



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAKURU**  
**ELECTION PETITION 1 OF 2013 (1)**

**IMMANUEL INCHOR IMANA.....APPELLANT**

**VERSUS**

**DAVID ETHURO.....1ST RESPONDENT**

**REUBEN BUTAKI.....2ND RESPONDENT**

**ELECTION COMMISSION OF KENYA.....3RD RESPONDENT**

**RULING**

The Application has been brought through Notice of Motion under Order LR.1 of the Civil Procedure Rules and Sec. 3 (A) of the Civil Procedure Act. The application seeks the following orders:

- That pending hearing of all the previously filed applications and or the Petitioner's Petition there be a stay of proceedings until this application is first heard and decided.
- That the firm of M/s MIRUGI KARIUKI & CO. ADVOCATE be barred or disqualified from representing or appearing for the 1st Respondent (Hon. DAVID EKWE ETHURO) in his matter whether in the main Petition or and in any interlocutory applications or in any manner howsoever. The application has been supported by the affidavit of IMMANUEL ICHOR IMANA. The thrust of the affidavit is as follows: -
- That when the Petitioner engaged the firm of M/s Karanja Mbugua & Co. Advocates he strictly and wholly dealt with Mr. Lawrence Macharia Karanja (hereinafter referred to Karanja Junior) then an Advocate in that firm.
- That the entire Petition together with all the preliminary pleadings were drafted and fine-tuned by Mr. Lawrence Macharia Karanja to whom he passed all the confidential information regarding the petition.
- That Mr. Lawrence Macharia Karanja is privy to client – advocate confidential information in so far as the petition is concerned and all the matters related thereto and that the information has been passed over and trickled into the entire firm of M/s Mirugi Kairuki & Co. where Mr. Karanja is a partner.
- That the Petitioner believes that if the firm of Mirugi Kariuki & Co. represents the 1st Respondent then he will be prejudiced and that confidential information will be used and relied upon to his detriment and for the advantage of the 1st Respondent. During the hearing of the application, Mr. Karanja Mbugua added that it was Mr. Karanja Junior who answered all the particulars that were requested by the 2nd and 3rd Respondents and also drew the witnesses' deposition ready for hearing of the Petition. He also interviewed the witnesses and reduced their evidence in writing. In support of his submissions, Mr.

Karanja Mbugua quoted the following authorities:-

- Penina Kinuthia Vs Joseph Nduati
- Koigi Wamwere & Others Vs Republic
- John Alexander Kamau & 5 Others Vs Joseph Gaitho Mwango

In the above case, the firm of Mirugi Kariuki was barred from representing the Plaintiffs.

- Isaac Kimani & 3 others Vs Municipal Council of Nakuru
- King Woolen Mills Ltd. Vs Kaplan Strattan Advocates

The above case was decided by the Court of Appeal.

EARL Cholmondely Vs Lard Clinton

1814 - 23 ALL ER On the other hand, Mr. Mirugi Kariuki has opposed the application while relying on the Reply and further affidavits of Mr. Karanja Junior and the law. At the outset, Mr. Kariuki submitted that it had not been alleged anywhere that Mr. Karanja Junior had any conferences with the Petitioner and secondly that he had taken any statements from the witnesses except Regina Ekitela. Mr. Kariuki denied that Mr. Karanja junior had taken any statements from the other witnesses. Besides the above, Mr. Kariuki further submitted that the Applicant's affidavit of 21st June, 2004 confirms that Mr. Karanja Junior had left the firm of Karanja Mbugua before 11th June, 2003. He pointed out that was in contradiction to what Mr. Karanja Mbugua had stated that Karanja junior had left his firm in late 2003.

Apart from the above, Mr. Kariuki submitted that the Applicant's case is based on some alleged confidential information which was passed to their firm on or before 11th June, 2003. However, he pointed out that by then Karanja Junior was still with the firm of Karanja Mbugua – and only left 5 months later. That meant that the foundation of their application has collapsed.

In addition to the above, Mr. Kariuki also submitted that the Civil Procedure Rules do not apply since we are dealing with Election Petitions. He pointed out that the Election Rules are a legal regime in their own right. Apart from the above, Mr. Kariuki submitted that the prayers being sought are in the nature of an injunction which can only be issued against a party to a suit. He further argued that in this case, Mirugi Kariuki Advocate is not a party to the suit and that injunctions can only apply to suits.

Apart from arguing that the quoted authorities are not relevant, he also argued that there was no confidential information that had been passed on to his firm by Karanja Junior.

This Court has carefully perused the detailed submissions by both Counsels. The same include various authorities. Having gone through the above, it is apparent that Mr. Karanja Mbugua contradicted the affidavit of his client dated 21st June, 2004. Para. (6) of that affidavit states as follows:-

“That my fear is real, in that it was only after Mr. Lawrence Macharia Karanja left the firm of M/s Karanja Mbugua & Co. Advocates and joined M/s Mirugi Kariuki & Co. Advocates that the application dated 11th June, 2003 was presented in Court to bring down my Petition.”

On the other hand Mr. Karanja Mbugua himself stated that Mr. Karanja Junior had left his firm towards the end of the year 2003. Since Mr. Karanja Mbugua was the employee of Mr. Karanja Junior, I am inclined to believe what he has stated to the Court. Having stated the above, it is apparent that the application dated 11th June, 2003 never benefited at all by any input by Mr. Karanja Junior.

Apart from the above, the Court notes the case of

In the Matter of :-

Rift Valley Agricultural Contractors Ltd.

And

In the Matter of:-

THE COMPANIES ACT

where Hon. Justice Mwera stated as follows:-

“On adopting the foregoing this Court adds that much as it will always endeavour to ensure that a party seeking legal services will be given opportunity to have a lawyer of his choice, as by the Constitution mandated, it will not lose sight of the bigger need and right that a fair trial is conducted.”

Though the above case is not binding to this Court, it is definitely of persuasive value since the same captures the spirit of the constitution.

Besides the above, in the case of :-

RAKUSEN Vs. ELLIS MUNDAY & CLERKE [1912] 1 Ch P. 831 COZENS – HARDY M.R. stated as follows:-

“A solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets which are confidentially reposed in him. In that respect, it does not very much differ from the position of any confidential agent who is employed by the principal. But in the present case we have to consider something further. It is said that in addition to the absolute obligation not to disclose secrets there is a general principle that a solicitor who acted in a particular matter, whether before or after litigation has commenced, cannot act for the opposite party under any circumstances, and it is said that that is so much a general rule and the danger is such that the court ought not to have regard to the special circumstances of the case. I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client, but in my view we must treat each of the cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client but, as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability, result if his solicitor is allowed to act.”

In this case, no prejudice or mischief has been proved. Mr. Karanja Junior is an Advocate of the High Court. I am inclined to believe that he knows and understands his role as an officer of the Court. Besides the above, when he joined the new firm all the pleadings were complete. As a general rule, parties are bound by their pleadings in civil litigation. The upshot is that there is no sufficient basis to disqualify the firm of Mirugi Kariuki & Co. Advocates from appearing for the Respondent in this case.

In view of the above, the application is hereby dismissed with costs.

**MUGA APONDI JUDGE**

**8TH APRIL, 2005**

**Ruling read, signed and delivered in Open Court in the presence of Mr. Kahiga for 1st respondent.**

**MUGA APONDI**

**JUDGE**

**8TH APRIL, 2005**