



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO.537 OF 2018

**STANDARD CHARTERED KENYA NOMINEES LIMITED (NOMINEES OF THE
TRUSTEES OF STANDARD CHARTERED KENYA PENSION FUND).....PLAINTIFF**

=VERSUS=

SAMWEL NJERU MUTHI.....1 ST DEFENDANT

CHIEF LAND REGISTRAR.....2 ND DEFENDANT

REGISTRAR OF TITLES.....3 RD DEFENDANT

DIRECTOR OF SURVEYS.....4 TH DEFENDANT

RULING

1. On 16/1/2019, the 1st defendant brought a notice of motion dated 14/1/2019 through which it sought an order disqualifying Mr George Odinga Oraro, Senior Counsel, together with the entire firm of Oraro & Company Advocates, from acting for the plaintiff in this matter. He also sought an order striking out all documents filed by the said law firm in this suit. That application is the subject of this ruling.

2. The application was premised on the grounds set out on its face. It was supported by an affidavit sworn on 14/1/2019 by the 1st defendant. The case of the applicant was that the suit herein together with the plaintiff's notice of motion dated 13/12/2018 were predicated upon an alleged provisional conveyance/indenture dated 13/6/1997 between the Registered Trustees of Getrude's Gardens Children's Hospital and the plaintiff, and on its face, the said instrument was prepared by the defunct firm of Oraro & Rachier Advocates. The 1st defendant intends to challenge the authenticity of the said instrument. The applicant added that because Mr George Odinga Oraro, Senior Counsel, was a partner at the defunct firm of Oraro & Rachier Advocates, he will be required to testify as to the authenticity of documents relating to the suit property. It was the applicant's contention that, in the circumstances, Mr George Odinga Oraro, Senior Counsel, together with the entire firm of Oraro & Company Advocates were conflicted and the continued representation of the plaintiff by the said firm offended the rules of this court and the sacrosanct provisions of both the Evidence Act and the Advocates Act.

3. The plaintiff opposed the application through a replying affidavit sworn on 18/7/2019 by Mr Hillary Chacha Odera, the Managing Partner of the firm of Oraro & Company Advocates. He deposed that the application was not only scandalous and aimed at besmirching the good reputation of the firm of Oraro & Company Advocates, but was also an abuse of the process of the court. He added that the firm of Oraro & Company Advocates had never acted for any of the defendants in this matter and had never been in possession of any privileged information or documents pertaining to any of the defendants in the suit. His position was that there was no basis for the applicant's contention that the said firm is conflicted. He further deposed that the mere fact that a partner in the said firm may be called as a witness did not in itself warrant the disqualification of the entire law firm from acting for the plaintiff. Mr Odera added that the right of the plaintiff to have a counsel of its choice cannot be subjugated at the whims of the 1st defendant based on a misconceived conflict of interest. He urged the court to dismiss the application. The 2nd 3rd and 4th defendants did not respond to the application.

4. The application was canvassed through written submissions. Through written submissions dated 22/7/2019, the applicant argued that Mr Oraro Senior Counsel, is best placed to guide the court as to the genuineness of the indenture conveying the suit property to the plaintiff and he cannot be an advocate and a witness at the same time. The applicant relied on rule 9 of the Advocates (Practice) Rules. Further reliance was placed on the decision in **Uhuru Highway Development Limited & 3 Others v Central Bank of Kenya & 5 Others, Nairobi Civil Appeal No 286 of 2001** and the decision in **Francis Mugo & 22 Others v James Bress Muthee & 3 Others (2005) eKLR**.

5. The applicant further relied on the provisions of Section 134(1) (a) of the Evidence Act and contended that Mr Oraro owed a duty to the court to testify as to the legality of the indenture which was prepared by the firm of Oraro & Rachier Advocates. He added that as an officer

of the court, Mr Oraro owed allegiance to a cause higher than serving the interests of his client; the cause of justice and truth. He urged the court to grant the prayers sought in the application.

6. In response, the plaintiffs counsel, through written submissions dated 11/11/2019, argued that the attempt to curtail the constitutional right to legal representation of one's choice is one which should not be taken lightly. Reliance was placed on the decision in **Delphis Bank Limited v Channu Singh Cathe & 6 Others (2005)eKLR**. Counsel added that the applicant did not contend that the firm of Oraro & Company Advocates acted for him in the past or was in possession of any confidential or privileged information that might be used against him in the present case. He further submitted that there were no evidential materials placed before court to suggest that Mr Oraro, Senior Counsel, had been listed as a witness in this suit. Counsel argued that the fact that one advocate in a firm might be called as a witness did not in itself bar the firm from acting. It was contended that the applicant was required to demonstrate the probability of “**real mischief and real prejudice**”. Reliance was placed on the decision in **British American Investments Company (K) Limited v Njomaitha Investments Limited & Another (2014) eKLR**.

7. Counsel for the plaintiff further submitted that it was clear from the court record, including appearances, that Mr George Odinga Oraro, Senior Counsel, did not have personal conduct of this matter and no explanation had been tendered by the applicant to demonstrate why he sought the disqualification of the entire firm of Oraro & Company Advocates. Counsel added that in the absence of a clear demonstration of real mischief and/or real prejudice, the constitutional right to legal representation of one's choice must prevail over the 1st defendant's subjective and unfounded apprehension.

8. Lastly, the plaintiff submitted that no statutory or jurisprudential authority had been cited to support the plea for the draconian order striking out the plaintiff's pleadings. Counsel contended that even if the order for disqualification was to be granted, there would be no basis for striking out the plaintiff's pleadings. Counsel urged the court to dismiss the application altogether.

9. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal frameworks and jurisprudence. Three key questions fall for determination in this application. The first question is whether Mr George Odinga Oraro, Senior Counsel, should be disqualified from acting for the plaintiff in this matter. The second question is whether the firm of Oraro & Company Advocates should be barred from acting for the plaintiff in this suit. The third question is whether the pleadings and documents filed by the firm of Oraro & Company Advocates on behalf of the plaintiff should be struck out. Before I analyze and make my pronouncements on the three questions, I will set out the relevant legal framework and the prevailing jurisprudence on the principles applied by our courts when faced with the question of whether or not to disqualify an advocate or a law firm from acting in a suit.

10. The relevant legal framework on the subject of disqualification of an advocate in circumstances such as the ones before court is contained in rule 9 of the Advocates (Practice) Rules which 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”

11. It is now a settled principle of law that a party seeking an order of disqualification against an advocate or law firm is required to satisfy the court that real mischief and/or real prejudice will, in all human probability, result if the advocate is allowed to act in the case. The Court of Appeal, while quoting Sir Nicholas Brown-Wilkinson summed up this jurisprudential criteria in the case of **Delphis Bank Limited v Channan Singh Chathe & 6 others (2005) eKLR** in the following words:

“The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rukusen v Ellis, Munday & Clarke (1912) 1 Ch.831...The law as laid down there is that there is no absolute bar on a solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word “likely” loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rukusens case itself. Cozens – Hardy M. R. laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act.”

12. The above criteria has been applied consistently in a line of cases, among them: **(i) King Wollen Mills Limited & another v M/s Kaplan & Stratton (1993) LLR 2170 (AK), (CA 55/93); and (ii) Uhuru Highway Development Limited & Others v Central Bank of Kenya & 2 Others (2002) 2 EA 654**. What is to be borne in mind, however, is that each case turns on its own facts to establish whether real mischief or real prejudice will result.

13. In the application under consideration, the applicant contends that Mr George Odinga Oraro, Senior Counsel, and the firm of Oraro and Company Advocates should be disqualified from acting for the plaintiff because Mr George Odinga Oraro, Senior Counsel, was a partner in the defunct firm of Oraro & Rachier Advocates, which drew the indenture of conveyance dated 13/6/1997 conveying the suit property to the plaintiff. He wants them disqualified because he intends to challenge the authenticity of the instrument. He contends that Mr George Odinga Oraro, Senior Counsel, will be a witness in this suit. The applicant does not contend that either Mr George Oraro or the firm of Oraro & Company Advocates acted for him in the past in relation to the subject matter of this suit. Similarly the applicant does not contend that either Mr George Odinga Oraro, Senior Counsel, or the firm of Oraro & Company Advocates is in possession of privileged communication or information within the meaning of Section 35 of the Advocates Act, entrusted or conveyed to them by him under a client/advocate relationship.

14. Secondly, there is no evidence at this point to suggest that Mr George Odinga Oraro, Senior Counsel, will be called by any of the

parties as a witness in this suit. The plaintiff filed a list of witnesses dated 13/12/2018 in which they listed Fred Waswa as the only witness. They similarly filed a witness statement by Mr Waswa dated 13/12/2018. The 1st defendant entered appearance on 9/1/2019 through a memorandum of appearance of even date. The court record does not bear any list of witnesses or witness statements filed by the plaintiff. The 2nd, 3rd and 4th defendants entered appearance on 22/7/2019 but the record does not bear any list of witnesses or witness statements by them. The applicant's contention that Mr George Odinga Oraro, Senior Counsel, is a witness in this suit is at this point purely speculative and without basis. For Mr George Odinga Oraro, Senior Counsel, to be a witness, one of the parties must call him and the other parties to this suit will be entitled to have his witness statement furnished to them by the party calling him.

15. Given the above circumstances, I find no proper basis at this point, for the applicant's contention that Mr George Odinga Oraro, Senior Counsel, is a witness in this suit. Consequently, there is no basis for issuing an order of disqualification against Mr George Oraro, Senior Counsel.

16. The applicant similarly seeks an order of disqualification against the firm of Oraro & Company Advocates. Other than contending that Mr George Odinga Oraro who is a partner in the said firm was a partner in the defunct firm of Oraro & Rachier Advocates, no evidence has been placed before the court to satisfy the legal criteria in rule 9 of the Advocates (Practice) Rules and the jurisprudential criteria of real mischief and/or real prejudice. The plaintiffs are entitled to an advocate of their choice. That right can only be derogated upon satisfaction of the requirements of rule 9 of the Advocates (Practice) Rules and the jurisprudential criteria of real mischief and/or real prejudice. Regrettably, the applicant has not satisfied the requirements and the jurisprudential criteria.

17. The totality of the foregoing is that the applicant has failed to satisfy the legal and jurisprudential criteria for disqualification of Mr George Odinga Oraro, Senior Counsel, and the law firm of Oraro and Company Advocates. My findings on the first two issues are therefore in the negative.

18. The last issue is whether the pleadings and documents filed by the plaintiff through M/s Oraro & Company Advocates should be struck out. No legal basis was laid to support the plea for an order striking out the plaintiff's pleadings and documents. Similarly, no jurisprudential basis was laid. Thirdly, having found that there is no basis for disqualifying the firm of Oraro & Company Advocates, the plea for an order striking out the plaintiff's pleadings cannot be granted. The totality of the foregoing is that there is no merit in the plea for an order striking out the plaintiff's pleadings and documents.

19. The net result is that the 1st defendant's notice of motion dated 14/1/2019 is dismissed for lack of merit. The 1st defendant shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH

DAY OF MAY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Eredi holding brief for Mr Kamau for 2nd, 3rd and 4th Defendants

Mt Mbaluto for the Plaintiff

Court Clerk - June Nafula