



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO 353 OF 2012

TOM KUSIENYA & OTHERS PETITIONERS

VERSUS

KENYA RAILWAYS CORPORATION & OTHERSRESPONDENTS

RULING

1.This Ruling relates to the objection by the petitioners to the firms of **Miller and Co. Advocates** and **Ochieng, Onyango, Kibet & Ohaga Advocates** from representing the 1st and 3rd respondents respectively. The objection is contained in the petitioners' Notice of Motion dated 24th September 2012.

2.In the said application, the petitioners seek at prayer 1 and 2, which are the subject of this ruling, the following orders:

1.That the firm of M/S Miller and Co. Advocates be stopped from acting for the 1st respondent or any other party herein by virtue of Rule 9 of the Advocates(Practice Rule, Cap 16 Laws of Kenya.

2.That the firm of M/S Ochieng, Onyango, Kibet & Ohaga Advocates be stopped from acting for the 3rd respondent or any other party herein by virtue of Rule 9 of the Advocates(Practice Rule, Cap 16 Laws of Kenya.

3.The petitioners pray that these orders be issued prior to the commencement of the hearing of this consolidated petition involving Petition No. 159 of 2012 and 353 of 2012 in which allegations of breaches of the constitutional rights of the petitioners are made. The Petitioners in Petition No. 353 of 2012 do not oppose the application which is opposed by all the respondents

4.Mr. K'Opere for the applicant submitted that the court should bar the firm of Miller and Co. and the firm of Ochieng Onyango Kibet & Ohaga Advocates from representing the parties they represent or any other party in this petition. The reasons for the application are that the petitioners were removed from being trustees of the Kenya Railways Staff Retirement Benefits Scheme by the Retirement Benefits Authority (RBA), the 3rd respondent in this matter, on the basis of a report which alleged improprieties in the manner in which certain properties belonging to the scheme were sold.

5. The transactions complained about and which led to the removal of the petitioners were, according to the petitioners, coordinated by the firm of Miller & Company Advocates which represented the Scheme while the firm of Ochieng Onyango Kibet & Ohaga Advocates represented the purchasers. The 2nd respondent was the Corporate and Pension Trust Services Ltd not party to the transaction, but their parent company, Alexander Forbes Financial Services Ltd, were the financial advisers of the Scheme. They submit that at the meeting at which the transactions were conceived, Mr Nduva Muli, the Managing Director of the 1st respondents, was present as a trustee; Mr. Olubayi, Chairman of Alexander Forbes was also present, as was a representatives from Miller & Co. Advocates and Ochieng Onyango, Kibet & Ohaga Advocates

6. The petitioners contend that one of the things that led to their removal was alleged overpayment of the legal fees of Miller & Co. Advocates. They therefore contend that the said firm cannot now properly represent the opposing side in the matter before the court. If it does, and they are accused of overpaying its fees, the firm or advocates from the firm would be vital witnesses.

7. The petitioners' also object to the representation of the 3rd respondent by the firm of Ocheing Oduol, Kibet & Ohaga Advocates. They contend that the report leading to their removal as trustees was prepared by the 3rd respondent, and the firm of Ochieng Onyango Kibet & Ohaga Advocates represented the purchasers of the property in question. Accordingly, they are barred by Rule 9 of the Advocates (Practice) Rules from representing any party in the matter as they would be witnesses when the issues in question are raised.

8. The petitioners relied on the decision of the Court of Appeal in the case of **King Wollen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd versus M/s Kaplan and Stratton Advocates Nairobi C.A. 55/93 and Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others Nairobi CA. Nai.136 of 2005 (76/05 UR)** in support of their case.

9. Mr. K'Opere termed as erroneous the contention by the respondents that the issue of representation must be dealt with as a right guaranteed under Article 50(g) of the Constitution. He maintained that the issue of representation must be guided by the Advocates Act, and that representation of a party must be by Counsel who does not have a conflict of interest.

10. In opposing the application, Ms. MacAsila for the 1st respondent submitted that there was no link between the facts of the transaction in question and this petition that would lead to the firm of Miller & Co. Advocates being called upon to give evidence in the petition; that it was not the jurisdiction of the court to examine the report of RBA or delve into transactions that have already taken place; that the jurisdiction of the court is to deal with infringements of rights as provided under Article 165; and that no infringements had been raised and so there would be no cause for the firms to be called as witnesses.

