



Kantai v Inspector General of Police & another; Director of Public Prosecutions & 3 others (Interested Parties) (Petition E334 of 2021) [2023] KEHC 3178 (KLR) (Constitutional and Human Rights) (18 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E334 OF 2021

HI ONG'UDI, J

APRIL 18, 2023

BETWEEN

JUSTICE SANKALE OLE KANTAI PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

GABRIELE HANNAH VAN STRATEN INTERESTED PARTY

GRACE NGINDA ITA (FOR HERSELF AND AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE SILAS M' NJAMIU ITA) INTERESTED PARTY

PETER NJOROGE KARANJA INTERESTED PARTY

RULING

1. The 4th Interested Party (Sarah Wairimu Kamotho) filed the Notice of Motion dated March 9, 2022 seeking the following orders:
 - i. Spent.
 - ii. That this Honourable Court be pleased to Order that Danstan Omari, Shadrack Wambui and all other advocates practicing in the name of style of M/s Musyoki Mogaka & company advocates, be and are hereby disqualified



from representing the 4th respondent, 3rd and 4th interested party herein, or any other party in this matter.

- iii. That the costs of this application be provided for.
2. The same is supported by the grounds on its face plus the affidavit of the 4th Interested Party sworn on March 9, 2022 which basically reiterates the grounds in support. A Summary of the 4th Interested Party/Applicant's grounds and averments is that Mr Danstan Omari, Mr Shadrack Wambui both of M/s Musyoki Mogaka & company advocates have played an active role in the investigations in respect of the murder of one Tob Chichou Cohen the husband of the 4th Interested Party. That the murder of Mr Cohen is the subject of the petition filed by Gabriele Hannah Van Straten (2nd interested party) at the Public Service Commission based on the replying affidavit of John Gachomo.
 3. It is further stated that the two advocates (Danstan Omari & Shadrack Wambui) are conflicted in this matter as they are potential witnesses in the murder case. The following documents related to the murder case and allegedly authored by the two advocates have been annexed to the Applicant's sworn affidavit viz:
 - i. SWKC-1 – copy of Mr Omari's witness statement dated February 17, 2020.
 - ii. SWKC -2 – excerpts of some news articles by Mr Omari.
 - iii. SWKC – 3 – Letters authored by M/s Musyoki Mogaka & Co advocates where Danstan Omari and Shadrack Wambui operate from.
 - iv. SWKC – 4 – copy of Shadrack Wambui's written letter of complaint dated June 4, 2019.
 4. It is her averment that the two advocates mentioned above are likely to be called as witnesses in the murder case Nairobi High Court Criminal Case No 60 of 2019, Republic v Sarah Wairimu Kamotho Chohen and Peter Karanja. According to her this would go against Rule 8 of the [Advocates \(Practice\) Rules 1966](#) if Mr Danstan Omari and Mr Shadrack Wambui and the firm of M/s Musyoki Mogaka & company advocates were to appear for any of the parties herein as they are conflicted.
 5. The Office of the Director of Public Prosecutions (ODPP), (the 1st interested party) filed a replying affidavit by Grace Murungi the deputy director sworn on October 7, 2022. She confirmed that Mr Danstan Omari from the firm of Musyoki Mogaka & Company advocates is a witness in the murder case of the late Tob Cohen High Court Criminal Case no 60 of 2019. That the said murder case is the subject of this petition and other related ones. Thus being a witness Mr Danstan Omari and the firm of Musyoki Mogaka & co advocates are privy to confidential information passed between them, the late Tob Cohen and the Applicant is therefore conflicted. The 1st interested party therefore supports the application dated March 9, 2022.
 6. Despite being served with the application the firm of Musyoki Mogaka & company advocates for the 2nd and 3rd interested parties did not file any responses nor submissions.

Parties submissions.

7. The Applicant filed submissions dated March 28, 2023 through the firm of Murgor and Murgor advocates. Counsel has given a brief background to this petition and others and the murder case High Court Criminal Case No 60 of 2019. It's his submission that Counsel Danstan Omari and the advocates from the firm of Musyoki Mogaka & company advocates are incurably conflicted in this matter. He argues that the right to representation by an advocate of one's choice is not absolute as it



may be limited where there is a conflict of interest. In this case counsel submits that the advocate will be doubling up as a witness and this will conflict with his duty to the client.

