



**Kenya County Government Workers Union - Bungoma Branch v Bungoma
County Public Service Board & another; Muyundi (Interested Party)
(Petition 1 of 2019) [2024] KEELRC 1782 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1782 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION 1 OF 2019
JW KELL, J
JULY 10, 2024**

BETWEEN

**KENYA COUNTY GOVERNMENT WORKERS UNION - BUNGOMA
BRANCH PETITIONER**

AND

**BUNGOMA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT
COUNTY GOVERNMENT OF BUNGOMA 2ND RESPONDENT**

AND

MOSES MAELO MUYUNDI INTERESTED PARTY

RULING

(On the oral application by Mr. Oketch Advocate objecting to Mr. Makokha Advocate appearing for the respondents under Rule 8 of the Advocates (Practice) Rules)

1. The ruling is on the oral application by Mr. Oketch Advcoate for the Petitioner during the hearing of the application by the Interested Party dated 23rd January 2024. Mr.Oketch Advocate objects to the appearance of Mr. Makokha Advocate for the Respondents under the provisions of Rule 8 of the Advocates (Practice) Rules, for having sworn a replying affidavit on the 27th October 2023 and that of 12th March 2024.
2. Rule 8 of the Advocates (Practice) Rules provides that:-
 - “ 8. 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.”

3. The Application was opposed by Mr. Makokha Advocate arguing that, Article 50 of *the Constitution* and Order 9 (1)(a) of the Civil Procedure Rules is clear that a party has a right to choose an advocate of their choice. Counsel contended that he is the advocate on record in the matter and that practice rules are delegated legislation. He asserted that the Civil Procedure Rules Order 9 Rule 1 gives power to a party to appoint an advocate. Order 9 Rule 1 of the Civil Procedure Rules provides that:-

“1. Applications, appearances or acts in person, by recognized agent or by advocate [Order 9, rule 1]

Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that—

(a) any such appearance shall, if the court so directs, be made by the party in person; and

(b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney-General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.”

4. Mr. Makokha Advocate urged that Rule 8 of the Advocates (Practice) Rules, applies where an advocate has a reason to believe he is conflicted. That he swore the affidavit as Acting County attorney of Bungoma County, and that it is the County Attorney who represents the County and all its agencies.

5. In rejoinder, Mr. Oketch Advocate contended that Rule 8 of the Advocates (Practice) Rules says that where it is apparent that the advocate may be required as a witness he ought not to appear. Article 50 and Order 9 of the Civil Procedure Rules generally speak on representation. He informed the court that it was his expectation, that Mr. Wekesa Advocate, who was appearing with Mr. Makokha would take Mr. Makokha’s place, although that appeared not to be the case.

6. Mr. Oketch argued that the replying affidavit sworn by Mr. Makokha made averments on what was made by other parties in their affidavits.



Decision

7. The court having heard the oral submissions by the parties held that the essence of Article 159 of *the Constitution* is for the court to pursue substantive justice. The court was faced with a unique challenge of the advocate, Mr. Makokha, having sworn a Replying Affidavit in a dispute where he was likely to be a witness and he was. The advocate is also the acting County attorney of the respondent. There is a conflict in the process and of course, Rule 8 of the Advocates (Practice) Rules would require him not to be the advocate.
8. This matter has been long in the court on the execution of judgement delivered in 2020.
9. In the interest of justice the court disallows the application, subject to Mr. Makokha standing down as an advocate to be cross-examined on his replying affidavit dated 27th October 2023 as a witness. There is his assisting Counsel Mr. Wekesa who will hold a brief for Mr. Makokha when he is cross-examined.
10. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 10TH DAY OF JULY 2024.

J.W KELI

JUDGE

In the presence of:-

Court Assistant: Brendah

Petitioner: Oketch

Respondent/-: Wekesa/Makokha

2nd Interested party: In Person

1st Interested party: Absent

