



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 28 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

PERRY MANSUKH KANSAGARA.....1ST RESPONDENT

VINOJI JAYA KUMAR.....2ND RESPONDENT

WINNIE MUTHONI MUTISYA.....3RD RESPONDENT

TOMKIN ODO ODHIAMBO.....4TH RESPONDENT

JACINTA WERE.....5TH RESPONDENT

WILLIEC OMONDI WERE.....6TH RESPONDENT

LYNNETE JEPCHIRCHIR CHERUIYOT.....7TH RESPONDENT

JOHNSON KAMAU NJUGUNA.....8TH RESPONDENT

LUKA KIPYEGEN.....9TH RESPONDENT

RULING

1. On 5th July, 2018, the Solai Dam broke its banks, and in its wake swept away Nyakinyua and Energy Villages. Forty Eight people were killed by flood waters. After investigations the state opened a prosecution against the nine interested partes herein in **Naivasha CMCC No. 977 of 2018**. The Respondent, Mr. Gordon Ogolla, acts as defence counsel to Jacinta Were, the 5th Interested Party. It is also not disputed that the Respondent also acts as counsel for some of the victims.

2. The proceedings which are the subject of this case were instituted by the state, which sought to transfer the said case to Nairobi from Naivasha Chief Magistrate's Court. It was during those proceedings that it came to light that Mr. Ogolla was acting for both the victims and for the 5th Accused therein who is the 5th Interested Party herein.

3. The application now before me is a Notice of Motion by the prosecution dated 21st November, 2018. It seeks that this court should disqualify Mr. Gordon Ogolla Advocate from participating in these proceedings on the ground of conflict of interest. The Applicant alleges that Mr. Ogolla has acted and is still retained by some of the Victims of the Solai Dam.

4. In the affidavit of Catherine Mwaniki in support of the application, she attaches the proceedings of 12th November, 2018 in the lower court criminal case. There, Mr. Ogolla is recorded stating:-

“Mr. Ogolla - I have also acted for the victims. And I always had a list of who they are.”

And Mr. Muteti for the prosecution is recorded as responding:-

“.....Mr. Ogolla acts for the victims so that is critical. I will be objecting to this further participation in this matter. There is a conflict of interest.”

5. Another representative for the victims, Mr Godfrey Otieno Onyango, **Chairman of the Justice and Environment Foundation** supports the prosecution’s application. Mr. Onyango states that his foundation is the 1st Petitioner in **Petition No. 13 of 2018 in the Environment and Land Court** against the 1st and 2nd Respondent/Interested Party. The Petition is filed as a class action by the victims and families of the victims of the Solai Dam Tragedy. According to him, they are all co-petitioners under Victims Protection Act, 2014.

6. Mr. Onyango asserts that Mr. Ogolla sought to block the Foundation’s counsel, Mr. Amunga from appearing for the victims and representing them in court on the ground that he had not provided a list of the victims the foundation represents. He further states that after the filing of the said petition, Mr. Ogolla and his law firm partner, Mr. Kipkoech, were reported by the Print Media on 22nd August, 2018 and several times thereafter as having sent four hundred demand letters to the 1st Accused/Interested Party’s company seeking compensation for the said Solai Dam Tragedy Victims.

7. He terms as a conflict of interest, Mr. Ogolla’s representation of the 5th Accused whilst also representing victims in the petition and in the criminal case; that such conflict is prejudicial to the interests of the Victims in both cases; that such conflict is covered by the Law Society of Kenya Code of Conduct and the Advocate Act.

8. Mr. Onyango attached a report by Standard Media marked “**G002**” in which Mr. Ogolla and his partner, Mr. Kipkoech, are reported to have moved to court over the Patel Dam tragedy in a suit filed by MCA Peter Mbae. The report states, inter alia:

“Dr. Mbae through his lawyers Kipkoech Ngetich and Gordon Ogolla, said there were six dams in the farm that were not in good condition and whose status needed to be known.”

9. In another newspaper dated.....report exhibited as “**G003**” the entitled Patel Dam Victims demand Kshs 500 million compensation from Patel, it is stated:-

“At least 400 victims of the Solai dam tragedy in Nakuru have written to the Director of the Patel farm requesting for an out of court settlement of the matter.

Through lawyers Gordon Ogola and Kipkoech Company Advocates, the victims have written individual demand letters to the Patel Farm director asking him to agree to an out of court settlement process that will culminate in the compensation of at least 400 victims affected by the tragedy.

In total the victims are demanding Kshs 500 million compensation from the Patels which they argue will cater for the lives, property, business and land cost as well as injuries suffered during the tragedy.”

10. In his replying affidavit Mr. Ogolla depones, inter alia, as follows:-

“5. That the Criminal Case 977 of 2018 is purely in respect to the victims who lost their lives.

6. That I have never been instructed or acted for any of the victims mentioned in Courts (sic) to XLVII in the charge sheet dated 5th July, 2018.

7. That all the defence counsels were supported with the Charge Sheet which contains the list of victims in respect of the charges before the court in Criminal Case No. 977 (sic) of 2018, and it is on that basis that I alluded to the fact that I have always had a list of victims.

8. That not all the victims of Solai Dam tragedy are complainants in this matter.

9. That the state and/or in particular Ms Catherine Mwaniki should be able to identify the victims that I am acting for in this matter if indeed they are there.”

11. Mr. Ogolla asserts that the term “Victim” is broad based and should be interpreted within the context of the proceedings; and that the application is mischievous brought in bad faith and is meant to deny the 5th Accused (5th Interested Party herein) of her right to counsel of her own choice.

12. At the hearing, Mr. Kinyanjui represented the prosecution and filed written submissions and authorities. Mr. Amunga appeared for the victims. Mr. Ogolla did not attend despite the fact that the hearing date was taken in open court.

13. The essential content of Mr. Kinyanjui’s submissions were adopted by Mr. Amunga. The case of the submission revolves around the concept of conflict of interest that ensues when an advocate is acting for two parties with adverse interest. He submitted that the court has the duty to ensure that proceedings before it attain the highest attainable professional and ethical standards. He noted that **Article 157 (ii) of the Constitution** obliges the DPP, when exercising his constitutional powers, to:

“...have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

On account of this obligation, the DPP filed the aforesaid application.

14. The prosecution submitted out that it is not in dispute that Mr. Ogolla was acting for both the 5th Interested (5th Accused person) and the victims in respect of the Solai Dam Tragedy. Under the **Victims Protection Act**, he submitted, **Section 2 (1)** defines “Victim” as follows:

“ ‘Victim’ means any natural person who suffers injury, loss or damage as a consequence of an offence.”

15. It was urged that Mr. Ogolla’s conflict of interest arose the moment he appeared to represent the 5th Interested Party (5th Accused) and at the same continued to represent the victims of the Solai Dam Tragedy. He argued that the right of choice of an advocate, as asserted by Mr. Ogolla, was not absolute. On this he cited **Halgryn -Vs- S [2002] 4 AU 5A 157** where the Supreme Court of South Africa considered **Section 35 (3) (f)** of the **South African Constitution** whose provisions are similar to **Article 25 (c) and 50 (2)** in our Constitution on the right to fair trial. The South African Supreme Court held:

“Although the right to choose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations.”

16. Close home, counsel referred to **Delphis Bank Ltd -Vs- Channan Singh Chatthe & 6 Others [2005] 1 KLR** where the Court of Appeal suggested that a party’s right to choice of counsel can be interfered with when it stated:

“In sum, there is no evidence before us, as there should be, for consideration before the drastic decision of interfering with a party’s constitutional right to counsel of his choice is interfered with.”

17. Mr. Kinyanjui relied heavily on **Rule 9 of the Advocates (Practice) Rules** and the case of **Republic -Vs- Silas Mutuma Marimi [2016] eKLR** as the foundation for his two pronged attack on the rationale for disqualifying Mr. Ogolla. **Rule 9 of the Advocates (Practice) Rules** provides for the situation where an advocate may be called as a witness and states:-

“9. 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 in formal or non-contentious matter of fact in any matter in which he acts or appears.”

18. In the **Delphis Bank Ltd** case (supra) the Court of Appeal identified the following principles on representation:

“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.” (emphasis supplied)

19. Mr. Godfrey Onyango annexed as “G004” relevant provisions **No. 82 to 87** on “**conflict of interest**” from the Advocates Code of Conduct. The date of the document was not indicated. However, the **2016 LSK Code of Conduct and Ethics for Advocates**, provides for conflict of interest in **Rule 6 paragraph 87 to 97**. I quote extensively from the said Code of Conduct whilst is relevant herein.

