



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

MISC. APPLN. NO. 15 OF 2020

MURGOR & MURGOR ADVOCATES.....ADVOCATE/APPLICANT

-VERSUS-

KENYA PIPELINE CO. LTD.....CLIENT/RESPONDENT

RULING NO. 1

1. Before Court for consideration are two applications both filed by the Advocate/Applicant. They are Notices of Motion dated 12th October, 2020 and 12th November, 2020 respectively.
2. The Notice of Motion dated 12th October, 2020 seeks the following orders: -
 1. *That this application be heard in priority to the taxation of the Bill of Costs dated 15th April, 2020.*
 2. *That this honourable court be pleased to Order that PROF. GITHU MUIGAI, SC. and all other advocates practicing in the name and style of M/S MOHAMMED MUIGAI LLP, be and is hereby disqualified from representing the Client/Respondent in the matter herein.*
 3. *That the costs of this application be provided for.*
3. The application is supported by the Affidavit sworn by *Philip Kipchirchir Murgor*, SC on 12th October, 2020.
4. In opposition to the application, the Respondent filed Grounds of Opposition dated 12th November, 2020.
5. The prayers sought in the Notice of Motion dated 12th November, 2020 are as follows: -
 1. *That this application be heard in priority to the Bill of Costs dated 15th April, 2020.*
 2. *That this honourable Court be pleased to order that Stanley Manduku, be summoned for purposes of cross-examination on the matters deponed to in the Replying affidavit sworn on 26th August, 2020.*
 3. *That the costs of this application be provided for.*
6. The application is supported by two Affidavits both sworn by *Philip Kipchirchir Murgor*, SC on 12th November, 2020. They are a Supporting Affidavit and a Supplementary Affidavit respectively. The Supplementary Affidavit is in response to the Replying Affidavit sworn by *Stanley Manduku* on 26th August, 2020 in opposition to the Advocate/Applicant Bill of Costs dated 15th April, 2020.
7. The Respondent relied on the said Replying Affidavit sworn by *Stanley Manduku* on 26th August, 2020 in opposition to both the Advocate/Applicant Bill of Costs dated 15th April, 2020 and the Notice of Motion dated 12th November, 2020.
8. Both parties filed written submissions and made oral highlights.

9. I will first deal with the Notice of Motion dated **12th October, 2020**.

10. The Applicant raised six grounds in support of the application. They are contained in paragraph 5 of the Supporting Affidavit of Philip Kipchirchir Murgor, SC as follows: -

a. *The Senior Partner of the firm of M/s Mohammed Muigai LLP, Prof. Githu Muigai, SC. is the immediate former Attorney General of the Republic of Kenya having served in the said capacity from 29th August, 2011 until his resignation on 13th February, 2018.*

b. *During his service as the Attorney General, Principal Legal Advocate to the Government of the Republic of Kenya and the state Officer constitutionally authorized and mandated to represent the national government in Court and in other legal proceedings to which the national government is a party, Prof. Githu Muigai, SC. as the Hon. Attorney General, participated in the suit which is the subject of the instant taxation being High Court Petition No. 173 of 2014, after entering appearance for the 2 Respondent, the Public Procurement Oversight Authority, in a Memorandum of Appearance dated 23 April, 2014 and proceed to file a replying affidavit and submissions in the matter.*

c. *The position taken by the Attorney General evidenced by the documents filed in the High Court Petition No. 173 of 2014, show that the project undertaken by the Client/Respondent was valued at no less than 500 million USD.*

d. *Further, following the dispute that arose between the Advocate/Applicant and the Client/Respondent herein concerning the Advocate/Applicant's legal fees, the Client/Respondent's Board of Directors constituted an ad hoc Committee to look into the dispute, which Committee sought the legal opinion of Prof. Githu Muigai, SC as the Attorney General and the government's legal advisor on the issue of the Advocate/Applicant's legal fees*