8. Counsel referred to the cases of:
 - i. *Delphis Bank Ltd vs Channan Singh Chatthe & 6 others [2005] eKLR*
 - ii. *Maina Njenga v Republic [2017] eKLR*
 - iii. *Francis Mugo & 22 others v James Bress Muthee & 3 others eKLR (Civil Suit No 122 of 2005)*
 - iv. *William Audi Odode & another v John Yier & another Court of Appeal in Nairobi application No 360/2004 (cited in Zimuel Ondicho Bwana v Samuel Mogaka Mamboleo & another [2022] eKLR)* where the Court of Appeal stated.

'Each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interest of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.'
9. Counsel further referred to the case of *Republic v Chief Magistrate, Nairobi [2007] eKLR* where this Court in an application for Judicial Review considered a preliminary objection challenging the appearance of Kahuthu & Kahuthu advocates for the interested party on similar grounds. The Court in its Ruling held:

' That statement has a bearing in the Criminal Case out of which this Judicial Review Application emanates. The Advocates Statement on oath means that he knows how the money was withdrawn and he can be called as witness in the Criminal Case. He cannot therefore act for a party in this Application. In my view, GJ Kahuthu is an Interested Party in this matter. For that reasons, Rule 9 of the Advocates (Practice) Rules bars Kahuthu Advocate from acting as an Advocate in a matter where he can be called to testify as a witness. He cannot represent the Interested Party as an Advocate in this matter and I would uphold the applicants Preliminary Objection on that point.'
10. The 1st interested party's submissions dated October 7, 2022 were filed by Judy Thuguri Principal Prosecution Counsel. She submitted that where an advocate of the High Court of Kenya records a statement in support of a prosecution case, that advocate is essentially a witness for the state and cannot then purport to appear as an advocate in a contested matter between the prosecution, the accused persons and potential accused persons.
11. Further that an advocate of the High Court of Kenya has a sacrosanct duty to the court that outweighs his/her duty to his/her client. As an officer of the Court the advocate should present his/her client's case in an objective and truthful manner. Counsel made references to the authorities cited by Mr Murgor SC, stressing that an advocate has an overriding duty to the Court to act with independence in the interests of the administration of Justice. In stressing this she referred to the cases of:
 - i. *Uhuru Highway Development & others vs Central Bank of Kenya & 2 others [1998] eKLR.*
 - ii. *Wheat States, 486, U.S 153 (1988)*



Analysis and Determination

12. I have carefully considered the application, supporting affidavit, replying affidavit, plus the submissions, cited authorities and the Law. The only issue for determination is whether the Law firm of Musyoki & Mogaka advocates is conflicted, in this matter.
13. Rule 9 and not Rule 8 of the Advocates (Practice) Rules as averred by the 4th interested party 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, 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.'
14. There is no dispute that the murder of the late Tob Cohen in Nairobi High Court Criminal Case No 60 of 2019 is the subject of this petition and others. The Applicant (Sarah Wairimu Kamotho) and a deputy director ODPP (Grace Murungi) have averred to the roles played by Advocates Mr Danstan Omari & Mr Shadrack Wambui in the said criminal case. Documents have been filed showing their statements, letters and aired articles, confirming that they are witnesses, and what they have said.
15. Despite all these serious averments against them and service of the application and annexures upon them the said Law firm and / or the advocates have not filed any response to the allegations, to confirm or rebut the same. The Court takes it that the averments are unchallenged. I am duly guided by the cited authorities some of which are by the Court of Appeal e.g Delphis Bank Limited (supra) and Uhuru Highway Development Ltd & 3 others (supra).
16. From the material placed before this Court I have no doubt in my mind that Mr Danstan Omari & Shadrack Wambui and the firm of Musyoki Mogaka advocates have played a critical role in Nairobi High Court Criminal Case No 60 of 2019 which is the subject of this petition and Petition No 543 of 2021. Their position stands out as one of what is stated clearly in Rule 9 of the Advocates (Practice) Rules.
17. I find that in the interest of justice and all fairness the said Advocates and all advocates practising in the Law firm of Musyoki Mogaka advocates should be disqualified from representing Gabriele Hannah Van Straten, And Grace Nginda ITA and any other party / parties in this petition or Petition No 543/2021.
18. I therefore allow the Notice of Motion dated March 9, 2021 in terms of prayer No 2 Costs shall be in the cause.
19. For clarity, this Ruling applies to Petition No E543 of 2021 where a similar application had been filed, plus the consolidated Misc Petition No E037 of 2021 which had been part of this petition before deconsolidation.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF APRIL, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

