REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 333 OF 2017

STANLEY NGUGI KINUTHIA.....PETITIONER

VERSUS

HON. ELIUD MATU WAMAE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

NEW PUBLIC CO-OPERATIVE CREAMERIES LIMITED.....INTERESTED PARTY

RULING

1. In the application dated 16th January 2018, the 1st respondent/applicant seeks orders *inter alia* that:

> **a. Muriu Mungai & Company advocates (hereinafter "the Advocates") on record for the petitioner be restrained from representing the petitioner: and**
>
> **b. The documents filed by the firm the advocates on behalf of the petitioner in this court be struck out of the record.**

2. The application is supported by the applicant's affidavit sworn on 8th January 2018 wherein he avers that, having acted for the applicant, and the interested party during the period between 2005 and 2007 when the applicant was the interested party's chairman, the firm of Muriu Mungai & Company Advocates obtained privileged information and should therefore be restrained from acting for the petitioner in the instant petition that he has filed against the applicant and the interested party.

3. The applicant's case is that there exists a continuing duty of confidentiality owed by the said advocates to the applicant and the interested party while at the same time the said advocates have a duty of loyalty to the petitioner. He further states that he is apprehensive that the information he shared with the advocates in the past, will be used against him as long as the said advocates continue to act for the petitioner. He adds that it is trite law that that an advocate should not act in a case where he is likely to be called as a witness and maintains that the documents filed on behalf of the petitioner through the said advocate will prejudice him unless they are struck out of the court's record.

4. Mr. **Mwiti**, learned counsel for the applicant/1st respondent, submitted that the advocates had a near client relationship with the applicant. He referred to the case of **Simmons & others vs. Government of Prince Edward & Others 2006 PESCTD 09** wherein it was held that where there is a close association, the case should be treated as that of near client. In illustrating the claim that there was a close association between the advocates and the applicant, counsel drew the court's attention to the fact that the advocates had attached the applicant's national identity card to the petition. He argued that the respondents' claim that the national identity card was not a confidential document and was only used to prove age was not a valid claim as age was one of the contested issues in the petition. He observed that the respondents had not controverted the fact that the applicant's national identity card was obtained by the advocates in the course of their client/advocate relationship with the applicant.

5. Counsel relied on the decision in the case of **Kings Woolen Mills vs Kaplan & Stratton [1993] e KLR** wherein the Court of Appeal emphasized that any information obtained from a retainer is confidential information and that the advocate cannot use information obtained from a retainer in any way against a former client.

6. On the test applicable in establishing the existence of a confidential relationship, counsel referred to the case **of MacDonald -vs- Martins [1990] 3 S.C.R. 1235** where the court expressed itself on the 2 questions to be answered as:

1. Did the lawyer obtain confidential information and

2. Is there a risk that it may be used against the client?

7. It was the applicant's contention that the respondent did not deny that the advocates obtained confidential information from the retainer. The applicant cited the case of **Analytica vs. NPD Research Inc 708 F. 2d 1263(7th cir 1983)** wherein Posner J. stated that the substantial relationship test and held that where there is clear relationship given during the retainer and the current case, then there is an irrebuttable presumption on that the information will be used against the client and the court will presume that the client will be prejudiced by such information.

8. Counsel further relied on the **MacDonald's** case (supra) and argued that no amount of assurance or undertaking can satisfy the court as there is always the inherent prejudicial effect of a lawyer acting against a former client and that mere appearance of unfairness is enough to bar the lawyer from acting. The applicant's case was that no matter how slight the interest may be, even the slightest information may warrant the removal of an advocate and the general rule is that an advocate may not act against a former client without his consent no matter how slight the information may be.

9. Counsel urged the court to abandon the test set in the case of **Rukusen vs. Ellis, Munday & Clarke [1912] CH 83** which had been criticized on many occasions and instead adopt the test set in the **MacDonald's case** (supra).

The respondent's case

10. The respondent opposed the application through the replying affidavit of **Daniel Musyoka** dated 13th February 2018 wherein he confirms that there was an advocate client relationship between the advocates and the interested party. He states that the instant petition challenges the selection and appointment by the President, of the 1st respondent/applicant as the chairperson of the interested party on the basis that such an appointment can only be done by the Public Service Commission, and that therefore, the petition does not in any way relate to the work done by the advocates on behalf of the interested party.

11. He further states that the mere fact that there existed an advocate/client relationship between the interested party and the advocates does not in itself bar the advocate from acting against such a party as there was no valid reason to deprive the petitioner of his right to be represented by an advocate of his choice. He also faulted the applicant for failing to disclose the nature of the confidential information obtained by the advocates that would prejudice the applicant or cause the advocates to be called as witnesses in the petition.

12. At the hearing of the application, **Mr. Rotich**, Learned counsel for the respondent submitted that the applicant had not stated that the advocates will be called as witnesses in the petition in line with the provisions of **Rule 8** of **the Advocate Practice Rules** so as to justify his claim that there would be a conflict of interest.

13. While conceding to the claim that there was an advocate/client relationship between the interested party and the advocates, counsel submitted that the instant petition does not relate in any manner whatsoever to the said client/advocate relationship or the work done by the advocates for the interested party as the petition challenges the appointment of the applicant on the basis that does not meet the constitutional threshold for appointment of public officers.

