



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION 216 OF 2014

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF EMBU.....RESPONDENT

EMBU COUNTY LIQUOR DEALERS ASSOCIATION.....EXPARTE

RULING

This is a ruling on an application dated 5th December 2014 brought by the Exparte applicants Embu County Liquor Dealers Association officials namely John Ileri, Doris Wairimu and Peter Njagi Munya. The application seeks for the following orders:-

1. *That Mungai Kivuti do disqualify himself from acting for the Respondent and all his pleadings be expunged from the record.*
2. *That costs of this application be provided for.*

The application is supported by the affidavit of John Ileri which puts forth four grounds:-

1. *That Mr. Mungai is the legal counsel for the Ex-parte applicant;*
2. *That he was instructed by the exparte applicant in this case and when he took too long to act, the exparte applicant hired another counsel now on record;*
3. *That the exparte applicants gave Mr. Mungai confidential information that was privileged;*
4. *That the said information is being used by Mr. Mungai in favour of the respondent against the exparte applicants in this case.*

Ms. Thungu for the exparte applicants submitted that if Mr. Mungai is allowed to continue acting for the respondent, there will be a conflict of interest. The document given to him by the exparte applicants were confidential and privileged within the ambit of an advocate – client relationship. She further said that it is not only wrong but unethical for the respondents counsel to use the confidential information against the client.

The application was opposed by the respondent relying on grounds of opposition dated 9th December 2014 and filed the same day which raise the following issues.

- i. *That the application is brought under the wrong provisions of the law;*
- ii. *That the application is an abuse of the due process of the law; and*
- iii. *That the application lacks merit.*

The respondent relied on three past decisions on the subject of disqualification and urged the court to

dismiss the application for failure by the applicants to demonstrate that there was any advocate – client relation between the counsel and the ex parte applicants; or that they were principles under whose employment the counsel was. The affidavit in support of the application was faulted for failing to disclose the capacity of the deponent and the other two people in relation to the ex parte applicant Embu County Liquor Dealers Association. It was also argued that no prejudice was likely to be suffered by the applicants even if the orders were not granted.

From the pleadings and arguments of both parties the following issues arise for determination:-

- i. *Whether the applicants have demonstrated their locus standi in this application on behalf of the ex-parte applicant;*
- ii. *Whether the application is properly before the court;*
- iii. *Whether the applicants have shown that they had an advocate - client relationship with Mr. Mungai;*
- iv. *Whether the counsel should be disqualified from representing the respondent in this case.*

Regarding the application being properly before the court or otherwise, this court will be guided by relevant provisions of the law. The application is brought under Section 3A of the Civil Procedure Act which provides:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

This is a general provision and should only be used where there are no direct provisions relating to the subject matter before the court. The Advocates Act Cap. 16 is the law purposed to govern all issues relating to advocates in performance of their official duties. The matter before this court concerns disqualification of an advocate and ought to have been brought under the provisions of this Act. The applicant urged the court to utilize the provisions of Section 1A and 1B of the Civil Procedure Act which provides that overriding objective of the Act and the rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

In furtherance of the overriding objective, the court is required to handle all matters presented before it for purposes of attaining just determination of the proceedings among other aims. In addition to the overriding objective, the court must decide all matters without undue regard to procedural technicalities in accordance with the provisions of Article 159(2)(d) of the Constitution. The bringing of this application under the wrong provisions of the law is not fatal to this application taking into consideration the foregoing provisions.

The applicants herein are Embu County Liquor Dealers Association whose three officials are named in the application including the deponent of the supporting affidavit one John Ileri. Order 19 Rule (3)(1) of the Civil Procedure Rules provides that affidavits shall be confined to matters within the knowledge of the deponent. The deponent who alleges he is an official of the ex parte applicant ought to have stated his legal capacity and source of authority for swearing the affidavit on behalf of the Association. If this fact is omitted the deponent may not be able to prove that he possesses of the legal capacity to represent the ex parte applicant and that he is duly authorized to swear the affidavit. This omission is not just an irregularity or technicality which the court will disregard as immaterial. It is a more serious omission as opposed to the irregularities referred to in Order 19 Rule 7. For this reason the court is not obligated to hear the said John Ileri for failure to establish his *locus standi*.

For this reason I expunge the affidavit of John Ileri in this application. This leaves the application unsupported by any ground. The application is therefore not properly before the court and it is hereby struck out with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF DECEMBER, 2014.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Mungai for Respondents

Mr. Momanyi for Ms. Thungu for Applicants

F. MUCHEMI

JUDGE