“87. Rule 6: 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.

88. 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.

89. Rationale for the rule: The Advocate’s ability to represent the client may be materially and adversely affected unless the Advocate’s judgment and freedom of action are as free as possible from compromising influences and the relationship between the Advocate and the client is not materially impaired by the Advocate acting against the client in any other matter.

90. Maintaining loyalty to clients promotes trust and confidence in the Advocate. Therefore, as a general rule, an Advocate should not knowingly assume or remain in a position in which a client’s interests conflict with the interests of the Advocate, the firm’s or another client. The Advocate should not represent a client if the representation involves a conflict of interest.

91. Situations in which a conflict of interest might arise 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.

92. *Additionally, a client is entitled to expect independent, unbiased and honest advice from the Advocate. Circumstances in which a Advocate's independence may be at risk of being compromised include:*

a. Getting involved in a business transaction with the client, such as a debtor- creditor relationship;

b. Acquiring an ownership, possessory or security interest in a property which is adverse to the client's interest in the same property;

c. Acquiring a financial interest in the subject matter of the case that the Advocate is handling; or

d. Having a personal or professional relationship with the adverse party or a close associate or family member of the adverse party.

93. *The rule as regards the need for professional independence applies to an Advocate in private practice as it does to in-house counsel, notwithstanding that in the latter case the advice is rendered to the employer. The objectivity and detachment of in-house counsel may however be compromised, understandably so, by the employer-employee relationship.*

94. *The Advocate is required to make a full and frank disclosure to the client when it becomes clear to the Advocate that there is a conflict of interest. This requirement is to enable the client make an informed decision about whether to have the Advocate act despite the existence or possibility of a conflicting interest. The Advocate should however nevertheless guard against acting for more than one client where, despite the fact that all parties concerned consent, it is clear that a contentious issue may arise between them or that their interests, rights or obligations will diverge as the matter progresses.*

95. *Further an Advocate who has acted for a client should not, in the same or a related matter, act against the client or otherwise act against the client where the Advocate might be at risk of using against the client information previously obtained from the client. It is not however improper for the Advocate to act against the former client in a fresh and independent matter wholly unrelated to any work the Advocate has previously done for that person.*

96. *The Advocate may act in a matter which is adverse to the interests of a current client provided that the matter is unrelated to any matter in which the Advocate is acting for the current client and no conflicting interest is present.*

97. *Accepting instructions and proceeding to act without making a disclosure of the existence of a conflict of interest amounts to professional misconduct. It would be good practice for the Advocate to ensure that the disclosure made, and the client's decision that the Advocate should continue to act despite the existence of a conflict of interest, are both in writing."*

20. From Mr. Ogolla replying affidavit, it is clear that he sought to distinguish general victims of the Solai Dam Tragedy from the victims contained in the list provided by the prosecution which was not disclosed to this court. He seemed to suggest that Criminal Case No. 977 of 2018 is only concerned with victims:

".....purely in respect to the victim who lost their lives."

This is an incorrect characterization, since those victims who died are not in fact all represented by him. Further the statutory definition of victims as much as broader and includes any person who suffered any loss, injury and damage as a result of the offence.

21. It has been shown from the press reports mentioned earlier that Mr. Ogolla is acting for at least four hundred victims of the Solai Dam tragedy who were seeking compensation. In addition, it appears from the lower court criminal proceedings in **CMCR No. 977 of 2018**, earlier referred to that he **"also acted for the victims. I always had a list of who they are"**. This, he appears to be acting for at least two categories of victims - those in the criminal case and numerous other not in the criminal case. He also indisputably acts for the 5th Accused/Interested Party herein.

22. Ultimately, the real question for determination in this application is whether in the circumstances herein the conflict of interest rules are applicable to disqualify Mr. Ogolla from acting in this matter.

23. In her affidavit, Catherine Mwaniki stated that Mr. Ogolla had access to the statements of the witnesses lined up by the prosecution. Further, that there is:

"....a real likelihood that mischief and injustice will be occasioned by the participation of the Learned Counsel (Ogolla) which cannot be ignored or downplayed and must be avoided since it had already occurred and it is anticipated that it will be continued."

