



**St. Patrick's Hill School Ltd v Bank of Africa Kenya Ltd (Civil Case
7 of 2017) [2024] KEHC 4701 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE 7 OF 2017
SN MUTUKU, J
APRIL 22, 2024**

BETWEEN

ST. PATRICK'S HILL SCHOOL LTD PLAINTIFF

AND

BANK OF AFRICA KENYA LTD DEFENDANT

RULING

1. The proceedings in this matter are on-going. The Plaintiff has closed its case. The defendant has called one witness who is yet to be cross-examined. There are two issues that have necessitated this ruling, namely:
 - a. The Plaintiff's application, Notice of Motion dated 27th March 2024, seeking leave to the Plaintiff to file a Preliminary Objection on a substantive point of law to the effect that Ben Mwaura lacks capacity and competency to testify as a defence witness.
 - b. Conflict of interest on the part of Mr. Kang'ethe to represent the Plaintiff in these proceedings.
2. The application seeking leave is based on the main ground that this court (Nyakundi, J) directed that no interlocutory application shall be entertained without leave of the court.
3. The issues being raised at this stage of the trial are not new matters in these proceedings. As early as 23rd March 2023, the Plaintiff filed a Notice of Motion seeking orders to expunge and strike out from the court record the witness statement of defence witness known as Charles Waiyaki for failure to abide by the law. This court was asked, in the same application, to uphold the existence of the witness statement of Ben Mwaura. That application was supported by the affidavit sworn by Mr. Kang'ethe learned counsel appearing for the Plaintiff and whose presence as one of the counsels representing the Plaintiff is questioned.



4. The Plaintiff and indeed his counsel, both Mr. Rigoro and Mr. Kang'ethe had no issues with Mr. Ben Mwaura testifying for the defence. It was deposed in the affidavit in support of that application, inter alia, that the defendant acted in gross misconduct by sneaking into court record the witness statement of Charles Waiyaki without leave of the court which was prejudicial to the plaintiff and that the defendant had not demonstrated in any manner or form why the original witness Ben Mwaura was unable to give evidence on the witness statement on record upon which the plaintiff had prepared for so long to interrogate directly and personally.
5. This court, through a ruling delivered on 7th November 2022, pronounced itself on that application. The witness statement of Charles Waiyaki was expunged from the record and court directed that the defendant was at liberty to bring Ben Mwaura as its witness.
6. On 18th October 2023, Mr. Wawire, learned counsel for the defendant raised the issue that the presence of Mr. Kang'ethe appearing for the Plaintiff alongside Mr. Rigoro was offending the law and was prejudicial to the defendant because of conflict of interest as Mr. Kang'ethe has testified in these proceedings as a witness for the Plaintiff. Mr. Wawire stated that Mr. Rigoro should continue representing the plaintiff but not Mr. Kang'ethe. This issue was not addressed by the court in its ruling. It remained an active issue.
7. Defence case did not proceed on 8th April 2024 as scheduled because of the two issues under consideration in this ruling. Mr. Wawire revived submissions on the issue of Mr. Kang'ethe representing the plaintiff. He submitted that the fact that it was erroneous for Mr. Kang'ethe to continue representing the plaintiff and since this error has been discovered it should not be allowed to continue.
8. On the other hand, Mr. Rigoro reiterated that both he and Mr. Kang'ethe have been representing the plaintiff and there is no conflict of interest in having Mr. Kang'ethe representing the plaintiff.
9. I have considered the submissions on the issues before me. It concerns this court a great deal that the plaintiff does not seem keen to proceed with this matter to a conclusion. I have pronounced myself on the need for this court to obey the command of the law and expeditiously hear and conclude this matter and the parties to act similarly and facilitate this court to do its duty. I seem to be talking to a brick wall. None of the cautions I have issued on the delay in finalizing this matter seems to have sunk home.
10. I will not belabour the point. The issue of Ben Mwaura as a defence witness has been determined. My two rulings, dated 7th November 2022 and 14th November 2023 are clear on that. For that reason, I will not allow further applications challenging the issue of Mr. Ben Mwaura appearing as a defence witness for the reasons that it is my view that this issue has been adequately addressed. I also hold the view that any issues on the competency or otherwise of Mr. Ben Mwaura to testify as a defence witness can be handled adequately through cross-examination and submissions.
11. On the issue of Mr. Kang'ethe appearing as counsel for the plaintiff, I have read the proceedings in this matter and considered the submissions by both parties on the matter. The record shows Mr. Kang'ethe took to the stand as the first witness for the plaintiff on 16th May 2018. He introduced himself as the director and chairman of the Board of Directors of the Plaintiff.
12. I have read Rule 8 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.

