



Republic v Nairobi County Government (Judicial Review Application 366 of 2014) [2025] KEHC 6519 (KLR) (Judicial Review) (19 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION 366 OF 2014**

**RE ABURILI, J
MAY 19, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

NAIROBI COUNTY GOVERNMENT RESPONDENT

RULING

1. This matter has a judgment by Odunga J rendered on 11th day June, 2015 issuing an order of mandamus compelling the Respondent to implement the Decree/Order emanating from the Judgment given by the High Court in Milimani HCCC 890 of 2002 on 20th February, 2009.
2. Now for determination is an application dated 7th May, 2024 filed by Kerosi & Company Advocates supporting affidavits of Dr. Bernard Nyamwega and David Munga sworn on seeking to be recognized as the duly appointed advocate for the ex parte Applicant in place of the current advocate on record and to act alongside the firm of Catherine Muriuki & Company Advocates. The applicant/ advocate also applies that Coulson Harney LLP be expunged from representing the exparte applicant.
3. The application is opposed by Coulson Harney LLP, which claims to have been retained by the exparte applicant after the exparte applicant took over these proceedings initially instituted by the firm of the now deceased advocate Bonface Njiru, on behalf of the ex parte Applicant.
4. Mr. Kerosi, instructed by Njomuki Agencies claims that the matter herein was instituted by Njomuki Agencies on behalf of the Exparte applicant and that therefore the said agency is the one with the authority or mandate to determine which advocate should represent its interests in the matter and not Coulson Harney, because the Company, Sanlam Kenya PLC in its takeover of the exparte applicant, did not take over this suit.



5. On the part of Sanlam Kenya PLC, it was contended that it took over Gateway Insurance Company Ltd and that therefore it has the mandate to determine who should represent them in this case. Further, that the issue of legal representation of the exparte applicant is moot as it was determined by Nyamweya J in their favour, with Njomuki Agencies appealing the ruling to the Court of Appeal, which appeal is yet to be determined hence this application is res judicata and moot. That the said Njomuki also filed another case in the High Court against Sanlam Kenya PLC and sought for stay orders but its application was dismissed and he has abandoned that case only to return to this court hence the application herein is an abuse of court process
6. This court had to read the entire file which is old, bulky and scattered with documents which were filed prior to the e-filing system launch in order to establish the position as it is, before understanding the parties' respective positions and I will restate here what I established as undisputed facts.
7. The entity originally known as Gateway Insurance Company Limited, the ex parte Applicant herein filed these proceedings, having instructed its Agent, Njomuki Insurance Agency, represented by Mr. Munga, to lead the process of recovery of monies due to it by the respondent Nairobi City County Government.
8. The exparte applicant was subsequently acquired by a different entity, Sanlam Kenya PLC, the takeover company, and therefore, the the successor in title of the Exparte applicant, which company asserted its right to appoint an advocate of its own choice to represent its interests in these proceedings. The said successor in title company did instruct Coulson Harney LLP law firm to represent it by taking over the conduct of this matter from Boniface Njiru advocate who has since demised, upon which an application for leave to come on record was filed vide notice of motion dated 7th February 2018.
9. Vide a ruling dated 2nd July 2018, rendered by Nyamweya J, after a protracted battle between Bonface Njiru advocate and the Coulson Harney LLP instructed by Bowmans, Coulson Harney LLP was granted leave of court to take over legal representation of the exparte applicant and it filed Notice of Change of Advocates. That ruling has never been set aside.
10. That position alone in my view, should settle the application which is before this court without wasting precious judicial time debating on who is rightfully on record as an advocate for the exparte applicant.
11. I say so because it cannot be that the Agency is still battling Coulson Harney LLP after the demise of Boniface Njiru advocate yet the latter firm was legally ejected from representing the exparte applicant, in these very judicial proceedings while Mr. Bonface Njiru was still alive.
12. The court record shows that before Coulson Harney LLP took over the conduct of the matter, they duly notified Bonface Njiru advocate as per the correspondence contained in the file and although the latter advocate viciously resisted the move, claiming that he had been instructed by the Agency, Njomuki Agencies which had been designated as a debt collector for the exparte applicant, the court heard the dispute and allowed of Coulson and Harney LLP to take over the conduct of the matter from Bonface Njiru & Co. Advocates.
13. As at the time that the exparte was changing advocates through Sanlam Kenya PLC, Mr. Njiru concede din writing that Kshs 75 million had been recovered from the respondent herein, out of the over 329 million owed.
14. Njomuki Agency asserts that it continues to have an interest in the matter and prefers to maintain its own advocate to represent the exparte applicant.



