



China Wu Yi (Kenya) Company Limited v Stephen Kithi Ngombo t/a Steve Kithi & Co. Advocates; Stephens Kithi Ngombo t/a Steve Kithi & Co. Advocates & another (Plaintiff); China Wu Yi (Kenya) Company Limited (Defendant) (Civil Suit 89 of 2019) [2023] KEHC 18139 (KLR) (5 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 89 OF 2019**

OA SEWE, J

JUNE 5, 2023

BETWEEN

CHINA WU YI (KENYA) COMPANY LIMITED PLAINTIFF

AND

**STEPHEN KITHI NGOMBO T/A STEVE KITHI & CO.
ADVOCATES DEFENDANT**

AND

**STEPHENS KITHI NGOMBO T/A STEVE KITHI & CO.
ADVOCATES PLAINTIFF
PROPKEN (MAURITIUS) LIMITED PLAINTIFF**

AND

CHINA WU YI (KENYA) COMPANY LIMITED DEFENDANT

RULING

1. The Notice of Motion dated July 26, 2022 was filed by the plaintiffs in the Counterclaim, Mr Stephens Kithi Ngombo T/A Steve Kithi & Company Advocates and Propken (Mauritius) Limited, pursuant to sections 1A, 1B and 3A of the Civil Procedure Act, Rule 9 of the Advocates (Practice) Rules and Order 51 Rule 1 of the Civil Procedure Rules. They sought orders that:
 - (a) The firm of M/s Wambugu & Muriuki Advocates by itself, its partners, associates, employees and/or agents be barred and removed from the record as representing the respondent.
 - (b) the costs of the application be provided for.



2. The application was based on the grounds that the firm of M/s Wambugu & Muriuki Advocates, on behalf of China Wu Yi (Kenya) Company Limited (hereinafter, “the respondent) wrote a letter of complaint dated June 26, 2020 addressed to the Director of Criminal Investigations (DCI) which letter gave rise to Mombasa Chief Magistrate’s Criminal Case No. E989 of 2021: Republic v Stephens Kithi Ngombo. Thus, the applicants contended that the partners and the advocates in the firm of Wambugu & Muriuki Advocates are likely to be called as witnesses in the Criminal Case; and therefore that there exists a conflict of interest for purposes of Rule 8 of the Advocates (Practice) Rules. In the premises, the applicants asserted that it is in the interest of justice that the firm of Wambugu & Muriuki Advocates withdraws from representing the respondent in this suit.
3. In his Supporting Affidavit sworn on July 26, 2022, Mr Stephens Kithi Ngombo (the 1st applicant) reiterated the grounds raised by the applicants in support of the application and annexed a copy of the subject letter of complaint dated June 26, 2020 addressed to the Director of Criminal Investigations as Annexure “PRKN-2”. The 1st applicant was of the firm conviction that the partners and advocates in the firm of Wambugu & Muriuki Advocates are likely to be called as witnesses in the Criminal Case and therefore ought not to act in this matter as the advocates for the respondent.
4. The respondent opposed the application, contending that it is a sham and an abuse of the process of the Court. In a Replying Affidavit sworn on the August 26, 2022 by its Administrator, Mr Zhang Hua, the respondent asserted that the applicants have no basis at all for challenging their choice of advocates. Mr Hua averred that the report by counsel to the DCI was not made out of counsel’s own motion, but pursuant to the respondent’s instructions as a corporate client and following a resolution of the Board of Directors of the respondent. Mr Hua added that the advocate on record herein has not done anything that would make him a potential witness in the Criminal Case. He consequently prayed for the dismissal of the application with costs.
5. The application was canvassed by way of written submissions pursuant to the directions given herein on July 27, 2022. In his written submissions filed on the October 25, 2022, the 1st applicant pointed out that on the November 29, 2021, the respondent filed a Supplementary List and Bundle of Documents introducing documents relating to Mombasa Chief Magistrate’s Criminal Case No. E989 of 2021; and therefore that the introduction of the said documents creates a conflict of interest as to the role played by the firm of Wambugu & Muriuki Advocates in this matter. The 1st applicant further pointed out that their application is not alleging conflict of interest in the Criminal Case, but in the instant case.
6. Mr Kithi therefore surmised that the respondent’s averments at paragraph 9 are but indicative of the total misconception by the respondent and its advocates on record as to the nature of the conflict of interest before the Court. He explained that the application is not about whether counsel for the respondent may be called as a witness in the Criminal Case, but about being called as a witness in the present proceedings and how that possibility potentially brings into disrepute the administration of justice. He also took issue with the fact that the Supporting Affidavit was not sworn by a director of the respondent, duly authorized in that regard. He prayed therefore that the application dated July 26, 2022 be allowed with costs.
7. The respondent’s written submissions were filed on October 26, 2022 by Mr Eredi, Advocate. He proposed one issue for determination in the application, namely, whether the applicants have presented any evidence to prove conflict of interest on the part of the respondent. He relied on Rule 6 paragraph 96 the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016 as to the definition of conflict of interest and urged the Court to find that, in this case, the 1st applicant has not availed any evidence showing that the respondent’s advocate on record has done anything that



gives rise to a substantial risk that representation by the firm will adversely affect the interests of the parties.