24. In the proceedings of 12th November, 2018 in **CMCR No. 977 of 2018** exhibited to Ms Mwaniki's affidavit, Mr. Ogolla for the 5th Accused is recorded as making the following statements:

“An application for transfer should not be considered.....The application for transfer was meant to cramvent the undertaking to supply the proceedings..... I have offered an olive branch to the state to withdraw the case

On his part Mr. Amunga who had been finally “permitted to come on record as holding a watching brief for the Victims” by Narok High the court as seen in **DPP -Vs- Penny Mansukh Kansangara & 8 Others [2018] eKLR** at paragraph 6. Mr. Amunga in the said proceedings is recorded as stating:-

“Amunga: the same of victims we undertook to supply the list of the victims we represent.....I am here for the victims. (Our support of the application (for transfer) by the state.”

It was then that Mr. Ogolla also stated that he also acted for the victims.

25. From the above exchange it is palpable that there is clear evidence of conflict of interest at two levels. First, and less critically, there is conflict of interest in representation of the victims as between Mr. Ogolla and Mr. Amunga who is formally on record for victims; second and most critically there is conflict of interest between the representation by Mr. Ogolla acting for the 5th Accused where he opposes the application for transfer and the support accorded to the same application by Mr. Amunga who is formally on record for victims. Mr. Ogolla in his speech in fact omits to make any representation at all regarding the position of the victims that he represents. As such, there is a further salient conflict of interest, which is that of failure to represent the victims on the matter in issue even after he had expressly acknowledged that he was acting for the victims. This counts to the victims' prejudice, as all his concentration is focused on the 5th Accused.

26. Similarly, I see on record a pending application for transfer by the prosecution dated 12th November, 2018. Mr. Ogolla has filed the 5th Accused's/Respondents grounds of opposition dated 23rd November, 2018 to the said application. In his said grounds he said nothing about the victims who he claims to represent. Further, he has not filed a separate pleading on behalf of the victims he represents in answer to the said application. In my view this counts to the prejudice of the victims.

27. Finally, the difficulty of Mr. Ogolla's position in the criminal case shows through in his replying affidavit filed on 28th November, 2018 in response to the present application. At paragraph 6 he states:-

“6. That I have never been instructed or acted for any of the victims mentioned in the counts (sic) to XLVII in the charge sheet dated 5th July 2018.

The charge sheet identifies the forty eight (48) complainants who were killed in the Solai Dam tragedy and for whom he states is prosecuting the accused persons as perpetrators of offences leading to their deaths. For which victims then did Mr. Ogolla state he was acting in the proceedings in respect or whom he had a list? And for which victims do the newspaper reports allege to him to be acting and seeking compensation.

28. In **Yunes Boera Nyamwange & 2 Others -Vs- Rhoda Montana Ondoro & 5 Others [2017] eKLR** which was cited by Mr. Ogolla, it was held by **Mutungi J** that:

“An advocate cannot be barred from representing a party on flimsy grounds and/or on some unsubstantiated grounds. The applicants have failed to demonstrate that they passed to Mr. Bosire Gichana advocate any information on the subject matter which the advocate could use to their prejudice and/or detriment and for the benefit of the Plaintiffs.”

I agree with the principle that an advocate cannot be lightly barred from representing a party on flimsy grounds. What is disclosed in the foregoing, however, is not flimsy but concrete and are examples of neglect of one party, the victim, as against the 5th accused.

29. In **Republic -Vs- Silas Mutuma Marimi & 2 Others [2016] eKLR Odera J** allowed a disqualification in a case where it was alleged that Mr. Ogolla would be acting mythically in ailing for the accused in a case where his firm Gordon Ogolla Kipkoech & Co. Advocates had previously been engaged by the family of the deceased to hold a watching brief for them. The Learned Judge stated:

“This is a murder case. It is a serious matter. The nature of the charge is a factor which further serves to persuade me that the application sought is merited. Even the slightest risk of any prejudice or appearance thereof to any party must be awarded.”
(Emphasis supplied)

30. The forecast case before me appears to raise more than the slight risk of prejudice or appearance thereof, particularly to the victims. It will be impossible, in my view to avoid such prejudice so long as Mr. Ogolla.

