



REPUBLIC OF KENYA



**AKM v DMN (Matrimonial Cause E001 of 2022)  
[2024] KEHC 8226 (KLR) (3 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8226 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
MATRIMONIAL CAUSE E001 OF 2022**

**RK LIMO, J**

**JULY 3, 2024**

**BETWEEN**

**AKM ..... APPLICANT**

**AND**

**DMN ..... RESPONDENT**

**RULING**

1. This Ruling is in respect to two applications, the first being the one dated 29<sup>th</sup> February 2024 brought by the Defendant/Applicant while the other one is dated 11<sup>th</sup> March 2024 brought by the Plaintiff/Applicant.
2. I will begin with the first application dated 29<sup>th</sup> February 2024 filed by David Munyao, the Applicant. He has cited the provisions of Section 1A & 1B, 3A & 3B of the *Civil Procedure Act* in seeking the following reliefs namely;
  - i. Spent/overtaken by events.
  - ii. Spent/overtaken by event.
  - iii. That the firm of Nzili & Sumbi Advocates be disqualified from acting for the plaintiff in this matter.
  - iv. Costs of this application.
3. The application is supported by the grounds on the face of application and the affidavit of DMN sworn on 29<sup>th</sup> February 2024 where he also avers that he feels frustrated by representation of the respondent by the firm of Nzili & Asumbi advocates. He contends that Mr. Nzili acts as a judge and that the respondent goes around telling people that she is represented by a judge which the applicant terms as intimidating.



4. He faults the Respondent for refusing to respect what he calls known traditional and cultural norms of leaving his property after the divorce proceedings. He complains that the Respondent has restricted his utility of the parcel of land in dispute and exposed him to danger and constant recording of statements at Police Stations.
5. He avers that his clan has met and reached unanimous decision that the Respondent should vacate the family home and faults the firm of Nzili & Sumbi Advocates who represents the Respondent of frustrating his efforts.
6. The Applicant further makes strange allegations against Justice Nzili stating that the Hon. Judge used to appear for the Respondent when he was in private practice and has continued to appearing for the Respondent which assertion is a rather wild but I will get back to the issue later in this ruling.
7. The Applicant avers that the Respondent has been going around intimidating everyone invoking the name of the Judge.
8. The Applicant onslaught does not stop there as he also accuses this court for not hearing the case as scheduled as per the directions given.
9. In his written submissions dated 22<sup>nd</sup> March 2024 the Applicant contends that the Respondent's Advocate should not be using a firm with a name associated with a Judge because of public perception. He argues that an ordinary man in the street will assume that the Judge still represents the Respondent arguing that there is value in a name.
10. He further argues that this court is likely to be "influenced"
11. by the fact that pleadings are drawn by a firm of a colleague and show bias as a result. He argues that there are many other lawyers from whom the Respondent can choose from.
12. On the issue raised by the Respondent regarding striking out some of the offending paragraphs in his supporting affidavit, the Applicant contends that the Respondent is at liberty to cross-examine him on those paragraphs and pleads with this court not to strike out the impugned paragraphs.
13. The applicant alleges that Justice Nzili continued to act for the respondent even after his a gazettelement as a judge because his name continues to appear in the firm's address. The applicant contends that the law firm is associated with the judge which is intimidating to him. The applicant refers to proceedings of 29<sup>th</sup> January 2023 or thereabouts when the main suit was allegedly coming up for hearing but the hearing did not proceed. He indicates that the court was informed by the respondent's counsel that the matter had been overtaken by events and faults this court for adjourning the case without interrogating the submission further. The applicant indicates that he felt restless because of the events of that particular court session and intimate that the adjournment was influenced by the fact that the respondent was represented by the firm of Nzili & Sumbi Advocates.
14. He further argues that the impugned paragraphs speak to when the Judge was an advocate and points out that the Hon. Judge has not sworn an affidavit to refute his claims adding that M/s Mutemi Advocate cannot in his view swear the affidavit in rebuttal.
15. The Respondent has opposed the application dated 29<sup>th</sup> February 2024 with a replying affidavit, her written submissions and to some extent through her own application dated 11<sup>th</sup> March 2024. The Respondent in summary is asking that a number of paragraphs in the Applicant's affidavit in support of application dated 29<sup>th</sup> February 2024 be struck out.