11. Ms. MacAsila contended that the provisions of Articles 50(2) of the Constitution guaranteed to everyone the right to a fair trial, which encompassed the right to choice of legal representation, which right cannot be taken away. She took the view that in any event, since the court had no jurisdiction to hear the petition, the firm of Miller & Co. Advocates is properly on record, and she asked the court to dismiss the application.

12. Mr. Muindi for the 3rd respondent agreed with Ms. MacAsila that the application should be dismissed. He submitted that Article 50(2)(g) on the right to a fair trial includes the right to choose an advocate of one's choice. He contended that Rule 9 of the Advocates Act (Practice Rules) has its roots in section 2 of the Advocates Act; that this section defines an advocate as a person, not as a firm. He concluded therefore that Rule 9 prevents the individual advocate from acting, not the entire firm. Mr. Muindi referred the court to the letters annexed to the affidavit of Daniel Owuor Obop sworn on 24th September 2012 which he submitted are from the firm of Ochieng Onyango, Kibet & Ohaga Advocates but are signed by different advocates from the firm. In his view therefore, only these two Advocates may be called as witnesses and would therefore be barred under Rule 9.

13. With regard to the cases relied on by the petitioners, Mr. Muindi contended that they were distinguishable: the Delphis case because, in his view, it did not support the petitioners' case; the King's Woollen Mills case because it related to information held by Counsel and the issue of conflict of interest would arise, which was not the case in the present petition.

14. Mr. Moshweshwe informed the court that as he represented the 2nd respondent in Petition No 353 of 2012, his client was not affected by the two prayers before the court and he therefore left the matter to the court.

15. I have considered the respective submissions of the parties in this matter. The petitioners allege, and this is not denied, that the firm of Miller & Co. Advocates acted in certain sale transactions for the Kenya Railways Staff Benefits Scheme, in which the petitioners were trustees, and in respect of which transactions the firm was paid sums of money which were queried in the RBA report that led to the removal of the petitioners as trustees. The firm or Advocates from the said firm also attended meetings of the scheme, and advised the trustees and members of the scheme as legal consultants.

16. It is also alleged, and again this is not denied, that the firm of **Ochieng, Onyango, Kibet & Ohaga** acted for the purchasers in a sale transaction in respect of one of the Scheme's properties, and that the firm or members of the firm were present at the meetings in which the transactions were negotiated. The petitioners also made various allegations with regard to the presence of Nduva Muli of the 1st respondent and Mr. Olubayi of Alexander Forbes, which is allegedly the parent company of the 2nd respondent, but as the objection before me is to the representation of the 1st and 3rd respondents by their respective counsels, I do not need to address the issue of the presence of the two officers at the alleged meetings.

17. The issue that I am called upon to determine, I believe, is whether the appearance of the firms of Miller and Company Advocates and Ochieng Onyango Kibet and Ohaga Advocates for any of the parties in this matter would breach the provisions of Rule 9 of The Advocates (Practice) Rules. Another issue, which is raised indirectly by the petitioners, is whether there would be a conflict of interest if the two firms of Advocates represented any of the parties in the matter.

18. The petitioners contend that as these firms of Advocates are potential witnesses, having been involved in all the transactions that give rise to this matter, they cannot act as advocates in the matter as they may be called as witnesses. They therefore ask the court to bar the two firms of Advocates from acting for any of the parties in this matter. The petitioners have relied on the case of **King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd versus M/s Kaplan and Stratton Advocates and Delphis Bank Limited -v- Channan Singh Chatthe and 6 Others (supra)**.

19. The legal basis of the petitioner's application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:

'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.'

20. From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in **Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others (supra)** observed 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 relationship or where the advocate would double up as a witness.

21. The court noted, however, that:

‘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.’

