



**Kilonzo v Ndenge & 2 others (Environment & Land Case
31 of 2019) [2024] KEELC 791 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 31 OF 2019
TW MURIGI, J
FEBRUARY 14, 2024**

BETWEEN

JANET MWENDE KILONZO PLAINTIFF

AND

GODFREY KYALO NDENGE 1ST DEFENDANT

FESTUS MWANIKI LONZI 2ND DEFENDANT

CHIEF LAND REGISTRAR MAKUENI 3RD DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 3rd March, 2023 brought under Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 137 of the [Evidence Act](#), [The Law Society of Kenya \(LSK\) Code of Standards of Professional Practice and Ethical Conduct](#) – June 2016 version, Paragraphs 96, 97 & 99 of the Advocates Practice Rules under the [Advocates Act](#), Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law in which the Applicant seeks the following orders: -
 - i. Spent.
 - ii. That this Honourable Court disqualifies and/or bars and/or recuses and/or prohibits the firm of Nzavi & Company Advocates and particularly one Maurice Muli Nzavi and any other Advocate practising under that name from acting for the 2nd Defendant herein for having conflicting interest in this case.
 - iii. That costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Janet Mwendu Kilonzo sworn on even date.



The Applicant's Case

3. The Applicant averred that the firm of Messrs Nzavi & Company Advocates is conflicted because the said law firm drew the sale agreement dated 29/07/2013 and the Memorandum and Articles of Association which are the subject of controversy between the Plaintiff and the Defendants. She further averred that the said law firm was acting for both the Plaintiff and the 1st Defendant as joint purchasers in the sale agreement dated 29/7/2023. She contended that Maurice Muli Nzavi Advocate being the key witness in the sale agreement has a duty to shed light on the contents of the same.
4. She further averred that the firm of Nzavi and Co Advocates drew and filed the Memorandum and Articles of Association for Malama Fresh Growers Limited which documents are part of the 1st Defendant's list of documents. She stated that together with the 1st Defendant they are the directors of the said company.
5. The deponent contended that Messrs Nzavi & Company Advocates now purports to represent the 2nd Defendant who has in his pleadings alleged that he was a purchaser of the suit property for value without notice. She stated that the said law firm had knowledge that the Plaintiff was a joint owner of the suit property by virtue of the sale agreement but filed documents on behalf of the 2nd Defendant purporting that he had no knowledge of the Plaintiff's interest in the suit property.
6. The Applicant further averred that she will be prejudiced by the presence of the firm of Nzavi & Co Advocates because the sale agreement and the ownership of the suit property are hotly contested. It is the Applicant's case that she intends to call Maurice Muli Nzavi Advocate as a witness but opines that it will embarrass the Advocate and the Court because he would still be acting for the 2nd Defendant. According to the Applicant, if the Advocate is called as a witness, his testimony will prejudice his client and as result the integrity of the judicial process will be jeopardized.
7. The Applicant contended that Messrs Nzavi & Company Advocates are seriously conflicted and their presence in the case will Prejudice her case. That despite raising her concerns to the said law firm, they did not bring the issue to the court's attention. The deponent averred that the application has been made in good faith and in the interest of justice.

The 2nd Defendant's Case

8. The 2nd Defendant filed a replying affidavit dated 28/4/2023 in opposition to the application. He averred that Messrs Nzavi & Company Advocates has never represented the Plaintiff and the 1st Defendant in any contentious matter and as such his Advocates cannot be conflicted in any manner. That even though the proprietor of Messrs Nzavi & Company Advocates drew the sale agreement and company registration documents herein, there was no controversy and no confidential information was shared or was necessary in performing the said assignments.
9. According to him, the court has no the business in telling litigants which Advocate should act in a particular matter. He asserted that a party to a litigation has the right to choose his or her own Advocate unless it is shown to the court that the interest of justice would not be served.
10. He argued that he has a constitutional right to choose the law firm which represents him. He averred that the Plaintiff has not shown a clear and valid reason to persuade the court to deprive him of legal representation of his choice. He stated that the application is devoid of merit and urged the court to dismiss the same with costs.
11. The application was canvassed by way of written submissions.