15. However, with the takeover of the *ex parte* applicant by Sanlam Kenya PLC, the latter terminated the agency of Njomuki Agencies vide letter dated 14th July, 2017, after demanding for accounts on what had been recovered from the *ex parte* applicant in vain, and Coulson Harney LLP has remained retained as confirmed by the letter dated 20th March, 2024, following the ruling by Nyamweya J on 2nd July 2018.
16. Although the Agency seeks to control these proceedings, it is clear that this is its second bite at the cherry. The first bite is when Coulson Harney LLP sought leave to come on record and to take over the legal representation from Bonface Njiru and despite the resistance, the Court allowed the firm of Coulson Harney LLP to come on record. That being the position and state of affairs, which was after judgment, the agency cannot return again after the demise of Bonface Njiru advocate and purport to appoint its own advocate to take over the conduct of these proceedings on behalf of the *ex parte* applicant.
17. On the other hand, the *ex parte* applicant's successor in title denies ever instructing Kerosi & Co. Advocates to come on record and represent the *ex parte* applicant hence the notice of change of advocates dated 8th May 2024 filed by Kerosi & Co. Advocates was without leave of court as judgment had already been entered and therefore it ought to be struck off.
18. It is worth repeating here that the successor in title to the *ex parte* Applicant has the right to appoint an advocate of its own choice in place of the advocate retained by the agency that previously claimed that it held beneficial interest in the Applicant.
19. The right to legal representation of one's own choosing is grounded in Article 50(1) and (2)(g) of *the Constitution* of Kenya, and although primarily applicable in criminal matters, the principle is applicable to civil litigation as part of the broader right to a fair hearing. This right is foundational to party autonomy in litigation.
20. The Court in *David M Mereka t/a Mereka & Co Advocates v County Government of Nairobi* [2021] eKLR emphasized that:

“19. The removal of an advocate from representing a client is not to be taken lightly as the litigant who appointed such advocate enjoys the constitutional right to be represented by an advocate of his choice and the right to a fair hearing. Thus, in *Jopa Vilas LLC v Overseas Private Investment Corp & 2 Others* [2014] eKLR the Court of Appeal in emphasizing the gravity of the matter quoted a passage from the judgment in *Delphis Bank Limited v Channan Singh Chatthe and 6 Others* (*supra*) before stating as follows:

“The Supreme Court of Samoa in *Apia Quality Meats Limited v Westfield Holdings Limited* [2007] 3 LRC 172 held on the subject of removal of an Advocate from proceedings that such an application had to be considered under the relevant legal principles on the courts exercise of inherent jurisdiction to control the conduct of the proceedings and those who appeared before it as counsel. The factors to be considered were such factors as conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct. It was further held that removal of an Advocate from acting for a party in proceedings was an extraordinary and drastic remedy to be contemplated only in the most extraordinary circumstances, requiring misconduct so serious that removal was the only way of safeguarding the future integrity of the proceedings.”



20. As observed by O’Kubasu J. A. (as he then was) in William Audi Odode & Another v John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004:

“...[I]t is not the business of the courts to tell litigants which advocate should or 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 a matter, the parties must be allowed to choose their own counsel.”

21. Thus, a party has the unqualified right to be represented by an advocate of his own choice and the Court should not lightly interfere with that right unless there is compelling justification.

22. Furthermore, it is undisputed that the ex parte Applicant was taken over by Sanlam Kenya PLC and is now under the control and new ownership. That change in control of the exparte applicant entity in law, the successor in title acquires all rights and liabilities of the entity, and accordingly assumes control over its legal affairs, including the right to appoint legal representation except where the contract for takeover states otherwise.

23. Courts have declined to disqualify Counsel from representing their clients. Some of these cases are examined below.

24. In Nairobi HCCC No. 570 Of 2011 (Milimani), British – American Investments Co. (K) Ltd -v- Njomaitha Investments Ltd & Another, the referred to several decisions namely: HCCC No 452 of 2007 Sunrise Properties Limited vs National Industrial Credit Bank & 2 Others (unreported), where the court dismissed an application asking a firm of advocates to disqualify itself on the ground that the applicant therein did not show there was any advocate/client relationship between it and that firm of advocates or establish circumstances justifying reasonable apprehension of likelihood of bias.

25. The Court further stated in the above British – American case that:

“.... Every party has a right to be represented by counsel of his choice. In other words, he is entitled to his own choice of legal representation as was with the Plaintiff herein. The court would therefore be very hesitant to come to the conclusion that M/S ... Advocates ought to be disqualified from acting in this matter on behalf of the Plaintiff herein.”

26. The upshot was that the application for disqualification of an advocate was dismissed with costs.

27. In Eldoret E&L Case No. 21 Of 2017, Serve in Love Africa (Sila) Trust -Vs.- David Kipsang Kipyego & 2 Others and Ambrose Kiprop & 4 Others, A. Ombwayo J sitting in Eldoret referred to several decisions in his judgment thus:

“In the decision of the Court of Appeal in Rakusen vs. Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 -1913) ALL ER Rep 813...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.”



28. The learned Judge cited other decisions as well, where O’Kubasu, JA in William Audi Odode & Another-vs- John Yier & Another, Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) (supra).

29. Ombwayo J further stated in his judgment that:

‘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’

30. Gikonyo J in the case of Dorothy Seyanoi Moschioni v. Andrew Stuart & another [2014] e KLR, 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 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. 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.”