16. I will begin with the replying affidavit, then the application and thereafter determination of the application dated 29<sup>th</sup> February 2024.
17. In her replying affidavit the Respondent, AKM, contends that the application by DMN is marred with baseless, and malicious accusations intended to attack the good reputation of Hon. Justice Christopher Nzili and the firm of Nzili & Sumbi Advocates. She pleads with this court to strike out the offending paragraphs cited as paragraph 21 to 38 of the affidavit sworn on 29<sup>th</sup> February 2024.
18. The Respondent faults the Applicant for referring the matrimonial home as “his property” and faults him for filing an application dated 6<sup>th</sup> November 2023 which seeks to cite her for contempt. The Respondent contends that the orders the applicant accuses her of breaching are restraining orders against the Applicant.
19. She faults the Applicant for delaying the hearing and determination of the said application dated 6<sup>th</sup> November 2023 adding she got notice that this court was not sitting on 20<sup>th</sup> February 2024 well in advance.
20. She faults the Applicant of delaying the hearing and determination of the cause by filing interlocutory applications which have to be dealt with first before the main suit.
21. In her written submissions dated 27<sup>th</sup> March 2024, the Respondent submits that the Applicant has failed to provide compelling reasons for disqualification of the firm of Nzili & Sumbi Advocates as counsel for the respondent. That the delay occasioned in the hearing and determination of the applicant’s application dated 6<sup>th</sup> November 2023 has been occasioned by the applicant. That the applicant’s application to have the respondent evicted from the matrimonial home is unobtainable as there is a live matrimonial property dispute in court. That the applicant’s description of Justice Nzili’s representation as her advocate in the lower court when he was practicing as an advocate does not constitute professional misconduct on his part. Further that any allegations of misconduct if any ought to be ventilated in the right forum. That use of Justice Nzili’s name by the firm is common practice and does not amount to misconduct. It is also submitted that there has been no evidence tendered of bias on the part of the court as a result of the firm of advocates acting for the respondent. She relies on *Nelson Havi & 8 Others vs Inspector General of Police & 5 Others* (2016) eKLR in her contention that compelling reasons have to be tabled for disqualification of an advocate from acting for a party.
22. The Applicant cites the provisions of Article 33 (3) of the *Constitution* which provides that in the exercise of the right to freedom of expression, the rights and reputations of others should not be disregarded or violated.
23. She further cites the provisions of Order 19 Rule 3 of the *Civil Procedure Rules* which provides that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove and that under Order 19 Rule 6 an affidavits containing scandalous, irrelevant and offensive issues may be struck out. She relies on the case of *Musikari Nazi Kombo –vs- Moses Masika Wetangula & 2 Others* [2013] where the court found that allegation in a pleading are scandalous if they state matters that are indecent, offensive or made for mere purpose of abusing or prejudicing the opposite party.
24. The Applicant submits that the impugned paragraphs in the affidavit impute misconduct on the firm of advocates representing her suggesting that it has unfair advantage because the firm representing her is associating with a Judge. She contends that the allegations are untrue. She asserts that the allegations against justice Nzili are offensive, defamatory ad scandalous adding that the Judge is not a party in this suit.



25. The Respondent contends that the Applicant ought to channel any complaint of impropriety on either the firm or from Judge through proper channels.
26. The Respondent, who is the Applicant in the application dated 11<sup>th</sup> March 2024 asks this court to strike out the cited impugned paragraphs alleging that the same are scandalous and made in bad faith. She relies on an affidavit sworn by Mercy Mutemi Advocate sworn on 11<sup>th</sup> March 2024 where she asserts that the allegations made by David Munyao are dangerous and are aimed at damaging the reputation of her firm, this court and Hon. Justice Nzili. She avers that the claims are false, rumors and unsubstantiated. She states that the claims are merely made to create a public spectacle without any evidence to back them up.
27. This court has considered both applications and the respective responses thereto.
28. The two application are related, the applicant in the application dated 29<sup>th</sup> February 2024 is seeking orders to have his mention date which had been fixed for 30<sup>th</sup> May 2024 brought forward which prayer is now spent. He is also seeking to have the firm of Nzili & Sumbi disqualified from acting for the respondent. In his supporting affidavit, the applicant made several averments touching on Hon Justice Christopher Nzili who previously represented the respondent in the trial court.
29. The specific averments are contained at paragraphs 21 , 22 ,23, 26,27,28, 29,31, 32, 33, 34, 36, 36, 37, and 38 in the affidavit of DMN sworn on 29<sup>th</sup> February 2024. (The same shall hereafter be referred to as impugned paragraphs for ease of reference). The same prompted the Applicant to file the application dated 11<sup>th</sup> March 2024 seeking to strike out the said impugned paragraphs.
30. The main issue in this matter is whether it is proper for the firm of Nziili & Sumbi Advocates to act for AKM . The Applicant, David Munyao expresses concern that the firm is associated with Justice Nzili. He feels intimidated and uncomfortable that the firm continues to act for his adversary in this matter when Justice Nzili acted for her in the divorce proceedings in the lower court. His position is that the firm of Nzili & Sumbi Advocates should be disqualified.
31. The right to legal representation and to be represented by an advocated of one’s choice is a fundamental right because it touches on the right to fair trial well stipulated under Article 25 (c) of the *Constitution*. That right is protected and can only be denied or restricted where there is an obvious conflict of interest or likely breach of principle of confidentiality between an advocate and a client.
32. Laying the test for disqualification of an Advocate, the Court of Appeal in *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* [2005] eKLR stated 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 relationships or where the advocate would double up as a witness. 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.”
33. In another the case of *Murgor & Murgor Advocates v Kenya Pipeline Co. Ltd* [2021] eKLR, the court laid out some of the general principles of the disqualification of Advocates from appearing for a client. The same are listed 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;”
34. Applying the above principles to the present case, the disqualification is sought only on one basis, that the respondent’s former counsel on record was later appointed as a judge. The said judge cannot and is not representing the respondent in this matter. There is also no possibility that he will be called as a witness. Therefore, conflict of interest cannot arise. The firm of advocates representing the respondent is a separate entity from Justice Christopher Nzili and the same is also evidenced by the certificate of registration for the firm of Nzili and Sumbi Advocates which indicate that Mercy Kanini Mutemi is the proprietor of the firm. The applicant’s contention that people from his home area know the judge has no relation to the current matter in court.
35. The contention by the applicant is speculative and infringes on the provisions of Order 19 Rule 3 of the *Civil Procedure Rules* which provide as follows;
- “Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:
- Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”
- The applicant has failed to demonstrate the source of information informing his fears as expressed in his affidavit in support.
36. The Applicant intimates and suggests that this court is likely to be influenced by the fact that the former Respondent’s counsel is now a sitting Judge. This to say the least is not only far-fetched but there is absolutely no evidence tendered by the Applicant to prove the claim or justify his fears for bias. In the



