



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 853 OF 2009**

**MARGARET MUMBI KARANJA.....PLAINTIFF**

**-VERSUS-**

**NATIONAL BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MWANGI KIRIMI.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. The application before the Court is a Notice of Motion dated 29<sup>th</sup> January 2010 by the 3<sup>rd</sup> Defendant. The application is filed under Section **3A of Civil Procedure Act, Cap 21** of the Laws of Kenya, **Order L Rule 1 and 2** of the Civil Procedure Rules, the Advocates Act, **Cap 16** of the Laws of Kenya and all enabling provisions of the law.
2. The application seeks the following Orders, namely:
  - a. *This application be and is hereby certified as urgent and service thereof upon the other parties be and is hereby dispensed with in the first instance.*
  - b. *The firm of M/S Khanimwa & Khaminwa Advocates be and is hereby disqualified and/or barred from the conduct or further conduct of this matter on behalf of the Plaintiff or other party proceeding against the 3<sup>rd</sup> Defendant.*
  - c. *Pending the hearing and determination of this application, the hearing of the Plaintiff's Chamber Summons application dated 19.11.2009 and of the entire suit, further proceedings herein be and are hereby stayed.*
  - d. *Costs of this application be provided for.*
3. The application is premised on the grounds set out therein, and is supported by the Affidavit of **JOSEPH MWANGI KIRIMI** dated 29<sup>th</sup> January 2010 with its annexures.
4. The application is opposed by the 3<sup>rd</sup> Defendant vide a Replying Affidavit of **DR. JOHN M. KHAMINWA** dated 8<sup>th</sup> June 2014. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants support the application. The Applicant through his counsel Mr. Ashitiva made oral submissions before the court on 31<sup>st</sup> July 2014 in the absence of Dr. Khaminwa for the Plaintiff/Respondent.

5. In his submissions Mr. Ashitiva for the Applicant stated that the firm of M/S Khaminwa & Khaminwa Advocates have filed this suit on behalf of the Plaintiff herein against, *inter alia*, the 3<sup>rd</sup> Defendant, and that the said firm of M/S Khaminwa & Khaminwa Advocates have also been personal lawyers of the 3<sup>rd</sup> Defendant and family lawyers for the 3<sup>rd</sup> Defendant for a long time, and have acted for the 3<sup>rd</sup> Defendant and his family and related entities in, among other cases, HCCC No.990 and C.A 33 of 2000. Through the Advocate-Client relationship that has existed between the said firm and the 3<sup>rd</sup> Defendant and his family, the 3<sup>rd</sup> Defendant has confided in and entrusted with the said firm of Advocates enormous amount of confidential and privileged information on the 3<sup>rd</sup> Defendant's person, family, business and life generally. The 3<sup>rd</sup> Defendant is therefore apprehensive that the said firm may use, disclose and/or be influenced by the privileged and confidential information at its disposal and that it has acquired from the 3<sup>rd</sup> defendant herein and members of the 3<sup>rd</sup> Defendant's family against and to the prejudice of the 3<sup>rd</sup> Defendant in the prosecution of the Plaintiff's Chamber Summons application dated 19.11.09 and the suit as a whole. The counsel submitted that the foregoing circumstances have raised a conflict of interest and/or, in any event, is likely to raise such a conflict and it is in the interests of justice and fairness that the orders sought be granted.
6. The 3<sup>rd</sup> Applicant further states that he is a partner and has interest in the entity known as **Muthoni Kihara**, represented by the firm of M/S Khaminwa & Khaminwa Advocates in **HCCC NO.990 of 1999**, in which **Muthoni Kihara** was the 1<sup>st</sup> Defendant, and in Court of **Appeal No. 33 of 2000**. Although Dr Khaminwa did not make oral submissions before the court, he opposed the application through his Replying Affidavit aforesaid. Dr Khaminwa in his Affidavit denies that his firm has ever represented the 3<sup>rd</sup> Defendant. Especially denied is the allegation that Dr. Khaminwa's firm represented the applicant in the suit **No.990 of 1999**. Dr. Khaminwa however conceded to have represented one **MUTHONI KIHARA** who was the 1<sup>st</sup> Defendant in the suit **No.990 of 1999**. The 3<sup>rd</sup> Defendant Joseph Mwangi Karimi was not a party to that suit. In the Criminal **Appeal No.33 of 2000**, Dr. Khaminwa states that he did not represent the 3<sup>rd</sup> Defendant, but the said **Muthoni Kihara**. Dr. Khaminwa denies the existence of any conflict of interest, either in the past or in the future, and states that neither him nor his firm is in possession of any oral or written privileged or confidential information concerning the 3<sup>rd</sup> Defendant/Applicant that will prejudice him in the present suit.
7. I have very carefully considered the application and submissions of the parties and the opposing Affidavits. There is only one issue for determination, and that is whether there is likelihood of conflict of interest if the firm of Khaminwa & Khaminwa Advocates continues to represent the 3<sup>rd</sup> Defendant. In order to answer this question, it is important to determine one sub issue;
  - i. ***Whether the alleged conflict of interest have been shown or proved.***
8. The Applicant states that there will be conflict of interest because Dr. Khaminwa and his firm of advocates had represented him in **HCC NO.990 of 1999** and in the **Criminal Appeal No. 33 of 2000**. However, a look at these proceedings show clearly that the Applicant was not party to these proceedings. The applicant nonetheless stated that he was interested in the entity called **MUTHONI KIHARA** which was the party to those proceedings. The Applicant however does not show the nature and the extent of his interest in that entity called **Muthoni Kihara**. Mere allegation is not enough. I am satisfied that the firm of Dr. John Khaminwa did not represent the Applicant in those proceedings.
9. The Applicant also stated that Dr. Khaminwa's firm of advocates had represented him and his family in several matters. However, those matters are not disclosed. It is not stated whether they were matters in court or legal advice. Whatever they are, they are not identifiable and cannot form the basis of denying the Plaintiff to be represented by a Counsel of her choice.
10. It is certainly not enough for the applicant to allege that the firm of Dr. Khaminwa had acted for