e. *The said ad hoc Committee had several sessions, and requested Hon. Attorney General to give a legal opinion, which was finally provided by Prof Githu Muigai, SC the Hon. Attorney General vide his letter dated 3 August, 2015 which purportedly advised the Client/Respondent herein, that the Ksh 5,000,000/- offered by the Client/Respondent as full and final settlement was excessive in the circumstances and advised the Client/Respondent to continue with negotiations in the matter. This was communicated to the Advocate/Applicant in a letter from the Client/Respondent dated 3 July, 2017*

f. *In addition, under the State Corporations Act, the Attorney General is a member of Board of Directors of the Client/Respondent. It therefore follows that during the mate time, that is between 16th April, 2014 up to 13 February, 2018, Prof Githu Muigai, as the Hon. Attorney General was a member of the Board of Directors and was actively, intimately involved in the decision to appoint and replace the firm of M/s Ngatia & Advocates and instruct and appoint the Advocate/Applicant, and was thereafter a part the decision to refuse to pay the Advocate/Applicant*

11. The grounds were expounded in the submissions. The Applicant submits that *Rule 8 of the Advocates (Practice) Rules 1966* bars a Counsel from acting for a client on account of conflict of interest.

12. In a rejoinder to the Respondent's submission that a client has a right to equal protection and equal benefit of the law through representation by advocates of its choice as guaranteed under Article 27(1) of the Constitution, the Applicant submits that the right to representation is not absolute and it is curtailed by the aspect of conflict of interest.

13. The Applicant submits further that by dint of *Paragraph 13A of the Advocates (Remuneration) Order, 1962 Prof. Githu Muigai* is a witness in the matter capable of being summoned to testify by the Taxing Officer. The Applicant argues that Prof. Githu Muigai was a member of the Respondent's Board of Director's during his tenure as the Attorney General during which time instructions were issued to the Applicant to take over Petition No. 173 of 2014 which is the subject of the instant taxation. It is also contended that Prof. Githu Muigai rendered legal opinions to the Respondent on the quantum of the Applicant's outstanding legal fees. As such, the Applicant submits that there is an apparent conflict of interest as Prof. Githu Muigai is privy to the contentious issues between the Advocate and the Respondent.

14. The Applicant relied on *Delphis Bank Limited v. Channan Singh Chatthe & 6 Others (2005) eKLR, Guardian Bank Limited v. Sonal Holdings (K) Limited & 2 Others (2014) eKLR and Francis Mugo & 22 Others v. James Bress Muthee & 3 Others (2005) eKLR* in support of his submissions.

15. The Applicant prays that the Notice of Motion dated 12th October, 2020 be allowed as prayed.

16. The Respondent in opposition to the application submits that it has filed grounds of opposition which is a good rejoinder to the application.

17. The Respondent submits that it is possessed of the right to representation by a Counsel of its choice and that the right is sacrosanct and must be recognized and respected. The decisions in *Mohan Galot & 5 Others vs. Kenya National Capital Corporation Limited (2016) eKLR* and *William Audi Ododa & Another vs. John Yier & Another, CA NO. Nai 360 of 2004 (UR)* were referred to in support of the submission.

18. On whether Prof. Githu Muigai, SC and the rest of the Advocates in the firm of Mohammed Muigai LLP should be disqualified from appearing in this matter, the Respondent contends that the definition of conflict of interest provided for in Black's Law Dictionary and the conditions discussed in *Guardian Bank Limited v. Sonal Holdings (K) Limited* case (supra) are not demonstrated in the matter.

19. On the standard of proof in respect of the issue of conflict of interest, the Respondent submits that a party must not only allege such, but should adduce evidence in support of such allegation as stated in *British-American Investments Company Limited (K) Limited v. Njomaita Investments Limited & Another (2014) eKLR* among other decisions.

20. Resulting from the foregoing, the Respondent contends that the Applicant has not demonstrated how Prof. Githu Muigai is a potential witness in the current taxation proceedings and that the allegation of conflict of interest is not proved.