The Plaintiff's Submissions

12. The Plaintiff's submissions were filed on 6th November, 2023. On her behalf, Counsel submitted that Messrs Nzavi & Company Advocates are conflicted in this matter because they had previously drawn documents on behalf of the Plaintiff and the 1st Defendant which are the subject of controversy in the suit herein. Counsel further submitted that the sale agreement is part of the Plaintiff's evidence and since the 1st Defendant disputes the contents thereof in his statement of defence, it makes the 2nd Defendant's Advocate a potential witness for the Plaintiff.
13. Counsel submitted that the Plaintiff also intends to rely on the contents of the Memorandum and Articles of Association to advance her claim against the 1st Defendant. Counsel maintains that the Plaintiff's interests are directly adverse to those of the 2nd Defendant who is being represented by the firm of Nzavi & Company Advocates. Concluding her submission, Counsel submitted that the question of conflict of interest is tied to client confidentiality which entails the advocate's duty not to disclose or misuse privileged information. Counsel urged the court to allow the application as prayed.
14. None of the authorities that were cited by counsel were availed for the court's perusal.

The 2nd Defendant's Submissions

15. The 2nd Defendant's submissions were filed on 9th October, 2023. On his behalf, Counsel submitted that Messrs Nzavi & Company Advocates has never represented the Plaintiff and the 1st Defendant in any contentious matter. Counsel submitted that the sale agreement drawn and witnessed by Messrs Nzavi & Company Advocates was for the purchase of land and documents relating to the registration of a company. That there is no controversy and no confidential information was shared when performing the said assignments.
16. Counsel submitted that the Plaintiff has not demonstrated the prejudice she is likely to suffer if the said law firm continues to represent the 2nd Defendant. Concluding his submissions, Counsel submitted that the instant application is devoid of merit and urged the court to dismiss the same with costs.

Analysis and Determination

17. Having considered the application, the respective affidavits and the rival submissions, the issue that arises for determination is whether the firm of Messrs Nzavi & Company Advocates should be disqualified from acting for the 2nd Defendant in this suit.
18. The right to legal representation is a fundamental principle of *the Constitution*. In the case of *William Audi Odode & Another v- John Yier & Another*, Court of Appeal Civil Application No. Nai 360 of 2004, the court held: -

“I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel”.



19. The Court of Appeal in *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* [2005] eKLR laid out the test which must be demonstrated when considering an application for the disqualification of an advocate from representing a litigant. The Court of Appeal aptly held 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 interests 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), (C.A 55/93) and *Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others* (2), [2002] 2 EA 654.”

20. Rule 8 of the *Advocates (Practice) Rules* 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:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

21. In the matter at hand, the Plaintiff averred that the firm of Messrs Nzavi & Company Advocates is conflicted because it had previously drawn a sale agreement and Memorandum and Articles of association on behalf of the Plaintiff and the 1st Defendant. It is not in dispute that the firm of Messrs Nzavi & Company drew, attested and registered the sale agreement and Memorandum and Articles of Association on behalf of the Plaintiff and the 1st Defendant

22. Faced with a similar controversy such as the one herein, Justice F. Gikonyo took the following position in *Guardian Bank Limited v Sonal Holdings (K) Limited & 2 others* [2014] eKLR: -

“What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that “these advocates participated in the drawing and attestation of the Deeds in dispute”; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say “I intend to call them as witnesses”. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in the conveyancing transaction... It is, therefore, doubtful whether the said



advocates will offer any useful evidence or different from what the plaintiff is stating in its pleadings, because the drawing and attestation of the Debenture and Deeds of Assignment are not in issue. What is in dispute is the allegation that the Deeds of Assignment were made fraudulently by the 1st and 3rd defendants to rip off the plaintiff of its property. That notwithstanding, should the advocates be required to testify on the non-contentious matters of drawing and attesting to the Debenture and the Deeds of Assignment, the proviso to rule 8 of the Advocates (Practice) Rules will still bail them out and may give evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

Will there be any conflict of interest?

(13) I don't think so. Given the role of the concerned advocates and the nature of the claim herein, there is no possibility of conflict of interest arising herein as it has not been shown they have any particular personal interest which will collide with their fiduciary duties as advocates."

23. In the instant application, the Applicant has not shown the mischief or prejudice that will result if Messrs Nzavi & Company Advocates continues to act for the 2nd Defendant whom in any event, does not share any fiduciary relationship with the Plaintiff. In Guardian Bank Limited (supra) the court held that should the concerned advocates be required to testify on the non-contentious matters of drawing and attesting to the sale agreement and company registration documents, they may in accordance with the proviso to rule 8 of the Advocates (Practice) Rules give evidence either verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.
24. From the foregoing, I find that the application dated 3rd March 2023 is devoid and the same is dismissed with costs to the 2nd Defendant.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF FEBRUARY, 2024.

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HON. T. MURIGI

JUDGE

In the presence of:

Mrs. Sagini for the Defendant

Ms. Singi for the Plaintiff

Ms. Chelegat for the 2nd Defendant.

Court assistant Kwemboi.

