates (Practice) Rules among other Rules made under the Advocates' Act. Section 31 of the Act makes it a criminal offence for an unqualified person to act as an advocate, as follows:

“31. Unqualified person not to act as advocate

(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

(2) Any person who contravenes subsection (1) shall—

(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition be guilty of an offence.”

[21] It may be said therefore that there is a natural limit on the right to Counsel of one's choice that the counsel must be qualified as such in accordance with applicable law and that where one ceases so to qualify no accused person has a right to him, and the court in such circumstances must be entitled to say so. Mere qualification in law is not sufficient to render one fit as counsel to the appointed by an accused person in exercise of his right to counsel of his choice. For instances, a judge who would be qualified in law does not qualify to practice law as counsel on account of professional ethical considerations of conflict of interest and, therefore, no accused person has a right to insist on a judge of his choice appearing for him as counsel.

[22] In the same way, where an advocate does not qualify on the professional ethical rules of conflict of interest and fiduciary employment, such an advocate would cease to qualify as a competent counsel for purposes of the exercise of the accused's right to counsel of his choice in the particular case. There is no right to choose as counsel a person who is not qualified or who has by his conduct, or by circumstances of the case, become disentitled to act as such on account of his fiduciary relationship with a party with whose interest conflicts with those of the accused or other party, as the case may be.

Do the requirements on qualifications unconstitutionally the right to fair trial?

[23] It is not a limitation of the right of fair trial to require an accused to take a counsel other than one who has a conflict of interest in the matter. The right is not advocate specific; it is only specific to a qualified counsel. For instances in cases where counsel may not have taken out necessary licence under the advocate's Act, an accused cannot demand protection of a right to be represented by such unqualified person as counsel. Counsel must be qualified within the meaning of the applicable statutes and Common Law on the matter. This does not subordinate the constitutional right to statute or common law; it merely elaborates the constitutional provision consistently with the principle of the rule of law, which must hold that constitutional rights must operate within constitutionally established framework of legislation. The legislative provisions as to qualification of advocates are promulgated under the legislative authority of the Constitution and it must follow that a right to counsel means a right to a qualified and duly recognized counsel under the law.

Whether the court may disqualify an advocate for an accused

Disqualification of Counsel

[24] The principle behind the law as to disqualification of advocates is set out in dictum of Fletcher

Moulton LJ in the leading case of *Rakusen vs. Ellis, Munday and Clarke* [1912] 1 CH 831, 840 as follows:

"In my opinion the fundamental principle remains the same as in other cases of confidential employment, and I accept with regard to this the dictum of Jessel M.R. 'that, although there was no law that, because the solicitor had acted for a person, he might not afterwards act against him, it was not to be supposed that he was at liberty to disclose the secrets of his former client to his opponent in the subsequent proceedings, and that the court could always, on general principles, restrain the solicitor (from disclosing) client's secrets.' That is the law with regard to all confidential employment, and it applies therefore to confidential employment of the solicitor by a client.... The court must act in each case according to the circumstances of the case."

[25] **Halsbury's Laws of England** Vol.3 at page 626 observes the principle 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.**"*

[26] In a recent decision in *Bhutt v. Bhutt*, Mombasa HC Civil Suit NO. 8 of 2014, of 12th February 2015, I considered the issue of disqualification of an advocate in a matrimonial property case and observed that in Kenya, the Court of Appeal case of *Delphis Bank Ltd –vs- Channan Singh Chatthe & 6 Others* CA No. Nai 136 of 2005 (UR) had consolidated the principles as follows:

*"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 interest 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), (CA 55/93) and **Uhuru Highway Development Ltd & others –vs- Central Bank of Kenya Ltd & Others (2)**, (2002) 2 EA 654."*

[27] It is possible to translate the Rule in *Rakusen v. Ellis, Munday & Clarke* on to a criminal setting - if representation by counsel of one accused when such counsel has previously acted for the two or more accused who subsequently take separate and conflicting defences. It cannot be argued that the advocate should stay on for one accused person when he had confidential information on the other accused person whom he previously represented and whose defence conflicts with the defence of the one who chooses to retain him. *A fortiori*, the same applies for an advocate who has previously acted for the complainant in a criminal case on a matter which is the subject of the criminal case because he already has confidential information received by him as counsel for the complainant. His previous confidential employment by the complainant removes him from the list of eligible counsel from whom the accused may choose their advocate in the case.

Counsel as a witness in a matter

[28] Rule 9 of the Advocates (Practice) Rules under the Advocates Act is a rule of general application in contentious business of an advocate and it provides for the disqualification an advocate where it becomes clear that he shall be required to act as a witness in the matter. Rule 9 of the Advocates (Practice) Rules 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 matters of fact in any matter in which he acts or appears.”

[29] On the merits, without prejudice to the findings of the trial court on the pending criminal charges, having considered the statements of the complainant and the prosecution witness, Said Bakari Ndege, and the Charge and Caution statement of Salim Hussein Kipanga the 3rd Applicant herein, attached as exhibits to the respective affidavits filed for the parties in this application, it would appear the counsel, Mr. J. S. Asige advocate, was involved in the matter the subject of the criminal charges in alleged receipt of money from the complainant to the benefit of the 1st applicant as part of the arrangement for the purchase of land. Although, there was scanty evidence of fiduciary employment of the advocate by the complainant in the transaction the subject to the criminal charges, whether he received monies as alleged for the benefit of the applicants for purposes of sale of a parcel; of land will be matters for the determination by the criminal Court in the trial of the charges against the applicants for obtaining money by false pretences, and the said advocate will necessarily become a witness in the matter

[30] In addition, it is clear that the said advocate was counsel for the complainant as plaintiff in a case for trespass at Mombasa HCCC No. 48 of 2005 the Plaintiff whereof dated 2nd March 2005 is attached to the Replying Affidavit. Although, this suit is shown to be related to the present criminal charges, that the advocate was counsel for, as plaintiff in the civil suit, the complainant in the criminal against the subject of these proceedings demonstrates a fiduciary relationship between the advocate and the complainant, which was recent and not shown to have been terminated and which may well affect the performance of the complainant as a witness in the criminal case when he has to be cross-examined by his own advocate in a separate civil proceedings. On the converse, should an adverse result come out of the criminal trial, the applicants may suspect that the advocate did not put his best effort against and ask all necessary questions to the complainant who was his client in a separate civil matter. Justice must not only be done but be also seen to be done.

[31] As such advocate, who appears to stand in the position of a likely witness in the criminal trial against the applicants on a complaint made by the complainant was his client in a pending civil matter, the counsel Mr. J. S. Asige, advocate is disqualified by the rule of professional ethics that Counsel shall not act or continue to act in a matter where he is likely be called as a witness. It is the duty of the Court, of which the said advocate is an officer of the court by virtue of section 55 of the Advocates' Act, to so declare and bar the said advocate from acting in breach of the professional ethics rule codified in Rule 9 of the Advocates (Practice) Rules.

ORDERS

[32] Accordingly, for the reasons set out above, the applicants' Originating Notice of Motion dated 30th June 2010 is dismissed. However, in view of the constitutional nature of the application and public interest element of the case, there shall be no order as to costs.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 29TH DAY OF FEBRUARY 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of: -

..... for the Applicants

..... for the Respondents

..... - Court Assistant.