



**M’rimberia & another v Kirigia (Sued as the Legal Representative of the Estate of Josephat Kirigia - Deceased) & 2 others; Meru Bakers Co. Limited (Affected Party) (Miscellaneous Civil Application E023 of 2024) [2024] KEHC 14607 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14607 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E023 OF 2024  
EM MURIITHI, J  
NOVEMBER 21, 2024**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE  
A DERIVATIVE ACTION ON BEHALF OF MERU BAKERS CO. LTD**

**BETWEEN**

**M’TEA M’RIMBERIA ..... 1<sup>ST</sup> APPLICANT**

**JAPHET MBAE RUTERE (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF STEPHEN RUTERE M’IKABU) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**LABAN KIRIMI KIRIGIA (SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF JOSEPHAT KIRIGIA - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH GITONGA M’ITHINJI (SUED AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF FREDRICK M’ITHINJI - DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

**ANDREW MWIRIGI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MERU BAKERS CO. LIMITED ..... AFFECTED PARTY**

**RULING**

1. By a Notice of Motion dated 22/4/2024, brought under Articles 10, 50 of *the Constitution*, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Section 55 of the *Advocates Act*, Section 134 of the *Evidence Act*, Order 51 of the Civil Procedure Rules, Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct and all other enabling provisions of the law, the Applicants seek that:



1. The firm of Muia Mwanzia & Co. Advocates and any advocate practicing in the said firm of Advocates, be disqualified from acting for the Respondents, especially the 2<sup>nd</sup> Respondent, in this case.
  2. This Honorable Court be pleased to order that the Notice of Appointment dated 8<sup>th</sup> April 2024 together with a Preliminary Objection of an even date be and are hereby struck out from record.
  3. The costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Japhet Mbae Rutere, the 2<sup>nd</sup> Applicant herein, sworn on even date. He avers that the firm of Muia Mwanzia & Co. Advocates has accepted instructions to act for the 2<sup>nd</sup> Respondent by filing a Notice of Appointment dated 8/4/2024 and a Preliminary Objection of even date. The said firm of advocates acted for the affected company, Meru Bakers Co. Ltd against the deceased Respondents, now represented by their legal representatives in Meru H.C Case No. 112/1996, a matter which in part touches on some aspects of the derivative suit he intends to file for and on behalf of the affected company to protect the interests of its members against the Respondents' actions. He is aware that the said firm of advocates has come in possession of confidential and privileged information while receiving instructions in both Meru HC No. 112/1996 and Meru HC No. 165/2001, which information may be consciously or unconsciously used in this case. Therefore, the said firm of advocates cannot purport to act for the adversary party in a claim where such earlier information obtained from the former client may be employed in defending this claim, including but not limited to the wrangles between members of the affected company. He is advised by his counsel on record that the representation of the 2<sup>nd</sup> Respondent by the firm of Muia Mwanzia & Co. Advocates would be in violation of Rule 6 of the LSK Standards of Professional Practice and Ethical Issues and Principle 4 of the Principles of Professional Practice and Ethical Conduct for Advocates. In or about 2016, the said firm of advocates unceremoniously and without informing the affected company and/or its members jumped ship and instituted Meru ELC Case No. 172/2016 despite knowing too well that it was conflicted on the subject matter. The right to a legal counsel of one's choice cannot outweigh the public interest in this case by ensuring that trust and confidence in the legal profession is not undermined by allowing the said firm of advocates to continue acting for the 2<sup>nd</sup> Respondent. Further, no prejudice shall be occasioned on the 2<sup>nd</sup> Respondent if the application is allowed, as he will have a chance to retain another counsel, if he so wishes.
3. The 2<sup>nd</sup> Applicant swore a supplementary affidavit on 6/7/2024 in support of the application.
  4. The 2<sup>nd</sup> Respondent opposed the application vide his replying affidavit sworn on 24/6/2024. He avers that the firm of Muia Mwanzia & Co. Advocates has been acting for him in Meru ELC No. 172/2016 from its inception to its conclusion on 4/10/2023, where the Respondents have preferred an appeal which is yet to be heard. He filed the said case long after the conclusion Meru HCC No. 165/2001 and Meru HCC No. 112/1996 involving his father and Meru Bakers, which suits were concluded before 28/1/2008 before an application for review of the judgment was declined. Having obtained judgment in Meru ELC No. 172/2016 in his favour, the Applicants have now filed this suit seeking leave to institute and continue a derivative action on behalf of the affected company, to try and wrestle the land from the estate now that he has succeeded. He appointed the very firm that represented him in the ELC suit due to the vigor and prowess of Mr. Muia Mwanzia, an advocate of his choice. He instructed the said advocate to file a preliminary objection to state the above facts which are within the knowledge of his adversary. Instead of the quest for justice taking the centre stage, this application has subordinated that important quest by trying to prevent him from engaging an advocate of his choice contrary to *the*



Constitution. The Applicants cannot be allowed to fight the preliminary objection by eliminating his counsel on record on matters which are in the public domain and there is nothing privileged about that.