31. The learned Judge declined to grant orders for disqualification of the advocate.
32. In my humble view, once a party has demonstrated a legal interest in the suit, such party has a right to instruct counsel to protect its interest and be heard accordingly. In this case, the Agency instructing Mr. Kerosi and Catherine Muriuki Advocates has not demonstrated that there exist a binding agreement, assignment, or statutory obligation that restricts the *ex parte* applicant’s successor’s discretion. Accordingly, the agency that formerly controlled the *ex parte* Applicant has no residual authority to determine who represents the *ex parte* Applicant in the ongoing proceedings.
33. Order 9 Rule 5 of the Civil Procedure Rules provides that:

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.
34. Where a dispute arises regarding representation, or where judgment has been entered, Order 9 Rule 9 requires that leave of court be obtained, or that parties consent in writing. The Rule provides:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
35. In the present case, the successor in title to the *ex parte* Applicant Sanlam Kenya PLC did instruct the new advocate Coulson Harney LLP and did effect a change in representation.
36. Previous attempts by the Agency to retain their own advocate on record after the termination of the agency failed and there is a pending appeal being *CA 319 of 2018* challenging the ruling of 2nd July 2018 by Nyamweya J and which appeal has not been determined hence the ruling by Nyamweya J still stands valid and authorizing Coulson Harney LLP to represent the *ex parte* applicant.
37. Further, there is evidence on record, which is not controverted that the Agency filed suit against Sanlam Kenya PLC vide Nairobi HCC 156 of 2020 seeking to bar the firm of Coulson Harney LLP from representing the *ex parte* applicant in these proceedings and vide a ruling delivered on 15th January, 2021, Majanja J (RIP) dismissed the application filed vide chamber summons dated 21st August 2021. That ruling has not been challenged by the Agency represented by Mr. David Munga and his group.
38. The record further shows that the said Njomuki Agency did instruct the firm of DRO Ngala & Partners to come on record in the place of the present advocates vide another application dated 4th January 2024 which application was dismissed for want of prosecution on 24th April 2024.



39. In my view, the frantic attempts by the Njomuki Agency and Mr. Kerosi alongside Ms Catherine Muriuki advocates to take over the conduct of the matter on behalf of the exparte applicant from Coulson Harney LLP are not based on any law and only goes toward convoluting the dispute between the Agency and the exparte applicant's successor in title.
40. In my view, the current controller of the exparte applicant is the Sanlam Kenya PLC and not the Njomuki Agency and therefore only Sanlam Kenya PLC has the power to appoint an advocate of their choice to represent the exparte applicant.
41. If the Agency, which had initial delegated authority to file suit on behalf of the exparte applicant has any pecuniary claim in terms of commissions against the exparte applicant now that the Agency relationship was terminated by the successor of the exparte applicant, the Agency can seek compensation from the exparte applicant's successor in title but not to demand to control judicial proceedings and on who should represent the exparte applicant, particularly when the said Agency is not a party to these proceedings.
42. Furthermore, from the record, the Agency was withdrawn by the Successor in title of the exparte applicant and therefore the Agency can only sort out that dispute with Sanlam Kenya LLP elsewhere and not to hold the exparte applicant's successor in title at ransom regarding legal representation in this case.
43. Although the Agency claims to have legal Interest in this matter, the agency having been withdrawn, and it not being a party to these proceedings, it cannot dictate legal representation by Coulson Harney LLP.
44. In my humble view, an advocate owes allegiance to the client, not to third parties who may have an indirect commercial or emotional interest in the matter.
45. Furthermore, the applicant did not even disclose that the issue of whether the exparte applicant could engage another advocate to represent it and take over from the firm of Bonface Njiru when he was still alive had been determined fully in the ruling of July 2nd 2018 and unless reversed on appeal, the present application is a total abuse of court process and is res judicata.
46. In view of the foregoing, this Court finds and holds as follows:
 1. The successor in title to the ex parte Applicant, Sanlam Kenya PLC has the legal right to appoint counsel of its own choice as ordered by Nyamweya J in the ruling of 2nd July 2018.
 2. The Njomuki Agency which initially instructed the firm of Bonface Njiru & Co. Advocates has no control over who should represent the exparte applicant in the current proceedings
 3. The issue of whether the exparte applicant's successor in title could engage an advocate to represent the exparte applicant and take over legal representation from the then firm of Bonface Njiru & Co. Advocates was determined vide the ruling delivered on 2nd July 2018 and unless the pending appeal in the Court of Appeal vide *CA 319 of 2018* is determined reversing that decision, the present application is an abuse of court process and is res judicata as it seeks to relitigate a matter which was litigated upon and fully determined on merit..
 4. The application for recognition of Kerosi & Co. Advocate and Catherine Muriuki & Co. Advocates as the new advocates for the exparte applicant is found to be devoid of merit and is hereby dismissed.



5. The prayer that Coulson Harney LLP be expunged from representing the exparte applicant is hereby declined and dismissed.
6. The Notice of change of Advocates filed by Kerosi & Co. Advocates, purporting to take over the conduct of these proceedings from Coulson Harney is hereby struck out and expunged from the court record.
7. As the party purporting to appoint Kerosi & Company Advocates and Catherine Muriuki & Co. Advocates is not a party to these proceedings, I order that each party bear their own costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE

