



REPUBLIC OF KENYA



**KENYA LAW**

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**Singh v Mutua & 2 others (Commercial Case E440 of 2023)  
[2024] KEHC 4868 (KLR) (Commercial and Tax) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4868 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E440 OF 2023**

**MN MWANGI, J**

**APRIL 12, 2024**

**BETWEEN**

**UBHI RIPTHUMAN SINGH ..... PLAINTIFF**

**AND**

**HON DR ALFRED MUTUA ..... 1<sup>ST</sup> DEFENDANT**

**EMILY CHEBET LOROUPE ..... 2<sup>ND</sup> DEFENDANT**

**BRAZILIAN RODIZIO LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff filed a Notice of Motion application dated 19<sup>th</sup> December, 2023 under the provisions of Order 51 Rule 1 & Order 9 Rule 12 of the *Civil Procedure Rules*, 2010, Rule 9 of the *Advocates (Practice) Rules* of the *Advocates Act*, Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and all other enabling provisions of the law. The plaintiff seeks the following orders –
  - i. Spent;
  - ii. Spent;
  - iii. That the firm of B. M. Musau & Company Advocates and Dr. B. M. Musau Advocate be and are hereby restrained and therefore barred from representing and/or appearing for the 1<sup>st</sup> defendant in this suit;
  - iv. That all the pleadings, affidavits and all other documents filed in this suit by the firm of B. M. Musau & Company Advocates be and are hereby struck out;



- v. That this Honourable Court be pleased to issue any such other orders as it deems fit in the circumstances; and
  - vi. That costs of this application be provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Ubhi Riphuman Singh, the plaintiff herein. In opposition thereto, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 24<sup>th</sup> January, 2024 by Dr. Alfred Nganga Mutua, the 1<sup>st</sup> defendant herein.
  3. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Nyachoti & Company Advocates on 28<sup>th</sup> February, 2024, whereas the 1<sup>st</sup> defendant's submissions were filed on 27<sup>th</sup> February, 2024 by the law firm of B. M. Musau & Company Advocates LLP.
  4. Mr. Nyachoti, learned Counsel for the plaintiff submitted that B. M. Musau Advocate was not only been directly involved in the drawing and signing of the Share Purchase Agreement dated 6<sup>th</sup> October, 2022 which forms the subject matter of this suit, but was also involved in the transactions as pertains the restructuring of the 3<sup>rd</sup> defendant's shareholding and directorship. It was contended that for the said reason, he is a potential witness who will be required by either party to verify the transactions in regard to the Share Purchase Agreement and the dealings in the 3<sup>rd</sup> defendant's directorship and shareholding, hence the firm of B. M. Musau should not be allowed to represent the 1<sup>st</sup> defendant in these proceedings.
  5. The plaintiff's Counsel urged this Court to take note of the fact that Kinyua Alex Mwenda Advocate, who acted with Dr. B. M. Musau in the same transaction is now a witness in these proceedings on behalf of the plaintiff. Counsel referred to the provisions of Rule 9 of the *Advocates (Practice) Rules* and the case of *Serve in Home African (SILA) Trust v David Kipsang Kipyego & 7 others* [2017] eKLR and stated that since the documents prepared by Dr. B. M. Musau Advocate are at the core of the dispute herein, his representation of the 1<sup>st</sup> defendant is contrary to the provisions of Rule 9 of the *Advocates (Practice) Rules*. Counsel relied on the Court of Appeal case of *William Audi Odode & another v John Yier & another* Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) and contended that an Advocate cannot be both an Attorney and a witness in the same matter, as he cannot relinquish his privileged position at the bar and shift to the witness box in the same matter.
  6. Mr. Nyachoti relied on the case of *Jacob Muriungi Mwendwa v Mbaya M'mwendwa* [2004] eKLR and submitted that based on the facts they have relied on, the applicable law and authorities relied on by them, it is only fair and just for the law firm of B. M. Musau & Company Advocates to be barred and/or restrained from representing the 1<sup>st</sup> defendant in these proceedings. He prayed for all the pleadings, affidavits and all other documents filed by the said firm in this suit to be struck out.
  7. Ms Kyamia, learned Counsel for the 1<sup>st</sup> defendant submitted that the primary issue in the main suit revolves around whether the plaintiff fulfilled the conditions precedent outlined in the Share Purchase Agreement dated 6<sup>th</sup> October, 2022, rather than the drafting of the said agreement. She submitted that as such, the relevance of Dr. Benjamin Musau (B. M. Musau) of B. M. Musau & Company Advocates LLP having witnessed the signature of the 1<sup>st</sup> defendant becomes minimal in the actual dispute. She further submitted that neither the firm of B.M. Musau & Co. Advocates LLP nor Dr. B. M. Musau drafted the aforementioned Share Purchase Agreement or the Share Transfer Form, as the said documents were drafted by Mr. Kinyua Alex Mwenda Advocate. Ms Musau stated that Dr. B. M.



- Musau's involvement was limited to witnessing the 1<sup>st</sup> defendant's signature, therefore the allegation that he was directly involved in drawing the Share Purchase Agreement lacks substantiation.
8. It was stated by Counsel that in any event, the plaintiff has not demonstrated what prejudice he will suffer in the event that the orders sought herein are not granted. Ms. Kyamia referred to the provisions of Article 50(2)(g) of the *Constitution* of Kenya, 2010 and the case of *N.M.T. alias Aunty v R* [2019] eKLR and submitted that the 1<sup>st</sup> defendant has a constitutionally underpinned right to be represented by an Advocate of his choice. She relied on the case of *Yusuf Abdalla Ibrahim Abdi v Ibrahim Noor Hillowly* [2017] eKLR and contended that removal of an Advocate from representing a client is a grave matter as it impacts a litigant's right to representation, thus it cannot be merely pleaded without evidence in support of it, as is the case herein.
  9. Counsel further relied on the case of *Paul Nduati Mwangi v Stephen Ngotho Mwangi & 9 others* [2015] eKLR, where the Court cited the case of *Dorothy Seyanot Moschioni v Andrew Stuart* [2014] eKLR and asserted that the grounds for disqualification on account of conflict of interest regarding the representation of the 1<sup>st</sup> defendant by Dr. B. M. Advocate or the firm of B. M. Musau & Co., Advocates LLP, should be thoroughly examined. Ms. Kyamia expressed the view that it is clear that there is no conflict of interest. She submitted that such a drastic measure of the removal of an Advocate should only be contemplated in truly exceptional circumstances. She stated that the plaintiff has not included the 1<sup>st</sup> defendant's Advocate as one of the witnesses he intends to call, and there is no issue in the main suit that necessitates summoning of the 1<sup>st</sup> defendant's Advocate as a witness.
  10. In submitting that the burden of proof in respect to the issue of conflict of interest lies with the plaintiff, Ms Kyamia referred to the case of *British American Investments Company Limited (K) Limited v Njomaittha Investments Limited & Another* [2014] eKLR. She contended that the plaintiff had failed to discharge the burden of proof. She relied on the case of *David M Mereka t/a Mereka & Co Advocates v County Government of Nairobi* [2021] eKLR where the Court restated the decision in *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* [2005] eKLR and submitted that the mere speculation about future witness testimony does not warrant the curtailment of the 1<sup>st</sup> defendant's right to choose his legal representative, and that without concrete evidence of actual harm or prejudice, the plaintiff's assertion remains speculative and unsubstantiated.
  11. Ms. Kyamia referred to the provisions of Order 2 Rule 15 of the *Civil Procedure Rules*, 2010 and the case of *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR, where the Court relied on the case of *Co-operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) for the proposition that the plaintiff has not given any justification to warrant striking out of all the pleadings, affidavits and all other documents filed in this suit by the firm of B. M. Musau & Company Advocates. She stated that in any event, the said pleadings do not contravene the provisions of any law, and that the Share Purchase Agreement was witnessed by Dr. B. M. Musau, an Advocate in the firm of B. M. Musau & Co. Advocates LLP and not the entire personnel in the said firm, thus nothing bars any other personnel in the law firm of B. M. Musau & Co. Advocates LLP from representing the 1<sup>st</sup> defendant in the suit.

### **Analysis and Determination.**

12. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit by the 1<sup>st</sup> defendant as well as the written submissions by Counsel for the parties. The issues that arise for determination are-
  - i. Whether the law firm of B. M. Musau & Company Advocates LLP and Dr. B. M. Musau Advocate should be barred from representing the 1<sup>st</sup> defendant in this suit; and



- (ii) If the pleadings filed by B. M. Musau & Company Advocates LLP should be struck out.
13. The plaintiff in his affidavit in support of the application herein deposed that on 6<sup>th</sup> October, 2022 he got into a Share Purchase Agreement with the 1<sup>st</sup> defendant for the purchase of fifteen shares of the one hundred (100) issued shares of the company for a sum of Kshs.60,000,000/=. In the said transaction, the plaintiff and the 1<sup>st</sup> defendant were represented by Mr. Kinyua Alex Mwenda Advocate and Dr. B. M. Musau Advocate of M/s B. M. Musau & Company Advocates LLP, respectively. It was averred that after execution of the said agreement, the said Dr. B. M. Musau Advocate and Mr. Kinyua Alex Mwenda Advocate visited Barclays Bank of Kenya, Queensway Branch to open the escrow account contemplated in Clause 3(a) therein and signed the necessary documents for that purpose.
14. The plaintiff asserted that the Share Purchase Agreement is the core document in this suit, and the parties thereto form part and parcel of this suit. He stated that several documents on record herein which are substantially in issue were prepared by the law firm of B. M. Musau Advocates LLP, and as such, their representation of the 1<sup>st</sup> defendant in this suit is contrary to the rules of practice, professional ethics and conduct, since Dr. B. M. Musau Advocate, of the law firm of B.M. Musau & Company Advocates is a potential witness likely to be summoned to give evidence by either party in these proceedings to shed light on the issues touching on the documents prepared by them.
15. The 1<sup>st</sup> defendant in his replying affidavit deposed that each party to a litigation has the constitutional right to choose his or her own Advocate, thus unless it is shown to a Court of law that the interests of justice would not be served if a particular Advocate was allowed to act in a matter, the parties must be allowed to retain the Advocate of their own choosing. He averred that the factors to be considered in the removal of an Advocate from proceedings include conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct.
16. The 1<sup>st</sup> defendant confirmed that the Share Purchase Agreement was drawn by the then plaintiff's Advocate and thereafter, the said Advocate and his Advocates on record went to Absa Bank Kenya PLC Queensway Branch to open an escrow account as contemplated in the said Agreement. The 1<sup>st</sup> defendant asserted that even if his Advocates on record reviewed any documents in the said transaction, there is no ethical rule preventing them from representing him in these proceedings.
17. The 1<sup>st</sup> defendant referred to Section 134 of the *Evidence Act* and averred that no person who is entitled to refuse to produce a document may be compelled to give oral evidence of its contents, therefore his Advocates on record being so privileged cannot be compelled to give evidence on an Agreement which they did not draw in the first place. He further averred that denying him the right to legal representation on the plaintiff's whimsical allegations that his Advocates on record are potential witnesses is an affront to his constitutional right to legal representation.

**Whether the law firm of B. M. Musau & Company Advocates and Dr. B. M. Musau Advocate should be barred from representing the 1<sup>st</sup> defendant in this suit.**

18. Rule 8 of the *Advocates (Practice) Rules* provides that -

“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”

19. The plaintiff contended that the 1<sup>st</sup> defendant was represented by the law firm of B. M. Musau & Company Advocates LLP in the Share Purchase Agreement dated 6<sup>th</sup> October, 2022 which forms the subject matter of this suit. That thereafter, the said Advocate together with the plaintiff's then Advocate on record, opened an escrow account as contemplated in Clause 3(a) of the Share Purchase Agreement at Barclays Bank of Kenya, Queensway Branch. It was stated that the said law firm and more particularly, Dr. B. M. Musau was involved in the transactions as pertains the restructuring of the 3<sup>rd</sup> defendant's shareholding and directorship, as a result of which, he is a potential witness who will be required by either party to verify the transactions in regard to the Share Purchase Agreement and the dealings in the 3<sup>rd</sup> defendant's directorship and shareholding.
20. The plaintiff contended that in view of the foregoing, there exists a conflict interest, hence the firm of B. M. Musau & Co. Advocates LLP should not be allowed to represent the 1<sup>st</sup> defendant in these proceedings.
21. A party to a suit has a constitutionally underpinned right to be represented by an Advocate of his/her choice. The said right could however be put to serious test if there was a claim for conflict of interest, which could in turn endanger the principle of confidentiality in an Advocate/Client fiduciary relationship or where an Advocate could also double up as witness. The Court in the case of *Charles Gitonga Kariuki v Akuisi Farmers Co. Ltd* [2007] eKLR dealt with the subject of conflict of interest and held that -

“The fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest. The applicant was required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a possibility that a conflict of interest would arise where the advocate is allowed to act for the opposing party against such a litigant”

22. Conflict of interest has been defined in the Law Society of Kenya *Code of Standards of Professional Practice and Ethical Conduct*, 2016 as hereunder -

“A conflicting interest is an interest which gives rise to substantial risk that the Advocate's representation of the client will be materially and adversely affected by the Advocate's own interests or by the Advocate's duties to another current client, former client or a third person.”