case of *Philip K. Tunoi & Another –vs- Judicial Service Commission & Another* [2016] eKLR the court held as follows;

“...In considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people...”

“[The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

37. Additionally, in the case of *Judicial Service Commission & 2 others* (2016) eKLR the Court of Appeal held that: -

“It cannot be gainsaid that the Applicant bears the duty to establish the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the Judge is biased. It is not enough to just make a bare allegations. Reasonable grounds must be presented from which an inference of bias may be drawn.”

38. The Applicant claims that the firm of Nzili & Sumbi Advocate should be disqualified because Justice Nzili acted for the Respondent in the divorce proceedings and that he has continued representing in this cause which I find misleading, false and in bad faith. For one even if Justice Nzili appeared for the Respondent in the divorce proceedings, in the lower court, this matrimonial cause is separate and distinct. There is no evidence that shows that since his appointment, the good Judge has ever had contacts with this court or the Plaintiff’s counsel over this matter. The allegations of likely bias is therefore speculative and scandalous. A party cannot swear an affidavit that is scandalous and offensive as against people who are not even parties to a suit. This court finds that the averments contained under the cited impugned paragraphs are averments that the Applicant cannot and has failed to prove of his own knowledge. They offend the provisions of Order 19 Rule 3 of the *Civil Procedure Rules* and are liable to be struck out under Order 19 Rule 6 of the *Civil Procedure Rules*.

39. This court finds it curious that the Applicant concedes that he conducted a search and found that the sole proprietor of the firm of Nzili & Sumbi Advocates is now Mercy Mutemi Advocate who appears in this cause but despite he continues to drag the name of Justice Nzili in this matter without demonstrating if Mercy Mutemi has acted in an improper or unprofessional manner in representing her client. In any event as correctly pointed out by Respondent’s counsel if Mr. DMN has any issue touching on professional conduct of either Mercy Mutemi, her firm, or Justice Nzili, there exist proper channels to channel those grievances. He cannot ask that the Respondent’s counsel be disqualified without giving sufficient reasons for such disqualifications.

40. I have looked at the exhibits shown through a further affidavit by DMN sworn on 15<sup>th</sup> March 2024 and find that the screenshots exhibited infringes on Section 60 of the *Evidence Act*. The screen shot should have been accompanied by a certificate of authenticity to be admissible in law. Besides that, the screen shots do not provide sufficient justification or reasons for the Applicant to ask that the firm of Nzili & Sumbi Advocate be disqualified.

41. This court finds that the application dated 29<sup>th</sup> February 2024 is merely a side show and lacks in merit. The same is dismissed with costs to the Respondent. On the other hand, this court for the reasons afore stated finds merit in the application dated 11<sup>th</sup> March 2024 and the same is allowed in terms of prayer (b) with the costs to the Applicant. This court further directs the parties to spend their energies in the main suit with a view to bringing this matter to an end rather than filing application after application and later blame the court for the attendant delay when it is common knowledge that courts are squeezed due to the number of cases pending and other official matters that has to be



attended. Judicial time should be spent well and with a view to bringing disputes to an end rather than prolonging them. Going forward, this court will proceed in that spirit and in accordance with the provisions of Section 1A & 1B of the *Civil Procedure Act*.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 3<sup>RD</sup> DAY OF JULY, 2024.**

**HON. JUSTICE R. LIMO**

**JUDGE**