5. The 2<sup>nd</sup> Respondent's advocate, Muia Mwanzia, swore a replying affidavit on 24/6/2024 in opposition to the application. He avers that on 20/12/2011, he was instructed by Joel Muriuki, Moses Kithinji, Kanata Manyara and Justus Kinoti to act for them in Meru HCC No. 112/1996 in place of the firm of Kiautha Arithi. He applied for reinstatement of that matter which had been dismissed by the court suo motto on 25/1/2001 for want of prosecution, and the application was directed to be heard by way of written submissions on 15/10/2015. When the persons who had instructed him came and collected their file from his chambers, he debriefed and never came into conduct with the matter. He came into conduct with HCC No. 165/2001 way back in 2002 when he was still working at the firm of Kiautha Arithi & Co. Advocates, and thus he does not hold any privileged information at all. The application is mischievous to come after he was instructed to file a preliminary objection for simply stating what is in the court file that the disputes were concluded. Despite the Applicants knowing that he was conducting ELC No. 172/2016, they did not raise an issue then over his appearances as there was no conflict of interest. There is more than meets the eye and it is not because there is conflict but the Applicants want to punish the 2<sup>nd</sup> Respondent by trying to debrief his counsel of choice to get even. The Applicants cannot be allowed to bring in their feelings over the case otherwise no counsel will ever work if the other side will feel intimidated to ask his disqualification without real mischief or prejudice.

### **Submissions**

6. The Counsel for the 1 & 3 Respondents did not wish to take a position on the matter and the counsel (as an officer of the Court) for the Intended Interested Party indicated that he did not support the application.
7. The Applicants urge that Mr. Mwanzia was retained by some members of the affected company to act for and in the interests of the affected company against Mr. Mwanzia's current client, and cite the locus classicus case on disqualification of Advocates by the Court of Appeal in King Wollen Mills Ltd (formerly known as Manchester Outfitters Suiting division Ltd) & Galot Industries v M/S Kaplan & Straton Advocate (1993) eKLR. They beseech the court to balance the 2<sup>nd</sup> Respondent's right to legal representation of his choice and the general duty to promote public trust and confidence in advocates while disclosing information to their advocates when instructing them, and cite the Court of Appeal case of Delphis Bank Ltd v Channan Singh Chatthe & 6 Others (2005) eKLR. They urge that Mr. Mwanzia's presence in this case risks real prejudice and mischief being occasioned against them, and cite Century Oil Trading Co. Ltd v Kenya Shell Limited (2008) eKLR and Uhuru Highway Development Ltd & 3 Others v Central Bank of Kenya & 4 Others (2003) eKLR. They submit that given Mr. Mwanzia's representation raises conflict situation and a real danger to breach of confidentiality, his firm of advocates should be disqualified from acting for the 2<sup>nd</sup> Respondent and/or any other Respondents in this case, and pray that any documents filed by the said firm be struck off the record accordingly. They urge that the cases cited by the 2<sup>nd</sup> Respondent in his submissions are distinguishable from this case and the cases they have cited resonate more with the case at hand. Fundamentally, they urge that letting Mr. Mwanzia proceed representing the 2<sup>nd</sup> Respondent against the interests of his former client, the affected company, where he jealously sought to recover the same property under litigation from his current client, would not sit well with the public trust that this court has for many years strived to promote and protect. They submit that there exists enough evidence that Mr. Mwanzia is in possession of confidential information and privileged communication belonging to the affected company, that if he is allowed to continue acting for the 2<sup>nd</sup> Respondent, he might end up either knowingly, wittingly or unwittingly using against the affected company causing great mischief and prejudice to the affected company and its members, including them.



8. The Counsel for the applicants, the 2<sup>nd</sup> Respondent and the Interested Party made oral submissions on their respective positions on the application, and ruling was reserved.
9. The 2<sup>nd</sup> Respondent filed a list of authorities dated 24/6/2024.

### **Analysis and Determination**

10. The singular issue for determination is whether the continued representation of the 2<sup>nd</sup> Respondent by Mr. Mwanzia will occasion great mischief and prejudice upon the Applicants. Put differently, the issue is whether there exists a conflict of interest between the 2<sup>nd</sup> Respondent and Mr. Mwanzia consequent to his previous engagement with the affected company.
11. In considering the question of disqualification on an advocate, this court respectfully notes the decision of the court (F.Gikonyo J.) in *Guardian Bank Limited v Sonal Holdings (K) Limited & 2 others* [2014] eKLR, as follows:

“What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that ‘these advocates participated in the drawing and attestation of the Deeds in dispute’; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say ‘I intend to call them as witnesses’. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be ‘their counsel’ in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in *the Constitution* as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. 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 real prejudice, then a disqualification of counsel will not be ordered.”



12. This court is further persuaded by *Dorothy Seyanoi Moschioni v Andrew Stuart & Another* (2014) eKLR, where the court (F. Gikonyo J.) emphasized that:

“... The mere fact that an advocate acted for both parties in an agreement subject of the proceedings, does not per se amount to conflict of interest. The party applying must show there is real possibility of the advocate concerned using the privileged information to the detriment of the said party and or to the advantage of the other party.”