31. In **King Mills Ltd** (formerly known as **Manchester Outfitters Sorting Division Ltd**) and another -Vs- **M/s Kaplan & Stratton Advocates [1993] eKLR** the Court of Appeal cited **Sir Nicholas Browne - Wikenson VC's** summation of the English law on the matter of disqualification of counsel as stated in **Supasave Retail Ltd -Vs- Coward Chance & Others [1991] 1 ALLER pg. 668**. There, it was determined:

The law is laid down that each case must be considered as a matter of substance on the facts of each case.Cozens

Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will in all human probability result of the solicitor is allowed to act.....As a general rule the court will not interfere unless there be a case where mischief is rightly anticipated.”

32. It is also a matter of great concern to me, in the present case, that that rule of the Advocate Code of Conduct is and continues to be at great risk of being violated. Paragraph 89 Rule 6 and especially paragraphs 88, and 91 are, in my view examples of ethical rules liable to be violated by Mr. Ogolla in this case. They provide as follows:

“88. 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.

89.;

90.;

91. **Situations in which a conflict of interest might arise 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.”

33. Mr. Ogolla is an Advocate practicing in this court and in terms of **Section 55 of the Advocates Act** he is:

“.....an officer of the court and shall be subject to the jurisdiction thereof, and subject to this Act, to the jurisdiction of the Disciplinary Tribunal.” (emphasis supplied)

As argued by the applicant and upheld in the case of **Amina N Rosa & 3 Others -Vs- Republic [2016] eKLR**, issues of professional conduct are a concern of the court. There, the court stated:

“The court has, therefore, jurisdiction to enforce professional conduct of advocates appearing before it in any matter.” (emphasis supplied)

34. It was well put in the **Amina N Rosa case** by **Muriithi J** when he stated:

“It cannot be argued that the advocate should stay on for one accused person when he had confidential information on the other accused person whom he previously represented and whose defence conflicts with the defence of the complainant in a criminal case on a matter which is the subject of the criminal case because he already has confidential information received by him as counsel for the complainant. His previous confidential employment by the complainant removes him from the list of eligible counsel from whom the accused may choose their advocate in the case.”

35. The similarity of the situation in **Amina Rosa’s case** with the present case becomes apparent when one looks at the requirements of representation of Victims. Under Section 2 of the definition of “Victim” read with Section 13 of the Victim Protection Act, it is recognized that a victim may or may not be a complainant. A victim’s representative is under Section 2 a person designated by a victim or appointed by the court:

“to act in the best interests of the victim.”

Under **Section 4(b) and (k) of the Victim’s Protection Act** every victim must as far as possible be given an opportunity to be heard and to respond before any decision affecting him or her is taken, the victim must not be discriminated.

36. I have already pointed out instances where the victims represented by Mr. Ogolla were discriminated or prejudiced by non-representation, in favour of his presentation of the 5th Accused/Interested Party. The situation will, in my view continue to snowball in favour of or against the victims and conversely for the 5th Accused as the criminal case goes deeper into the hearing. If that happens the propriety of the whole trial stands to be jeopardized.

37. Now is the time to cut off and bring to a halt any possible jeopardy to the trial. I am satisfied that Mr. Ogolla must be disqualified from these proceedings either as acting for the victims or acting for the 5th Accused/Interested Party. He cannot continue to act for both.

38. This court will not decide which party he must cease acting for. He must himself make the election to act either for the 5th Accused or for the Victims. He cannot in good conscience act for both. Likewise, the court will not be fairly and justly exercising its judicial authority if it permits him to act for both the victims and the accused. The former are more like complainants, the latter is a Defendant. The balance of professional ethics is tight and the likelihood of professional misconduct too high in a criminal case as serious as the present one.

Disposition

39. In conclusion the court hereby directs as follows:

- a. That Mr. Ogolla shall forthwith elect to act for one or the other of the victims or accused, but not for both.
- b. Alternatively, Mr. Ogolla may elect, in the circumstances of this case to act for neither of those parties.
- c. In any event the election shall be formally reported to the court in a written form, by application with an affidavit, notified to all parties within seven (7) days of the delivery of this Ruling.

40. Orders accordingly.

Dated and Delivered at Naivasha this 14th Day of February, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Koima holding brief for Awiti for the Applicant
2. No Representation for Respondents
3. Court Clerk – Quinter Ogutu