



**Kinyanjui v Wakahiu & 3 others (Petition E051 of 2023)
[2024] KEHC 8668 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E051 OF 2023**

OA SEWE, J

JULY 18, 2024

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 27(1), 28, 29, 31, 39,
40, 47, 50, 159(2) AND 165 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED THREAT TO AND CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22,
23, 27(1), 28, 29, 31, 39(1), 40(1), 40(2), 47 OF THE CONSTITUTION OF KENYA**

BETWEEN

SAMUEL MBUGUA KINYANJUI PETITIONER

AND

JUDY WAKAHIU 1ST RESPONDENT

**THE OFFICER COMMANDING STATION BAMBURI POLICE
STATION 2ND RESPONDENT**

**THE OFFICER IN CHARGE, DIRECTORATE OF CRIMINAL
INVESTIGATIONS, BAMBURI POLICE STATION 3RD RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The Notice of Motion dated 24th November 2023 was filed by the petitioner under Articles 22 and 23 of *the Constitution*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*. He also relied on Sections 125, 144 and 147 of the *Evidence Act*, Chapter 80 of the Laws of Kenya and all other enabling provisions of the law. He sought for orders that:
 - (a) the Court be pleased to bar the firm of M. Murimi & Co. Advocates from acting for the 1st respondent or any other respondent in this Petition.



- (b) That the costs of the application be provided for.
2. The application is supported by the petitioner's own affidavit sworn on the 24th November 2023. It was premised on the grounds that on 31st October 2023, the 1st respondent served him with a demand letter written by the firm of M. Murimi & Co. Advocates demanding for a total of Kshs. 1,012,098.12. The letter is one of the documents annexed to the petitioner's affidavit and is marked Annexure "SMK1". The petitioner further averred that he intends to call the author of that letter, one Maryanne W. Murimi as a witness at the hearing of the Petition. For that reason, the petitioner prayed that it is not appropriate for the firm of M. Murimi & Co. Advocates to act for the 1st respondent or any other respondent in the matter. He added that no prejudice will be suffered by the respondents if the orders sought are granted.
 3. The 1st respondent opposed the application vide her Replying Affidavit sworn on 19th December 2023. She averred that the application dated 24th November 2023 is misconceived, ill-advised and misplaced and therefore ought to be dismissed in limine because the petitioner has not outlined how the continued representation of the 1st respondent by the firm will occasion him injustice. The 1st respondent contended that no conflict of interest has been generally or specifically pleaded by the applicant to warrant the Court's intervention.
 4. The 1st respondent deposed that the task of the advocate concerned was to simply write a demand letter for reimbursement of the funds overpaid and unutilized; an assignment that in her view rightly fell within the purview of any advocate's series of assignments towards the institution of a suit. She added that the petitioner has not demonstrated what special evidence is within the knowledge or possession of the Advocate to warrant her being the best witness for the petitioner. Hence, the 1st respondent averred that the orders sought are tantamount to the derogation of the 1st respondent's constitutional right to counsel as enshrined in Article 50 of *the Constitution*.
 5. The application was canvassed by way of written submissions. Accordingly, the petitioner filed written submissions dated 26th January 2024. He submitted that having his Annexure "SKM1" annexed to his Supporting Affidavit sworn on 9th September 2023, counsel for the 1st respondent ought to have seen that they were potential witness in the suit and restrained themselves from taking instructions to act in this matter. The petitioner further submitted that the firm of M. Murimi & Co. Advocates is not the only firm in Kenya who can represent the 1st respondent in this suit. He added that the 1st respondent has not demonstrated what prejudice she stands to suffer if the said counsel is barred from representing her in this matter.
 6. The petitioner further submitted that his right to fair trial under Article 50(1) of *the Constitution* and access to justice will be greatly infringed by the if he is hindered from calling Advocate Murimi as his witness. He accordingly prayed that his application be allowed and orders granted as sought.
 7. On behalf of the 1st respondent, written submissions were filed herein by M. Murimi & Co. Advocates dated 12th January 2024. She proposed the following issues for determination:
 - (a) Whether the grounds adduced by the petitioner are sufficient to warrant the disqualification of the firm of M. Murimi & Co. Advocates from representing the 1st respondent in this suit.
 - (b) Who should be awarded costs.
 8. The 1st respondent reiterated her stance that no conduct laced with malice, fraud, misrepresentation, deceit or mischief has been pleaded or proved against the firm of M. Murimi & Co. Advocates or its Managing Partner to warrant disqualification. Reliance was placed on *Delphis Bank Ltd v Channan Singh chatthe & 6 others* [2005] eKLR for the proposition that 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; and that the key consideration is whether real mischief or prejudice will in all human probability result.

9. The 1st respondent further submitted that to bar an advocate from representing a party amounts to a derogation of the party's constitutional right to counsel and can only be done where conflict of interest is real or apparent. She contended that no such conflict was proved in this matter and therefore the orders sought are unwarranted. She added that no proof was availed as to the nature of the evidence expected from Advocate Murimi; and therefore even Rule 8 of the Advocates (Practice) Rules cannot avail the petitioner. In any case the proviso to that rule does not prohibit an advocate from handling non-contentious aspects of a case in which he/she appears.
10. In the premises, the 1st respondent urged the Court to find that the application dated 24th November 2023 is devoid of any merit. She prayed for its dismissal with costs.
11. I have given careful consideration to the application. Although counsel made reference to Rule 9 of the Advocates (Practice) Rules, the applicable provision is Rule 8. It states:

“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.”

12. The question to pose then is what was the mischief intended to be curbed by this rule? In *Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 7 Others* [2017] eKLR, it was held:

“The aforesaid rule attempts to guard against conflict of interest. An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren't compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe his fiduciary duty owed to clients and to former clients. Conflict of interest can arise broadly where an advocate acts for both parties in a matter such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate...may be a material witness in his client's matter...”

13. Moreover, there is the valid argument presented by the 1st respondent as to the right to be represented by an advocate of choice. Accordingly, in *Delpbis bank Limited v Channan Singh Chatthe & 6 others* (supra) it was held:

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative by an 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. 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."

14. In the present circumstances, no such conflict, mischief or real prejudice have been disclosed. Indeed, it is not the case of the petitioner that the firm of M. Murimi & Co. Advocates, or Ms. Murimi herself, has set out to act for two or more parties whose interest are incompatible. All she is accused of is preparing the demand letter before the intended litigation; which in itself is non-contentious. Moreover, the petitioner has not given an inkling as to what evidence Ms. Murimi would likely give on his behalf in this Petition.

15. Even assuming that such indication was given, it is not automatic that an advocate would be disqualified by the fact alone that he/she is a potential witness. The proviso to Rule 8 is explicit 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."

16. Accordingly, the point made in *Dorothy Seyanoi Mashioni v Andrew Stuart & Another* [2014] eKLR, which I endorse, was that:

"...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..."

17. In the premises, I am not convinced that either real mischief or real prejudice has been demonstrated by the petitioner to warrant the disqualification of Ms. Murimi or the firm of M. Murimi & Co. Advocates from continuing to represent the 1st respondent herein. That being my view, it follows that the application dated 24th November 2023 is utterly devoid of merit. The same is accordingly dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JULY 2024

OLGA SEWE

JUDGE