13. Rule 6 of the LSK Standards of Professional Practice and Ethical Conduct provides that:

“The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to the client(s) and obtains the client’s consent.”

14. Rule 8 of the Advocates (Practice) Rules provides 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: 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.”

15. Whereas the Applicants contend that Mr. Mwanzia came into contact with privileged information in the course of his representation of the affected party, the said advocate admits having represented the affected party for a short stint but strongly denies being in possession of any privileged information.

16. In order to establish whether Mr. Mwanzia is in possession of any privileged information regarding his former client, the affected company, it is imperative to set out the points of law raised in the 2<sup>nd</sup> Respondent’s Notice of Preliminary Objection dated 8/4/2024 as follows:

1. That the intended action is time barred and therefore contravenes the provisions of Section 7 of the *Limitation of Actions Act* Cap. 22 Laws of Kenya as the registration into the deceased into the deceased names Fredrick M’Ithinji and Josphat Kirigia occurred on 9.12.2002 and a certificate of lease issued in their names on 20.1.2002.
2. That the intended action is res judicata Meru HCCC No. 165 of 1996.
3. That the action is intended against a non-existent company known as Meru Bankers Co. Ltd.
4. That the application is incompetent and an abuse of the court process.

17. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have equally raised a Notice of Preliminary Objection dated 18/8/2024 that:

1. The intended action is Res-Judicata Meru, HCCC NO. 165/2001, and Meru HCCC 112 of 1996 respectively.
2. The intended ill-fated action based on “fraud” is statute barred pursuant to Section 7 of the *limitation of actions Act* Cap 22 of the laws of Kenya and hence any action is in vain.



3. That the miscellaneous application herein offends Section 34 of the *Civil Procedure Act* as any intended action ought to have been in the original and or parent files of HCCC No. 165/2001 or 112/1996.
  4. The application herein is grossly incompetent and amounts to the gross abuse of the court process.
  5. The affected company is non-existent and or dead legally.
18. It is apparent that the points of law raised in those two Notices of Preliminary Objections, albeit by different parties at different times are predominantly similar and thus quite comparable.
19. This court is counseled by Court of Appeal in *Delphis Bank Ltd v Channan Singh Chatthe & 6 Others* (2005) eKLR, cited by the Applicants, on the instances when a litigant may be deprived of their fundamental right to legal representation by counsel of their choice 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.”
20. Indeed, in response to submissions by counsel for the 2<sup>nd</sup> respondent and Interested party, counsel for the applicants submitted that :
- “The standard is not the client must have disclosed to the advocate. The test is whether real mischief or prejudice will in all human probability occur. The standard is not whether confidential information has been disclosed. We contend that the advocate has confidential information or might have confidential information. The court should look at all human probability.”
21. It is not the law that because an advocate previously acted for a party, he must be taken to have come across privileged confidential information for which he must be barred from acting for other against the said party. The test is one of “real mischief or real prejudice”. The applicants may be chagrined that their previous counsel is acting for the enemy, so to speak. But chagrin is not the test. It cannot be correct as submitted by the applicants that as counsel previously acted for the party, “the advocate has confidential information or might have confidential information” and he must be stopped from acting against the party.
22. The real mischief or prejudice in all human probability must depend on the nature of information allegedly obtained or may have been obtained in the context of the nature of business in which Counsel



acted. Counsel for the applicants was unable to point out the real mischief or prejudice that in all human probability would occur if counsel for the 2<sup>nd</sup> Respondent acted in the matter, only saying that:

“Mr. Mwanzia’s presence in this case will affect how he applicants prosecute the case and will disorient them in prosecuting the appeal as there is likelihood that information in his possession, not necessarily filed in court, may be used against the applicants.”

23. The court finds that the information within the knowledge of Mr. Mwanzia and/or any counsel in his firm is public information in the public domain, as the record bears witness, especially the preliminary points taken on existence of judgment in rem on the matter in dispute. Moreover, if the matters raised in this application are res judicata, the strict consequence of law under section 7 of the Civil Procedure Act in barring the subsequent suit will apply regardless of the counsel on record for the 2<sup>nd</sup> respondent.
24. The court is hesitant to accede to the Applicants’ invitation to interfere with the 2<sup>nd</sup> Respondent’s right to fair hearing in civil disputes akin to the right in criminal matters under Article 50 (2) (g) of the Constitution to legal representation by counsel of his choice, because no evidence of any real mischief or prejudice on the Applicants has been led.

### Orders

25. Accordingly, for the reasons set out above, the court finds the Applicant’s application dated 22/4/2024 to be without merit and it is dismissed.

Order accordingly.

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Njindo for the Applicants.

Mr. Onderi for 1<sup>st</sup> & 3<sup>rd</sup> Respondents.

Mr. Mwanzia for the 2<sup>nd</sup> Respondent.

Mr. Thangicia for Intended Third Party.