14. According to the respondents the petition also challenges the provisions of **Section 6(1)** and **6(2)** of **the State Corporations Act** and seeks the interpretation the powers of the President under Article **132(2) of the Constitution.** Counsel urged that all the documents that are relied upon in challenging the applicant's appointment are documents in the public domain and are therefore not confidential. Counsel relied on the decision in the cases of **King Woolen Mills (formerly known as Manchester Outfitters Suiting Division Ltd) & Another vs M/S Kaplan & Stratton [1993] eKLR, Super Save Retail Ltd vs Coward Chances & others [1991] 1 ALL ER 668 and Charles Gitonga Kariuki vs Akuisi Farmers Company Ltd [2007] eKLR** wherein the different courts held that the mere fact that an advocate has acted for a client does not *per se*, lead to a conflict of interest and is not an absolute bar to acting against the client in the subsequent cases.

15. Counsel also relied on the decision in the case of **British America Investment Co. (K) Ltd vs. Njomaitha Investments Ltd & Another [2014] e KLR** wherein the court held that mere suspicion or fear of prejudice cannot stop an advocate from acting. He further submitted that conflict of interest can only be determined on a case by case basis and that in this case, the relationship between the interested party and the advocates was such that no conflict of interest could arise.

16. It was respondent's case that under Article 50 of the Constitution he had a right to be represented by an advocate of his choice and that it was only in instances where an advocate would be called as a witness or where there is real mischief that the advocate will be barred from acting. Counsel took issue with the timing of the instant application and observed that it was an afterthought having been filed long after the petitioner had filed submissions to the petition on 24th November 2017.

DETERMINATION

17. I have considered the application dated 16th January 2018, the respondent's response, and the party's submissions together with the authorities that they relied upon. I note that the main issue for determination is whether the firm of Muriu Mungai & Company Advocates should be barred from acting for the petitioner/respondent herein on the basis that it had acted for the interested party wherein the applicant was the chairman during the period between 2005 and 2007.

18. It was not disputed that the applicant was, during the said period (between 2005 and 2007) the interested party's chairman and it was further not contested, that the advocates acted for the interested party. It was also not disputed that during the period that the advocates acted for the interested party, they came across information including the applicant's national identity card that, according to the applicant, was

confidential in nature.

Rule 8 of the Advocates Practice Rules stipulates 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 or fact in any matter in which he acts or appears.*** *(Emphasis added).*

19. **Section 134** of **the Evidence Act** requires an advocate not to disclose communication made in the course of employment by or on behalf of his client with which he has become acquainted.

20. In the instant case, even though the respondent has faulted the applicant for filing the instant application late after the filing submissions to the petition, I note that at paragraph 4 of the Grounds of Opposition the applicant stated that:

> ***"The petitioner is being used by his advocates to settle scores with the 1st respondent and interested party, its former client who are pursuing recovery of substantial amount of monies being held by them in M.A. No. 799 of 2007, and want to derail the personal efforts of the 1st respondent in pursuing recovery of the said monies. The 1st respondent shall seek order for cross examination of one of the partners of the said firm at the appropriate time".***

21. From the above statement by the 1st respondent, it is clear to me that the 1st respondent had, from the very beginning of this petition, raised the issue of conflict of interest between himself, the advocates and the interested party by expressing his intention to call one of the partners in the advocates firm for cross examination as a witness and I therefore find that the petitioner's claim or position that the application does not satisfy the provisions of Rule 8 of the Advocates Practice Rules is incorrect. My take is that even though the court had given directions that the petition proceeds by way of written submissions, which the parties have already filed, judgment is yet to be delivered in the petition and for that reason, it cannot be said that it is too late for the applicant to apply to cross examine a partner in the advocates' law firm.

22. A critical look at the grounds listed in the applicant's grounds of opposition to the petition especially paragraph 4, which I have already highlighted in this ruling, shows that there may be underlying outstanding issues between the applicant and the advocates, which issues, the applicant claims, the advocates want to settle through that instant petition.

23. My take is that the claims by the applicant, which claim was not controverted by the respondent or the advocates sets this application on a different level from the mere fear that confidential information may be divulged to that of using the petition and the confidential information to settle old scores, a scenario which, I find, might cloud the real issues in contention in the petition if not addressed.

24. The advocate/ client privilege is one of the incidents of the retainer between the advocate and client that binds the advocate not to disclose information reposed in him or her during the period of the retainer. This nature of this privilege is set out in **section 134(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provides as follows: ***"No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment…"*** **(See also *King Woolen Mills & Another v Kaplan & Stratton Advocates* (supra))**.

25. In the present case the respondent did not deny the applicant's claim that the national identity card that they had attached to the petition was obtained by the advocates during their tenure as advocates for the interested party. Needless to say, the said identity card was used in the petition without the applicant's consent. In the face of the applicant's claim that the advocates are intent on settling old scores through the instant petition and having acted for the interested party and by extension the applicant, I find that the applicant's apprehension on the presence of the advocates in this petition is not without basis as there is no knowing, at this stage of the proceedings, how far the advocates may go in pursuit of the said old scores.

26. My further finding is that in the circumstances of this case, the applicant's apprehension that confidential information may be divulged by the advocates or be used to his disadvantage cannot be over looked. My take is that under ordinary circumstances, an advocate should be careful not to appear in a matter where their appearance may raise fears of conflict of interest by a former client except where it can be shown that the fears are unfounded or far-fetched.

27. In the instance case, I am satisfied that the applicant has demonstrated that the advocates have confidential information which they may use against him and the interested party in this case and the order that commends itself to me is an order to allow prayer (b) only of the application dated 16th January 2018. The costs of the application will abide the outcome of the main petition.

Dated, signed and delivered in open court at Nairobi this 19th day of September 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Wilson for the petitioner

Mr Mwiti for the applicant/1st respondent

Mr Wachira for the interested party

Court Assistant – Kombo