8. Mr Eredi further submitted that there is no nexus whatsoever between the instructions to write the letter to the DCI and the instructions to represent the respondent in this suit. He made reference to *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR; *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR and *Commissioner of Investigations and Enforcement v Ahmed* (Tax Appeal E130 of 2020) [2021] KEHC 10 (KLR) (Commercial and Tax) (10 September 2021) (Ruling) to support his arguments and urged for the dismissal of the application.
9. I have carefully considered the application in the light of the averments set out in the affidavits filed by the parties. I have similarly taken into consideration the written submissions filed by learned counsel. I need to point out that while *Gladys Boss Shollei v Judicial Service Commission & Another* and *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* dealt with recusal of some of the judges handling the matter, and therefore are inapplicable to the facts hereof, the case of *Commissioner of Investigations and Enforcement v Ahmed* involved a situation where an advocate had in fact sworn an affidavit on behalf of the client. Thus, the third authority is somewhat distinguishable from the facts presented herein. And, as was pointed out by Mr Eredi, the application raises only one issue, namely, whether the firm of Wambugu & Muriuki Advocates is conflicted in the matter.
10. The background facts are not in dispute. The parties are essentially in agreement that, on the instructions of the respondent, the firm of Wambugu & Muriuki Advocates wrote a letter of complaint dated June 26, 2020 to the DCI seeking that investigations be initiated into allegations of fraud against the 1st applicant in connection with an agreement for sale of land known as Mombasa/Block XXV/169. A copy of the letter was annexed to the 1st applicant's Supporting Affidavit as Annexure PRKN-2. There is also no dispute that, as a result of that letter of complaint, investigations were carried out which gave rise to Mombasa Chief Magistrate's Criminal Case No. E989 of 2021: Republic v Stephens Kithi Ngombo.
11. In this suit the respondent seeks refund of some Kshs. 20,000,000/= that it paid to the 1st applicant in connection with the subject land sale agreement which was rescinded by the respondent. The respondent alleges negligence, fraud and misrepresentation. The applicants on their part counterclaimed, inter alia, damages for breach of contract and are of the posturing that the letter of complaint places the partners and advocates in the firm of Wambugu & Muriuki Advocates in a conflict of interest situation.
12. Rule 8 of the *Advocates (Practice) Rules*, is explicit 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...”
13. Nevertheless, Rule 8 does not entirely prohibit an advocate from giving evidence either orally or by way of an affidavit if such evidence is in connection with non-contentious issues. Accordingly, the proviso thereto states:

“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. The respondent explained, at paragraphs 7 and 8 of the Replying Affidavit that its advocates did not write the letter of complaint out of their own motion, but on its instructions, following a resolution by the company’s Board of Directors. An extract of the Board Minutes was annexed to the Replying Affidavit as Annexure “ZH-2” to confirm that assertion. In the premises, there can be no contention about the source of the complaint and the fact that the advocates merely effected the instructions of their client. In this regard, the analogy referred to by the respondent at paragraph 15 of the Replying Affidavit is apt. In civil suit, an advocate is not necessarily in a conflict of interest situation by merely issuing a pre-action demand notice to warrant disqualification.
15. Moreover, the impugned letter of complaint is attributed to one John K. Wambugu, as Managing Partner of Wambugu & Muriuki Advocates. Thus far, there is nothing to show that the said advocate is a witness either in this suit or in the Criminal Case. At any rate, no statement made by Mr Wambugu was brought to the attention of the Court to demonstrate that he is either a witness or a potential one in either of the pending matters. In the same vein, there is absolutely no indication that Mr Eregi, who is on record herein for the respondent, had any role to play in the issuance of the letter of complaint.
16. Further to the foregoing, it is instructive that for purposes of the Law Society of Kenya, its [*Code of Standards of Professional Practice and Ethical Conduct, 2016*](#) defines conflict of interest in Rule 6 thus:
- “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 interest or by the Advocate’s duties to another current client, former client or a third person.”
17. In this instance, it is not alleged that either Mr Eredi or any of the advocates practising in the firm of Wambugu & Muriuki Advocates have personal interests which conflict with the interests of either the applicants’ or the respondent’s interests in this matter; or that they are presently acting for another or former client in similar or connected matters. Certainly, it is not the case that counsel for the respondent has had instructions to simultaneously represent or act for either of the applicants in this suit or in the Criminal Case. Accordingly, the allegations of conflict of interest appear to not squarely meet the criteria envisaged by Rule 6 of the [*Code of Standards of Professional Practice and Ethical Conduct of the Law Society of Kenya*](#).
18. Indeed, in [*Serve in Love Africa \(Sila\) Trust v David Kipsang Kipyego & 7 others*](#) [2017] eKLR, it was held thus, in connection with Rule 8 of the [*Advocates \(Practice\) Rules*](#):
- “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 acts in a transaction in which his company or a company I which he is an associate is involved or has an interest; or where for some reason his own interests or an associate’s may conflict with his client’s, such as where he may be a material witness in his client’s matter...”



19. Similarly, the approach taken in *Guardian Bank Limited v Sonal Holdings (K) Limited & 2 others* [2014] eKLR by Hon. Gikonyo, J. which I find persuasive was thus:

“...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...”

20. The Court proceeded to hold that:

“Given the role of the concerned advocates and the nature of the claim herein, there is no possibility of conflict of interest arising herein as it has not been shown they have any particular personal interest which will collide with their fiduciary duties as advocates. The fraudulent intent on the part of the defendants will have to be established from other cogent evidence but not from the evidence of the advocates whose scope was limited to drawing and attesting to the Deeds herein.”

21. In the circumstances of this case, the respondent’s counsel merely conveyed the decision of the Board of Directors of their client to the DCI on the basis of which the Criminal Case was instituted. There being nothing to show that the advocate concerned is a witness either in the Criminal Case or this suit, I am far from convinced that conflict of interest has been demonstrated herein. In the premises, it is my finding that the application dated July 26, 2022 is utterly devoid of merit. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF JUNE 2023

OLGA SEWE

JUDGE