the applicant as personal and family lawyers without providing particulars of those instances, and where the applicant chooses to provide witness, the Applicant was not a party. Legal decision cannot be left for guesswork, however educated the guesswork is. A party who alleges must provide commensurate proof of the allegations.

11. The constitution provides a right for every litigant to access a lawyer of choice. Unless there are clear cogent and coherent circumstances, that right cannot be taken away. My attention has been drawn to “**JMK5**” which is annexed to the Applicant’s Affidavit. It is a letter by Dr. Khaminwa responding to the Applicant’s request for Dr. Khaminwa to withdraw from representing the Plaintiff. In that letter Dr. Khaminwa has made certain observations regarding the culpability of the Applicant in the death of the Plaintiff’s husband, and on that ground Mr. Ashitiva submitted that Dr. Khaminwa is thereby conflicted and has entered into the arena of a witness and should cease acting for the Plaintiff. It is very clear that whatever Dr. Khaminwa has stated in that letter is what he has been told by his client the Plaintiff. Those are instructions given to Dr. Khaminwa by his client. Indeed, at every stage of that communication Dr. Khaminwa refers to “*our Lady Client believes*”. These words, or rather the contents of that letter are not Dr. Khaminwa’s and so they cannot be attributed to him. While Dr. Khaminwa in that letter admits that his firm may have acted for the applicant in the past, no particulars of such past representation is given. However it is not for Dr. Khaminwa to provide such particulars. Not every past representation can result in barring a counsel from future representation of the same client or to represent a party against the same client. In the end the distinguishing factor or factors must be particulars of those representation to enable the court to determine if they are such representation that may result in conflict of interest.

12. The Applicant has in this case singularly failed to do that. The upshot is that this application fails with cost to the Plaintiff/Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Sifuna for Applicant for Plaintiff

No appearance for Defendant

Irene – Court Clerk