21. It is further vehemently submitted that the Attorney General did not appear for the Respondent in Petition No. 173 of 2014. It is also submitted that Prof. Githu Muigai neither appeared nor participated in the proceedings in Petition No. 173 of 2014 in his capacity as the Attorney General since PPOA was represented by a duly designated officer pursuant to Section 4(1) as read with Section 14(1) and (2) of the Office of the Attorney General Act No. 49 of 2012. As such, it is contended that the firm of Mohammed Muigai LLP as well as Prof. Githu Muigai did not file any documents in the taxation proceedings.

22. In its further submissions, the Respondent avers that neither the Applicant nor his firm were, at any time, represented by the Office of Attorney General in Petition No. 173 of 2014.

23. The Respondent further submits that all the information on the matter is already before Court and the issue of privity of information does not arise. It is argued that the issue of conflict of interest is imaginary and a way to delay the matter given the Respondent's position that the bill be taxed at Kshs. 350,000/=. It is also argued that any allegation of unethical conduct can only be taken before an appropriate forum and not in this matter.

24. In the end, it is submitted that even if this Court finds that Prof. Githu Muigai be disqualified from these proceedings there is no basis which has been laid for all the Advocates in the form of Mohammed Muigai LLP to be disqualified.

25. The Respondent prayed that the application be dismissed with costs.

26. The Notice of Motion dated 12th October, 2020 is made pursuant to Section 1A, 1B & 3A of the Civil Procedure Act, Rule 8 of the Advocates (Practice) Rules 1966, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

27. **Rule 8** of the **Advocates (Practice) Rules 1966** states 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, 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.

28. Courts have on several occasions dealt with the above issue. The Court of Appeal in Civil Appeals 286 of 2001 & 15 of 2002, **Uhuru Highway Development Ltd & 3 others v Central Bank of Kenya & 4 others** [2003] eKLR pointed that disqualification of an Advocate may occur where there is an Advocate-Client relationship. In ascertaining whether there is such a relationship, the Court stated as follows: -

Whether the plaintiffs were the counsel's client may be discerned from a careful consideration of the correspondence on record. A careful consideration of the same is, of course, required.

29. The Court went further and dealt with **Section 9** of the **Advocates Act**, Cap. 16 of the Laws of Kenya which prohibits an Advocate from appearing before any Court or Tribunal in a matter which the Advocate may be required to give evidence. The Court observed as follows: -

The counsel being the author of the charge may know much more behind the charge than is apparent on the charge and is bound to use that knowledge against the plaintiffs, his former clients. The suspicion is well-founded.

We have no doubt whatsoever in our minds that in the particular circumstances of this case, mainly due to the role played by the counsel in bringing about the 1st and the 2nd plaintiffs to agree to sign the charge, he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge.

30. On the subject of conflict of interest, the Court of Appeal in **King Woolen Mills Ltd & Another vs. Kaplan and Straton Advocates** (1990-1994) EA 244 observed as follows: -

An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate.

31. Laying the test for disqualification of an Advocate, the Court of Appeal in **Delphis Bank Limited v. Channan Singh Chathe & 6 Others** case (supra) followed the decision in **Rakusen v Ellis, Munday & Clarke [1912] CH 831** and held 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. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human

probability result...

(Emphasis added)

32. On a party's right to be represented by a Counsel of own choice, the Court of Appeal aforesaid found that in as much as it was a constitutional right of a party to be represented by an Advocate of his choice that right could be put to serious test if there was a conflict of interest, *which could endanger the principle of confidentiality in an Advocate/Client fiduciary relationship or where an Advocate could also double up as witness.*

33. Speaking of real mischief and real prejudice, the Court in **Rakusen v Ellis, Munday & Clarke (supra)** stated as follows: -

... but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act...

34. In **Charles Gitonga Kariuki v Akuisi Farmers Co. Ltd** [2007] eKLR the Court dealt with the subject of conflict of interest as follows: -

.....The fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest. The applicant was required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a possibility that a conflict of interest would arise where the advocate is allowed to act for the opposing party against such a litigant.....