13. The rule contemplates a situation where an advocate does not represent a client in a matter in which he is likely to testify. In this matter, it is on record that Mr. Kang'ethe took the stand as the plaintiff witness. The issue then is whether this is a contentious matter. In *Limo & another v Limo; Jerop (Interested Party)* (Succession Cause E040 of 2021) [2023] KEHC 2529 (KLR) (27 March, the Court (Nyakundi, J)) had this to say on that Rule 8:

“The advocate witness rule is rooted in evidence law but it is now a matter of legal ethics. The general legal framework, founded on that model rule, is that an advocate shall not act for a client in the cause of action he or she is likely to be a necessary witness. The only exceptions contemplated by the law, first is where an advocate’s testimony relates to an uncontested issue, second where the advocates testimony relates with the nature and value legal services rendered in the case, and thirdly where the advocates disqualification will work substantial hardship on his or her client. In the scenario of substantial hardship exception an applicant ought to demonstrate prejudice or injustice likely to be occasioned beyond the normal inconvenience and expense associated with changing counsel.

14. It is clear to this court that counsel for the defendant is seeking to have Mr. Kang'ethe disallowed from representing the plaintiff because of perceived conflict of interest. It is trite that he who asserts must prove as was stated in *British-American Investments Company (K) Limited v Njomaittha Investments Limited & another* [2014] eKLR:

“It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.”

15. In *Murgor & Murgor Advocates v Kenya Pipeline Co. Ltd* [2021] eKLR, the court, after discussing the issue of conflict of interest by comparing several authorities summarized the general principles guiding the disqualification of Advocates from appearing for a client in a matter as follows:

- (i) The basis upon which a Court disqualifies an Advocate from acting arises from the need to protect the interests of administration of justice. Whereas it is understood that choice of Counsel is an entitlement of a party, such Counsel must always bear in mind that he/she becomes an officer of the Court and as such owes an allegiance to a higher cause (justice and truth) than serving the interests of the client.
- (ii) Disqualification of an Advocate is only desirable in contentious matters and where there is or was an Advocate-Client relationship.
- (iii) It must be apparent that the Advocate sought to be disqualified will be required as a witness to give evidence in the matter.



- (iv) It is desirable that when the principle of confidentiality in an Advocate/Client fiduciary relationship will be prejudiced or where there is a possibility of real conflict of interest, then an Advocate sought to be disqualified ceases to appear in the matter.
 - (v) The fact that an Advocate acted for a litigant does not, per se, lead to a situation of conflict of interest.
 - (vi) Conflict of interest is an issue of fact which must be proved by way of evidence.
 - (vii) It is not a requirement that in a situation where a firm of Advocates acted for the opposite party all the Advocates in the firm be disqualified from the matter. In such an instance, only the Advocates who are in possession of confidential information relevant to the matters in issue before Court or Tribunal may be called upon to cease from appearing in the matter.
16. I have taken time to understand the issue being raised having conducted this matter and having read the record of the court which shows that Mr. Kang'ethe testified as a witness for the plaintiff. I am alive to the rights of any party to legal counsel of their choice. I am also alive that this is a highly contentious matter with high stakes. From the record Mr. Kang'ethe is not only one of the legal counsel representing the plaintiff, he is also the director of the Plaintiff and Chairman of the Board of Directors as shown in his evidence. He is also on record as having executed the instruments in respect of this case.
17. The best thing Mr. Kang'ethe ought to have done is to step down from representing the plaintiff. His continued appearance as one of the advocates for the plaintiff results in conflict of interest and also prejudicial to the defendant. He is an officer of this Court who owes allegiance to higher cause of justice. It is my finding therefore that his continued presence in court as counsel for the plaintiff is not tenable. This finding does not prejudice the Plaintiff in any way for the reasons that there is on record Mr. Rigoro, instructed by Murugu, Rigoro & Co. Advocates who has ably represented the Plaintiff. The Plaintiff is also free to have any other advocate from the firm of Kang'ethe & Co. Advocates team up with Mr. Rigoro and prosecute the case for the plaintiff.
18. I am satisfied that a conflict of interest exists in this matter as regards the continued representation of the Plaintiff by Mr. Kang'ethe. Consequently, Mr. Kang'ethe is hereby disqualified from representing the Plaintiff in this matter. It is so ordered.
19. I wish to caution parties, as I have done numerous times before, that they must obey the command of the constitution under Article 159 (2) (b) that justice shall not be delayed and the overriding objective under section 1A of the Civil Procedure Act to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act and to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF APRIL 2024

S. N. MUTUKU

JUDGE

