



Meridian Energy Limited v DIB Bank Kenya Limited; Timsales Limited (Interested Party) (Civil Suit E046 of 2022) [2025] KEHC 3149 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E046 OF 2022
AB MWAMUYE, J
MARCH 13, 2025**

BETWEEN

MERIDIAN ENERGY LIMITED PLAINTIFF

AND

DIB BANK KENYA LIMITED DEFENDANT

AND

TIMSALES LIMITED INTERESTED PARTY

RULING

1. Before me is the application dated 2nd October, 2024 filed by the Plaintiff, seeking orders that the firm of O&M Law LLP Advocates be disallowed from representing the Interested Party in this matter. The application is grounded on the allegation that the firm of O& M Law LLP Advocates allegedly prepared a sale agreement dating back to 1968 as well as the Lease Agreement dated 8th March 2019 pertaining to the Suit Property, which forms part of the current dispute; any serious inquiry into how the Interested Party acquired the ownership interest in the Suit Property and conveyed that interest to a third party, Cyrus Ngure Kagwi T/A Cyruseli Investments will inevitably necessitate the calling of O&M Law LLP Advocates, or members thereof, as witnesses; and Under Rule 9 of the Advocates (Practice) Rules, an advocate who may be required as a witness in a matter is barred from appearing or continuing to appear for the client in that same matter.
2. The application is supported by the affidavit of Suleiman Ibrahim Surrow, the director of the Plaintiff's Company, who states that the sale agreement which is the subject to this suit was prepared by the firm of O&M Law LLP Advocates and that they are a potential witness to be called and cross-examined during the trial. He further avers that O & M Law LLP Advocates prepared and lodged instruments of lease over the Suit Property in favour of a third party, Cyrus Ngure Kagwi T/A Cyruseli Investments



and at the same time represents the Interested Party, creating an irreconcilable conflict of interest. Furthermore, he contends that O&M Law LLP Advocates will be necessary witnesses at trial on issues touching on potential fraud or irregularities surrounding the property's title and, therefore, cannot validly continue to appear on record for the Interested Party.

3. The Interested Party opposes the Application through a Replying Affidavit sworn on 10th October 2024 by Jaswant Rai, the director of the Interested Party. The Interested Party contends that O&M Law LLP Advocates had no role in the original purchase or acquisition of the Suit Property, which is rooted in a 1968 conveyance undertaken by a separate law firm of Hamilton, Harrison & Mathews Advocates. The Interested Party maintains that the only professional work done by O&M Law LLP Advocates was the drafting of a lease agreement in 2019, which is distinct from the 1968 ownership transaction now under challenge and the present ownership dispute does not render O&M Law LLP Advocates material witnesses on contentious facts. It is further contended that any issues regarding fraudulent or irregular acquisition of title can only be fully addressed in the Environment and Land Court in a parallel suit (ELC Case No. E421 of 2022), and that O&M Law LLP Advocates are neither necessary nor material witnesses on that ownership question. Lastly, the Interested Party urges that disqualifying its chosen counsel would be unjust and would violate its fundamental right to counsel of its choice.
4. The Defendant/ 1st Respondent opted not to take part in this application and thereby did not file any response or documents.
5. The Plaintiff's Application is anchored primarily on Rule 9 of the Advocates (Practice) Rules, which provides:

“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.”

6. The rule carves out an exception that an advocate may give evidence on formal or non-contentious matters of fact. Hence, it is not every instance of an advocate's involvement in a transaction that triggers disqualification as it must be shown that the advocate's testimony will be material and adverse on disputed facts.
7. In *King Woolen Mills Ltd [formerly known as Manchester Outfitters Suiting Division Ltd] v Kaplan and Stratton Advocates* [1993] eKLR, the Court of Appeal underlined two key grounds for disqualification of counsel:

SUBPARA (i)

conflict of interest or breach of confidentiality from a prior or concurrent representation, or

- (ii) circumstances where the advocate is inextricably a necessary witness on contested matters. The Court stated that disqualification is a severe remedy that must be exercised sparingly and only where real mischief or real prejudice would inure if counsel continued to act.



8. In *Tom Kusienya & Others v Kenya Railways Corporation & others* [2013] eKLR, Mumbi Ngugi J. stated that: -

“ ...
19. The legal basis of the petitioner’s application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:

‘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.’

20. From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in *Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others* (supra) observed 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 relationship or where the advocate would double up as a witness.

21. The court noted, however, that:

‘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.’