35. In calling for an Advocate to cease acting for a party, it may be alleged that an Advocate or a firm of Advocates acted for one of the parties and is in possession of confidential information. In such a case, the averment should not be general. The principle was discussed in **Re a firm of Solicitors** [1995] 3 ALL 482, at page 489 as follows: -

... on the issue whether the solicitor is possessed of relevant information, it is in general not sufficient for the client to make general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required....

36. There are also instances where only some of the Advocates in a firm may be liable to disqualification. In **National Bank of Kenya Limited v. Peter Kipkoech Korat & Another** [2005] eKLR the High Court stated as follows: -

...even in a situation where the firm was actually acting for the opposite party, disqualification of the entire firm may not be required.....

37. The Law Society of Kenya developed a *Code of Standards of Professional Practice and Ethical Conduct, 2016* (hereinafter referred to as the '**2016 Code**'). The 2016 Code defines *conflict of interest* in Rule 6 paragraph 96 as follows: -

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 interests or by the Advocate's duties to another current client, former client or a third person.

38. Rule 6 paragraph 95 of the 2016 Code states 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 both clients and obtains their consent.

39. Rule 6 paragraph 99 of the 2016 Code enumerates instances in which a conflict of interest might arise. They include: -

(a) Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;

(b) Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.

(c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.

40. The above can be summed up in the words of *Musinga, J* (as he then was) in **Francis Mugo & 22 Others v. James Bress Muthee & 3 Others** case (supra) while allowing an application for disqualification of a Counsel where the Counsel had drawn a lease for one of the parties and appeared for the opposite party in a subsequent suit. The Learned Judge, correctly so, stated that the Counsel was a potential witness in the suit. The Judge further expressed himself as under: -

While I agree that the choice of counsels is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office an advocate he has duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by Richard Du Cann in "THE ART OF THE ADVOCATE." As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth.

41. From the foregoing, the following are some of the general principles guiding the disqualification of Advocates from appearing for a client in a matter: -

(i) The basis upon which a Court disqualifies an Advocate from acting arises from the need to protect the interests of administration of justice. Whereas it is understood that choice of Counsel is an entitlement of a party, such Counsel must always bear in mind that he/she becomes an officer of the Court and as such owes an allegiance to a higher cause (justice and truth) than serving the interests of the client.

(ii) Disqualification of an Advocate is only desirable in contentious matters and where there is or was an Advocate-Client relationship;

(iii) It must be apparent that the Advocate sought to be disqualified will be required as a witness to give evidence in the matter;

(iv) It is desirable that when the principle of confidentiality in an Advocate/Client fiduciary relationship will be prejudiced or where there is a possibility of real conflict of interest, then an Advocate sought to be disqualified ceases to appear in the matter;

(v) The fact that an Advocate acted for a litigant does not, *per se*, lead to a situation of conflict of interest;

(vi) Conflict of interest is an issue of fact which must be proved by way of evidence;

(vii) It is not a requirement that in a situation where a firm of Advocates acted for the opposite party all the Advocates in the firm be disqualified from the matter. In such an instance, only the Advocates who are in possession of confidential information relevant to the matters in issue before Court or Tribunal may be called upon to cease from appearing in the matter;

42. I will now apply the above general principles to the case at hand.

43. The disqualification is sought mainly on three fronts. *First*, that Prof. Githu Muigai, SC, then serving as the Hon. Attorney General of the Republic of Kenya, acted as a Counsel in High Court Petition No. 173 of 2014 which matter is the subject of the instant taxation. *Second*, that Prof. Githu Muigai, SC served as a member of the Board of Directors of the Respondent during the time the Respondent dealt with the matter subject of the taxation herein. *Third*, that Prof. Githu Muigai, SC offered his services to the Respondent in the matter subject of the instant taxation while serving as the Government's Chief Legal Advisor.

44. Resulting from the aforesaid, the Applicant contends that Prof. Githu Muigai, SC, and by extension the firm of Mohammed Muigai LLP, are seriously conflicted in the matter and further that Prof. Githu Muigai, SC is a potential witness.

