



REPUBLIC OF KENYA



Corporate Insurance Company Limited v Royal Associates Insurance Brokers (Insolvency Cause E024 of 2022) [2024] KEHC 11284 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E024 OF 2022**

PM MULWA, J

SEPTEMBER 19, 2024

BETWEEN

CORPORATE INSURANCE COMPANY LIMITED PETITIONER

AND

ROYAL ASSOCIATES INSURANCE BROKERS RESPONDENT

RULING

1. The petitioner has filed the Notice of Motion dated 24th January 2024 under Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Standard 6 (paragraphs 99 and 103) of the Code of Standards of Professional Practice and Ethical Conduct (the Code of Conduct) seeking inter alia that the firm of Nyang'au Manyura & Associate Advocates (the firm) including any of its partners or employees therefrom be disqualified from acting for the respondent in this matter and that the notice of change of Advocates dated 14th November 2023 be struck off. The application is grounded on the averments as set out on its face and the supporting affidavit sworn on 24th January 2024 by the petitioner's Chief Executive Officer, Anna Kavulunze. It is opposed by the respondent through the replying affidavit of Tiberius Nyang'au Manyura the founder of the firm and the respondent's Advocates sworn on 5th February 2024. The application was disposed by way of written submissions which are on record and which I will make relevant references to in my analysis and determination.

The application

2. The petitioner contends that the firm filed a notice of change of advocates dated 14th November 2023 seeking to represent the respondent in place of Litunda & Company Advocates. It states that Mr. Tiberius Nyan'gau who practises in the firm previously acted as its Legal Officer between 6th June 2011 and 14th June 2015 until he was promoted to Legal and Compliance Officer between 15th June 2015 and 2nd September 2019, then the Compliance Officer for the period 3rd September 2019 to 30th September



2021 and finally as the Head of Compliance and Head of Legal for the period between 1st October 2021 until his dismissal on 15th February 2023.

3. The petitioner avers that Mr. Tiberius Nyang'au is a potential witness for the petitioner in this matter and that the firm has now come on record for the respondent in the same matter after his dismissal by the petitioner which may lead to a conflict of interest arising from acting for two clients with incompatible interests in blatant breach of the Code of Conduct. That as counsel for the petitioner, Mr. Nyang'au was privy to all communications between the parties to the proceedings herein as he was responsible for drawing up and signing off the letters directed to the respondent demanding payment of suit money to the petitioner. That instructively, he authored a letter addressed to the petitioner on behalf of the petitioner to institute legal proceedings towards the recovery of the debt via the letter dated 16th February 2022.
4. The petitioner further avers that during his tenure as Head of Compliance and Legal, Mr. Nyang'au played a role in the debt recovery process as the nature of his responsibilities meant extensive involvement with the dispute at hand, both before and after the matter was filed in court. That during that period he was imparted with knowledge and confidential information material to the matters in contest in the instant proceedings. Therefore, the knowledge and information received is privileged by reason of the confidentiality arising from the Advocate-Client relationship.
5. It reiterates that Mr. Nyang'au is a material witness for the petitioner as regards various disputed matters in the petition herein and that his testimony is relevant, material and necessary to the issues in controversy.
6. It contends that given the nature of representation that Mr. Nyang'au now intends to make on behalf of his new client in this matter, there is a high probability of prejudice against his former client. That the possibility is real that he will use the privileged information to the detriment of the petitioner and/or to the advantage of the respondent. The petitioner depones that Mr. Nyang'au's will be incapable of observing the fiduciary duty owed to his current and former clients and this raises a conflict of interest.
7. The petitioner claims that the actions of Mr. Tiberius Nyang'au have adversely affected the fair trial legal rights of the respondent and that if Mr. Nyang'au does not recuse himself, the integrity of the judicial system will suffer as a result.

Respondent's reply

8. In response, the respondent depones that the application is misconceived and frivolous and does not meet the criteria for grant of the orders sought. The respondent avers that the nature of engagement between the petitioner and its counsel during the period particularized by the petitioner above was that of 'employer – employee' wherein he was in the direct employment of the petitioner as part of its salaried staff. That the petitioner has deliberately misrepresented to the Court that the nature of engagement was that of 'advocate – client', which it was not and that neither himself as an individual nor the firm have acted for the petitioner in the instant matter in an 'advocate – client' capacity.
9. The respondent claims that Mr. Nyang'au's direct engagement with the petitioner as its employee concluded on 15th February 2023, a clear 9 months before the firm accepted instructions to take up the respondent's representation in this matter and filed the notice of change of advocates. Mr Nyang'au depones that in his capacity as an employee of the petitioner, he received directions from the petitioner's deponent personally he complied with his supervisor's directive in authoring the letter dated 16th February 2022.