22. The court referred to these authorities as comprising *King Woolen Mills Ltd* (formerly known as *Manchester Outfitters Suiting Division Ltd*) and *Galot Industries Ltd –vs- Kaplan and Stratton Advocates* (supra). In this case, in restraining Mr. Keith and any partner of the firm of *Kaplan and Stratton Advocates* from acting for the defendant in the matter or in any litigation arising from the loan transactions in question, the court applied the test established in England in the case of *Supasave Retail Ltd vs. Coward Chance* (a



firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER where the court had observed that

"The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in *Rakusen vs. Ellis Munday and Clarke* (1912) 1 Ch. 831 (1911-1913) ALL ER Rep 813... The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was 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 *Rakusen's* case itself. *Cozens-Hardy MR* 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.....As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated." (Emphasis added)

23. The decision of O’Kubasu, JA in *William Audi Odode & Another-vs- John Yier & Another* Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) is also instructive with regard to Rule 9 of the *Advocates Act*. In declining to bar an advocate from acting for some of the parties in the matter, O’Kubasu J stated at page 3 of his ruling states as follows;

‘I must state on (sic) 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.’ (Emphasis added)

24. The Learned Judge of Appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the *Delphis Bank* and *King Woolen Mill* cases, O’Kubasu J observed at page 7 of his decision as follows:

‘*The Constitution* of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.’ (Emphasis added)



25. I wholly agree with the sentiments expressed by the Honourable Judge in the above matter. Like the provisions of Section 77 of the former constitution, the words used in Article 50(2)(g) of *the Constitution* make it clear that the provision relates to criminal matters:

‘(2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;’

26. However, I believe that the right to legal representation by counsel of one’s choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2) (a) of *the Constitution*, and it is only in exceptional circumstances that this right should be taken away.”

9. From the record, the Plaintiff’s argument is that O&M Law LLP Advocates prepared a 2019 Lease Agreement for the Interested Party and allegedly facilitated the lodging or registration of conveyance instruments concerning the Suit Property. The Plaintiff contends that any serious inquiry into how the Interested Party acquired or transferred its alleged ownership interest might require summoning the Interested Party’s Advocates to testify.

10. In contrast, the Interested Party emphasizes that the root of title in contention is a 1968 conveyance undertaken by another law firm altogether, and that its current Advocates have had no involvement in that earlier transaction. While O&M Law LLP Advocates indeed drew a lease agreement in 2019, the question arises whether that lease and the circumstances of its preparation are so central and so contested as to transform them or its personnel into necessary, material witnesses on disputed facts.

11. Under Rule 9 of the Advocates (Practice) Rules, an advocate should withdraw if the advocate will be required as a witness on a substantive or hotly contested factual matter.

12. In the case of *Dorothy Seyanoi Moschioni v. Andrew Stuart & another* (2014) eKLR, Gikonyo J., stated: -

“(12) I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. 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 says “ 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. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in *the Constitution* as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

(23) In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1st Respondent by the said firm of advocates. And I so hold fully aware of the Applicant's desire to call them as witnesses- and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious.”

13. Being guided by the above principles, in this case, the root transactions date back to 1968, apparently handled by a different law firm of Hamilton, Harrison & Mathews Advocates. Nothing on record shows O&M Law LLP Advocates participated in that foundational conveyance. It is also undisputed that O&M Law LLP Advocates came into the picture to draft the 2019 lease agreement and represent the Interested Party in litigation acts carried out some five decades after the original sale of the Suit Property.
14. On the face of it, therefore, the direct knowledge O&M Law LLP Advocates might have, is limited to
 - i. Verifying the Interested Party's instructions at the time of the 2019 lease, and;
 - ii. Lodging that lease for registration.
15. Whether the 2019 lease agreement itself is the product of fraud, or whether it is a non-contentious, formal instrument simply effecting the letting of property is a factual question. However, there is nothing to suggest that a complicated web of testimonies from O&M Law LLP Advocates themselves is necessary to establish the lease's authenticity or the Interested Party's instructions in the lease transaction.