45. There is no doubt one *Muthoni Kimani*, a Senior Deputy Solicitor General, and not the Attorney General, appeared for the Public Procurement Oversight Authority in High Court Petition No. 173 of 2014. That is in line with Section 4(1) as read with Section 14(1) and (2) of the Office of the Attorney General Act No. 49 of 2012. Strictly speaking, therefore, the Attorney General *per se* did not appear in the taxation proceedings. Having said so, it is also important to note that the Senior Deputy Solicitor General appeared for the Public Procurement Oversight Authority and not the Respondent herein in the taxation proceedings.

46. The Public Procurement Oversight Authority is a distinct legal entity from the Respondent herein. Apart from the fact that the Public Procurement Oversight Authority and the Respondent herein were both sued as Respondents in Petition No. 173 of 2014, the Applicant has not demonstrated any other nexus between the two entities pointing to the unanimity between them.

47. The Applicant has, therefore, failed to demonstrate that there existed an Advocate-Client relationship between the Attorney General and the Respondent or the Applicant/Advocate in Petition No. 173 of 2014.

48. There is the other contention that the Attorney General was a member of the Board of Directors of the Respondent during the time the Respondent dealt with the matter subject of the instant taxation.

49. To me, the Hon. Attorney General, as a member of the Respondent's Board of Directors is one among equals in the Board. The common practice in the corporate world, and indeed the law, is that decisions by a corporate entity are made by way of resolutions of the majority Board members. It is neither alluded nor demonstrated that the Attorney General is the member of the Board who unanimously made the decisions relating to Petition No. 173 of 2014. Further, there is no evidence that it is Prof. Githu Muigai, SC who personally appeared in the Respondent's Board of Directors since the Attorney General has powers to delegate its authority. It is also worth-noting that generally the Respondent is usually represented by the Managing Director in Court.

50. The last contention is that Prof. Githu Muigai, SC offered his services to the Respondent in Petition No. 173 of 2014, the matter subject of the instant taxation, while serving as the Government's Chief Legal Advisor.

51. My response to the issue is that the alleged advice by the Attorney General is not part of the record. However, even if the Attorney General so offered the alleged advice to the Respondent herein, still the advice remained as such. I say so because on receipt of the advice, the Respondent through its Board of Directors had the opportunity to either accept or decline the same. The Board of Directors could even subject the advice to further input by other legal experts. In the event the Board of Directors accepts and adopt the advice, then the advice ceases to be such and translates to a resolution of the Board of Directors. It is, hence, the resolution which the Respondent acts on and not the advice.

52. It is also important to note that since the Attorney General was not the Advocate who appeared for the Respondent in Petition No. 173 of 2014 and that the alleged advice was not produced as evidence, then the contention that the Attorney General is a potential witness is without any basis.

53. The above brief discussion, hence, leads to the inevitable finding that the allegations that Prof. Githu Muigai, SC or the larger firm of Mohammed Muigai LLP in participating in this matter are in breach of the client's confidentiality or that Prof. Githu Muigai, SC may be called as a witness are not proved.

54. I will now deal with the other application, the **Notice of Motion dated 12th November, 2020**. As said, the application seeks an order for cross-examination of one *Stanley Manduku* on the matters he deponed to in the Replying Affidavit he swore on 26th August, 2020.

55. Paragraph 13A of the Advocates (Remuneration) Order, 1962 states as follows: -

For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.

56. In view of the above provision, it is the direction of this Court that the Notice of Motion dated 12th November, 2020 be dealt with by the Taxing Officer.

57. The foregoing enables this Court to bring the matter to an end. In sum, the following final orders do hereby issue: -

(a) **The Notice of Motion dated 12th October, 2020 be and is hereby dismissed with costs.**

(b) **The Notice of Motion dated 12th November, 2020 shall be heard before the Taxing Officer.**

(c) **This matter shall be fixed for directions before the Taxing Officer on 21st July, 2021.**

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF JULY, 2021

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Murgor, Counsel for the Advocate/Applicant.

Miss Ngige, Counsel for the Client/Respondent.

Elizabeth Wambui – Court Assistant