22. The court referred to these authorities as comprising **King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd –vs- Kaplan and Stratton Advocates (supra)**. In this case, in restraining Mr. Keith and any partner of the firm of Kaplan and Stratton Advocates from acting for the defendant in the matter or in any litigation arising from the loan transactions in question, the court applied the test established in England in the case of **Supasave Retail Ltd vs. Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER** where the court had observed that

"The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rakusen vs. Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 -1913) ALL ER Rep 813... The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself. 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 if 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."
(Emphasis added)

23. The decision of O’Kubasu, JA in **William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04)** is also instructive with regard to Rule 9 of the Advocates Act. In declining to bar an advocate from acting for some of the parties in the matter, O’Kubasu J stated at page 3 of his ruling as follows:

‘I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.’ (Emphasis added)

24. The Learned Judge of Appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the **Delphis Bank** and **King Woolen Mill** cases, Justice O’Kubasu observed at page 7 of his decision as follows:

‘The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters [section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.’ (Emphasis added)

25. I wholly agree with the sentiments expressed by the Honourable Judge in the above matter. Like the provisions of Section 77 of the former constitution, the words used in Article 50(2)(g) of the Constitution make it clear that the provision relates to criminal matters:

‘(2) Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;’

26. However, I believe that the right to legal representation by counsel of one’s choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2)(a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away.

27. Applying the test and reasoning in the above cases to the matter before me, is there any justification for barring the two law firms from representing their respective clients?

28. In the petition dated 15th August 2012, the petitioners in Petition No. 353 of 2012 seek, among others, a declaration that there is no Board of Trustees duly constituted for the Kenya Railways Staff Retirement Benefits Scheme; that the appointment of the 2nd respondent on 29th June 2012 is against the Trust Deed and Rules of the Scheme and null and void, that the current trust deed and rules of the Kenya Railways Staff Retirement Benefits Scheme as they related to a normal scheme are defective. They also seek an order that the 3rd respondent effects amendment of the defective trust deed and rules and also gets the Kenya Railways Staff Benefits Scheme to be operated as a closed scheme.

29. In Petition No. 159 of 2012, the petitioners seek, among others, a declaration that their removal from office without proper investigations violated their right to fair administrative action; that the haphazard manner in which the investigations were carried out without due notice to the petitioners is illegal and unconstitutional; that subjecting them to inspections by parties they were investigating for alleged fraud against the scheme and relying on the report by the inspectors was malicious, unfair, actuated by ulterior motive and therefore unconstitutional; that barring them from offering themselves for re-election as trustees is unconstitutional for contravening their right to participate in a free and fair democratic process; and a declaration that they are entitled to remain in office until their term of office expires, and that they are entitled to offer themselves for re-election.

30. Essentially, therefore, the matters before me relate to the constitutionality or otherwise of the petitioners’ removal from their position as trustees of the Kenya Railways Staff Retirement Benefits Scheme, and the manner of operation of the scheme. This matter is thus a constitutional petition in which the court is not required and cannot properly enter into, an examination of the facts and the merits of the decision leading to the removal of the petitioners, but only into whether the process of removal, or the process of appointment of the 2nd respondent, is in accord with constitutional due process.

31. The need to inquire into the facts surrounding the transaction in which the two firms of advocates were involved, or the report that gave rise to the removal, will not, in my view, therefore arise. There will therefore not be a need for the advocates in question to be called as witnesses in the matter. There is therefore no violation or likely violation of Rule 9 of the Advocates (Practice) Rules.

32. In addition, the issues that arise in this petition, which are constitutional in nature, do not give rise to the probability that any conflict of interest, and therefore any prejudice to the petitioners will occur. To use the words of Cozens-Hardy MR in cited above, I am not satisfied that in the present case, real mischief and real prejudice will, in all human probability, result if the firm of Miller & Company Advocates and the firm of Ochieng, Onyango Kibet & Ohaga are allowed to represent their respective clients in this matter.

33. In the circumstances, the application dated 24th September 2012 is hereby dismissed. Costs shall be in the cause.

Dated Delivered and Signed at Nairobi this 11th day of April 2013.

MUMBI NGUGI

JUDGE

Mr. K'Opere instructed by the firm of Ameyo Guto, Etole & Co. Advocates for the Petitioners

Mrs Mc Asila instructed by the firm of Miller & Co. Advocates for the 1st respondent

Mr. Mshweshwe instructed by the firm of Muthaura Mugambi Ayugi & Njonjo Advocates for the 2nd respondent

Mr. Muindi instructed by the firm of Ochieng, Onyango, Kibet & Ohaga & Co. Advocates for the 3rd respondent