23. Rule 6 paragraph 99 of the said *Code* provides for instances where conflict of interest might arise to include -

- “(a) Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;
- (b) Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocate; and



- (c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.”

24. The Court in the case of *Murgor & Murgor Advocates v Kenya Pipeline Co. Ltd* [2021] eKLR in dismissing an application similar to the present one set out the general principles guiding the disqualification of Advocates from appearing for a client in a matter as hereunder -

- “(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; and
- (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.”

25. On perusal of the Share Purchase Agreement dated 6<sup>th</sup> October, 2022, it is evident that it was drafted by the law firm of Mwenda Kinyua & Company Advocates and not the law firm of B. M. Musau & Company Advocates LLP. The 1<sup>st</sup> defendant’s signature on the agreement and form of transfer was however witnessed by Dr. B. M. Musau Advocate as evidenced by his stamp affixed on the face of the said documents. In as much as the plaintiff contends that there exists a conflict of interest in respect to the law firm of B. M. Musau & Company Advocates LLP, and more specifically Dr. B. M. Musau Advocate representing the 1<sup>st</sup> defendant in the suit, since any of the parties herein is likely to call him as a witness to verify the transactions in regard to the Share Purchase Agreement and the dealings in the 3<sup>rd</sup> defendant’s directorship and shareholding, the plaintiff has not disclosed the nature of the evidence that Dr. B. M. Musau Advocate is expected to give for the Court to determine whether or not any conflict exists.

26. Further, in view of the fact that the Share Purchase Agreement was drawn by the law firm of Mwenda Kinyua & Company Advocates, Mr. Kinyua Alex Mwenda Advocate who is listed as one of the



plaintiff's witnesses, and who has prepared a witness statement in that regard, is better placed to testify as to the contents of the said Share Purchase Agreement and/or verify the transactions thereof and the dealings in the 3<sup>rd</sup> defendant's directorship and shareholding. As was correctly submitted by Counsel for the 1<sup>st</sup> defendant, the plaintiff bears the burden of proving that there exists a conflict of interest in respect to the 1<sup>st</sup> defendant being represented by the law firm of B. M. Musau & Company Advocates LLP and more specifically, Dr. B. M. Musau Advocate.

27. The Court of Appeal in the case of *Delphis Bank Limited v Channan Singh Chatthe & 6* (supra) eKLR cited with authority the case *Rakusen v Ellis, Munday & Clarke* [1912] CH 831 and laid down the test for disqualification of an Advocate as hereunder -

“...there is 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 the Court of Appeal is whether real mischief or real prejudice will in all human probability result...”

28. On perusal of the plaint, it is evident that there is no dispute as to whether or not the 1<sup>st</sup> defendant executed the Share Purchase Agreement and Form of transfer. Further, the plaintiff has not alleged that he is a former client of the law firm of B. M. Musau & Company Advocates LLP. The 1<sup>st</sup> defendant has not demonstrated what prejudice he will suffer in the event that the said law firm continues representing the 1<sup>st</sup> defendant in this suit. I am therefore not persuaded that by virtue of witnessing the 1<sup>st</sup> defendant's signatures on the Share Purchase Agreement and Form of transfer, there arises a conflict of interest by the 1<sup>st</sup> defendant being represented by the law firm of B. M. Musau & Company Advocates LLP and more specifically, Dr. B. M. Musau Advocate. In view of the foregoing, I find that the plaintiff has not discharged his burden of proof.
29. In the premise, this Court finds that the allegations that, by Dr. B. M. Musau or the law firm of B. M. Musau & Company Advocates LLP participating in this matter will lead to a conflict of interest since Dr. B. M. Musau may be called as a witness, has not been proved. In addition, there is no prejudice that will be suffered by the plaintiff in the event that the application herein is not allowed.

**If the pleadings filed by B. M. Musau & Company Advocates LLP should be struck out.**

30. On the issue of whether the pleadings filed by the law firm of B. M. Musau & Company Advocates LLP should be struck out, I find that the plaintiff has not made out a case for striking out of the said pleadings in view of the findings I have made on the 1<sup>st</sup> issue. The plaintiff has also not established any of the grounds set out in Order 2 Rule 15 of the *Civil Procedure Rules*, 2010, on striking out of pleadings.
31. The upshot is that the instant application is devoid of merits. It is hereby dismissed with costs to the 1<sup>st</sup> defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF APRIL 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Maiga h/b for Mr. Nyachoti for the plaintiff/applicant



Ms E. Kyamia h/b for Dr. B. M. Musau for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

Mr. Wafula for the 3<sup>rd</sup> defendant

Ms B. Wokabi – Court Assistant.