10. Mr. Nyang'au states that he has not been listed as a witness and has not been notified of any intention to call him as such nor is he a potential material witness in the instant suit. That his engagement of work with the petitioner centred on processing legal claims against the petitioner and/or its clients arising from Insurance Policy Contracts as well as Regulatory Compliance.
11. According to the respondent all the information that pertains to the circumstances leading to the institution of said suit and material to the judicious disposition of this suit is captured in the pleadings filed in Court and is known to both the petitioner and respondent, and as such there exists no privileged or confidential information pertinent to these proceedings. No prejudice will be suffered by the petitioner as a result of the firm acting for the respondent.
12. The respondent states that allowing the petitioner's application will be irreparably prejudicial to the respondent's rights to choose their desired legal representative in this matter and that the application is a misplaced attempt to belatedly obfuscate the nature of the relationship that existed between the petitioner and Mr Nyang'au.

Analysis and determination

13. Whether and under what circumstances an advocate can be barred from representing a party was discussed in detail by the Court of Appeal in *Delphis Bank Limited v Channan Singh Chatthe and 6 others* NRB CA Civil Appl. No. 136 of 2005 [2005] eKLR:

“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. The authorities we allude to are *King Woolen Mills Ltd & Anor vs. M/S Kaplan & Stratton* [1993] LLR 2170 (CAK), (C.A 55/93) and *Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2)*, [2002] 2 EA 654.”

14. This court (the late Majanja J.,) in *Wardy Communications Limited & 2 others v Chase Bank (Kenya) Limited (in Liquidation); Weya (Interested Party) (Civil Case 373 of 2016)* [2023] KEHC 991 (KLR) (Commercial and Tax) (17 February 2023) has stated that an advocate, is bound by the professional regulations issued from time to time by the Law Society of Kenya in the form of the Code of Conduct which defines ‘conflict of interest’ in Rule 6 para. 96 thereof as follows:

“...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.”

15. The respondent has argued that Mr. Nyang'au was not in an “advocate-client” relationship with the petitioner but that he was simply its salaried employee. The petitioner has countered by stating that their relationship fits the description in Sections 2 and 32A of the *Advocates Act*.
16. My view is that whether there was an ‘advocate-client’ relationship between the parties in the strict sense is not material and that what is material is whether there is potential conflict of interest and breach of confidentiality in light of Mr. Nyang'au's previous employment with the petitioner. Mr.



Nyang'au deponed that the nature of his engagement of work with the Petitioner centred on processing legal claims against the petitioner and/or its clients arising from Insurance Policy Contracts as well as Regulatory Compliance. He admitted that he was involved in instructing the advocate to pursue the claimed sum in these proceedings in line with his duties. He also did not deny that he was at times responsible for the matters which are material to the debt recovery in these proceedings on behalf of the petitioner.

17. Whereas I can understand the petitioner's apprehension from these averments, I find that it has not demonstrated the potential conflict of interest or breach of confidentiality arising from the same, or what information is likely to give rise to a conflict of interest or what confidential information is in possession of Mr Nyang'au that can be disclosed to the respondent and prejudice the petitioner.
18. I agree with the respondent that all information pertaining to this matter had already been filed by the petitioner together with its petition and equally responded to before the firm was appointed to take over from the previous advocates and as such, the firm cannot be accused of using confidential information previously only known to Mr. Nyang'au.
19. On Mr. Nyang'au being called as a witness, other than the averment that he is a potential witness, no notice has been served on the respondent, the firm, Mr Nyang'au or the court by the petitioner to that effect.
20. In sum, it is my finding that the petitioner has not demonstrated any real mischief or prejudice that will in all human probability result in the firm or Mr. Nyang'au representing the respondent in this suit and nothing warrants their disqualification or recusal herein.
21. For these reasons, I find that the petitioner's application dated 24th January 2024 lacks merit and is dismissed. Costs will be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2024.

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P. MULWA

JUDGE

In the presence of:

N/A for petitioner

Mr. Manyura for respondent

Court Assistant: Carlos