16. Even if the Interested Party's Advocates needed to confirm that they prepared and filed the lease, that might qualify as formal or non-contentious testimony. The mere drafting of a lease does not, by itself, demonstrate that Interested Party's Advocates hold privileged or unique knowledge about alleged fraud from 1968 or from subsequent dealings that drastically changed the property's ownership.
17. Further, it emerges that the question of ownership, along with any potential fraud or irregularities in title, is under scrutiny in ELC Case No. E421 of 2022 before the Environment and Land Court, which has exclusive or specialized jurisdiction over land title disputes. The present suit, being in the Commercial Division, primarily concerns the proposed sale of the property by the Defendant to recover a loan facility. The question for this Court is whether the property is validly chargeable and enforceable by statutory power of sale, an inquiry that might indeed hinge on clarifying which party legitimately owns or holds title. Nonetheless, the older conveyancing steps or alleged fraudulent steps that the Plaintiff claims will require O&M Law LLP Advocates' testimony appear remote from O&M Law LLP Advocates' discrete role in the lease agreement it prepared in 2019.
18. The Plaintiff has not demonstrated that the Interested Party's Advocates are privy to particular contested facts beyond the face of the lease instrument itself. A typical lease preparation might involve verifying certain title documents or instructions from the client but that alone does not necessarily place the advocates in a position to provide first-hand evidence about the alleged misrepresentation or fraud in the root of title from 1968.
19. Following the reasoning in the aforementioned authorities, disqualification cannot be rooted solely in the possibility that an advocate might have relevant testimony if the real focus of controversy lies elsewhere, namely, the authenticity or validity of a conveyance done more than fifty years before. Moreover, the lease is arguably a subsequent or ancillary act; proving or disproving the Interested Party's root of ownership does not necessarily hinge on O&M Law LLP Advocates' evidence but on historical conveyance documents prepared by a different firm.
20. In effect, this Court is not persuaded that the Interested Party's Advocates are so entangled in contested factual controversies, nor that their testimony is so unavoidable, that they must be disqualified. The authorities confirm that disqualification is a drastic measure, not to be done lightly, especially where the firm's role may well be explained through documents or by simpler means.
21. The Plaintiff further argues that the Interested Party's Advocates are conflicted because they acted in the lease transaction and now represent the Interested Party. A conflict of interest typically arises where an advocate's duty to one current or former client is incompatible with the duty owed to another client in the same or related matter, or where personal interests of the advocate directly conflict with those of the client.
22. In the present case, the evidence on record shows that O&M Law LLP Advocates' earlier role in preparing the lease was on instructions from the same party whom they continue to represent. There is no evidence of dual representation of adverse parties, nor is there an evident breach of confidentiality that would prejudice the Plaintiff.
23. The question of whether the Interested Party's Advocates might need to divulge privileged communications with the Interested Party to prove fraud or crime is speculative. For such an exception under Section 134(1)(a) & (b) of the *Evidence Act* to apply, a clear basis must be laid that the advocate in question holds direct knowledge of a fraud, crime, or illegality which they alone can clarify. The Court has not been pointed to specific evidence establishing that O&M Law LLP Advocates themselves orchestrated or witnessed a fraud.



24. The Plaintiff also prays that all pleadings filed by the Interested Party's Advocates be struck out. Striking out is a draconian remedy that affects a party's fundamental right to be heard. Given the high premium placed on the right to counsel of one's choice, a court would be cautious in granting such an order unless the continuing appearance of counsel is patently impermissible.
25. Having found no sufficient basis that O&M Law LLP Advocates must inevitably be called as material witnesses on substantially disputed facts, and lacking a demonstrated conflict of interest which rises to the level warranting disqualification, this Court is not persuaded that pleadings filed by O&M Law LLP Advocates for the Interested Party amount to an abuse of the court process or a violation of the Advocates (Practice) Rules.
26. Applying the principles enunciated in Rule 9 of the Advocates (Practice) Rules, as well as the cited authorities, this Court finds that the Plaintiff has not met the threshold for disqualification of O&M Law LLP Advocates as the Interested Party's Advocates.
27. While the Court appreciates the Plaintiff's apprehensions regarding the integrity of the process, the law compels a high standard before a litigant's choice of counsel is disturbed. The Applicant must show that the advocate is either a necessary witness on disputed facts or that a genuine conflict of interest and consequent prejudice arises from the representation. On the evidence before the Court, these conditions have not been met.
28. In the upshot, having considered the Application, affidavits on record, submissions by Counsel, and the applicable law and authorities including those not cited by the parties but relevant to the issues at hand, I make the following Orders:
 - a. The Plaintiff's Notice of Motion dated 2nd October 2024 is hereby dismissed.
 - b. The firm of O&M Law LLP Advocates shall remain on record for the Interested Party, there being no sufficient demonstration that they are necessary and material witnesses under Rule 9 of the Advocates (Practice) Rules in a manner that mandates disqualification.
 - c. The prayer for striking out pleadings filed by O&M Law LLP Advocates on behalf of the Interested Party is declined.
 - d. Costs of this Application shall abide the outcome of the main suit.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH, 2025

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BAHATI MWAMUYE

JUDGE

In the Presence of:

Counsel for the Plaintiff/Applicant– Ms. Omwoma h/b Mr. Osundwa

Counsel for the Defendant– Ms. Macharia h/b Mr. Nyamodi

Counsel for the Interested Party- Ms. Waweru

Court Assistant – Ms. Neema

