



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
MISC. CIVIL APPL. NO. E094 OF 2024 (OS)

BETWEEN

KIMETO & ASSOCIATES ADVOCATES
APPLICANT

AND

KIBE MUNGAI **1ST**
RESPONDENT

KINOTI & KIBE CO ADVOCATES **2ND**
RESPONDENT

RULING

Introduction and Background

1. For determination is the Notice of Motion application dated 26th November 2025. The applicants, who are the respondents in the proceedings commenced by way of Originating Summons filed by the firm of Ms. Kimeto & Associates on behalf of the plaintiffs, seek orders barring Dr. Khaminwa, Advocate, together with his

law firm, from representing the plaintiffs in the said proceedings.

- 2.** In support of the application, the applicants rely on an affidavit sworn by Mr. Kibe Mungai, Advocate, on 26th November 2025. In that affidavit, the applicants explain that the foundation of their application lies in the continued participation of Dr. Khaminwa and his firm, alongside Ms. Jackline Kimeto, in these proceedings without any formal Notice of Appointment filed to demonstrate authority to act for the plaintiffs. The applicants state that they wrote to the plaintiffs' counsel on record seeking clarification on this issue, but no response was forthcoming, thereby compelling them to file the present application.
- 3.** The applicants further argue that Dr. Khaminwa is disqualified from appearing for the plaintiffs on grounds of conflict of interest. They assert that he was directly involved in the negotiation of the Professional Undertaking which forms the subject matter of these proceedings. Consequently, they contend that Dr. Khaminwa had access to confidential and privileged information during

those negotiations, which could now be used to their detriment if he were permitted to act for the plaintiffs.

4. The application is opposed through a Replying Affidavit sworn by Ms. Jackline Kimeto, Advocate, on 10th December 2025. I have also considered the written submissions filed by the applicants. However, as at the time of preparing this Ruling, the plaintiffs had not filed any written submissions despite the existence of court orders directing them to do so.

Analysis and Determination

5. The first issue for determination is whether Dr. Khaminwa, SC has the right of audience before this Court. This question must be resolved by reference to the provisions of **Order 9 of the Civil Procedure Rules**, which govern representation of parties in civil proceedings.
6. **Order 9 Rule 1** provides that any application, appearance, or act in Court which the law requires or authorizes to be done by a party may, unless

otherwise expressly provided, be undertaken in three distinct ways:

a) By the party in person;

b) By the party's recognized agent; or

c) By an advocate duly appointed to act on the party's behalf.

7. The language of this provision is clear and categorical. It establishes that the right of audience is not open-ended but is confined to those three categories. An advocate cannot simply appear in Court on behalf of a party without demonstrating that he or she has been duly appointed. The appointment must be formalized through the filing of the requisite documentation, so as to ensure that the Court and the opposing party are certain as to who is properly authorized to act.

8. **Order 9 Rule 7** further reinforces this principle. It addresses the situation where a party initially sues or defends in person but subsequently appoints an advocate to act on his or her behalf. In such a case, the Rule requires that the party must give notice of the appointment. The underlying rationale is that representation must be

regularized at all times, whether a party begins in person and later appoints counsel, or whether counsel is engaged from the outset. Taken together, **Rules 1 and 7**, which are drafted in mandatory terms, presuppose that without compliance, the Court cannot confer the right of audience upon counsel.

- 9.** The applicants argue, and this fact has not been controverted, that neither the firm of Khaminwa & Khaminwa Advocates nor Dr. Khaminwa, SC, in his personal capacity, is formally on record for the plaintiffs. Indeed, paragraph 31 of the Replying Affidavit sworn by Ms. Jackline Kimeto candidly acknowledges that the firm of Khaminwa & Khaminwa Advocates is not on record.
- 10.** The critical question, therefore, is whether the Civil Procedure Rules envisage a scenario in which an advocate, who is a member of a law firm, may represent a client in his individual capacity without filing the requisite documents. This has been urged by the plaintiff. The answer must be in the negative. The Rules are explicit that representation must be regularized through proper filing, and the

right of audience is conditional upon compliance with these procedural safeguards. To hold otherwise would invite uncertainty, erode the discipline of practice, and undermine the orderly administration of justice.

11. The applicants have cited authorities which underscore the seriousness with which Courts enforce the provisions governing representation. These authorities, including the Court of Appeal decisions in **King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & Another V M/s Kaplan & Straton Advocates, [1993] KECA 57 (KLR)** and **Lalji Bhimji Sanghani Builders & Contractors V City Council of Nairobi, [2012] eKLR**, reiterate that compliance with **Order 9** is not a matter of mere technicality.

12. The judicial pronouncements further confirm that the issue of representation is a substantive requirement that goes to the root of each matter. It is designed to protect both the litigants and the Court. In this case, no explanation has been offered as to why the firm of Khaminwa &

Khaminwa Advocates has not filed the necessary documentation.

- 13.** The submission by the plaintiffs that Dr. Khaminwa, SC has made numerous appearances alongside them cannot be sustained. The mere fact of repeated appearances does not cure a fundamental procedural defect. To accept such an argument would be to endorse the dangerous proposition that continued acquiescence to an illegality can transform it into legality. The law does not permit such a result. It was the duty of the plaintiffs to ensure that their chosen counsel was properly on record in accordance with the Civil Procedure Rules. Their failure to do so cannot be excused by reliance on past irregular appearances.
- 14.** It is regrettable that the application was filed at the 11th hour, on the eve of the hearing. However, lateness does not diminish the seriousness of the irregularity. Two wrongs do not make a right. The plaintiffs, by failing to respond to the applicants' letter of 18th November 2025 and by disregarding the clear provisions on representation, contributed to the delay and confusion now before the Court.

15. I am equally mindful of the constitutional guarantees of the right to representation and fair hearing, as urged by the plaintiffs. Indeed, **Articles 25(c), 47, 48, and 50(2)(e) and (g) of the Constitution** safeguard the right to access justice, to be heard, and to be represented by counsel of one's choice. However, these rights must be exercised within the framework of the law. The Constitution does not sanction disregard of procedural rules but rather, adherence to procedure which is part of the due process that ensures fairness to all parties.

16. On the point of conflict of interest, this Court is guided by the **Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016**, which sets out the threshold for determining when a conflict arises in the advocate-client relationship. **Paragraph 93** of the Code defines a conflicting interest 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."

- 17. Paragraph 96** provides for the situations in which such conflict of interest may arise. The instances are only indicative and include circumstances where the interests of one client are directly averse to those of another, where representation of one client is materially limited by responsibilities to another client or third party and where confidential information obtained from a client may be used to that client's disadvantage.
- 18.** The central issue for determination, therefore, is whether the applicants have discharged the burden of proving the existence of a conflict of interest within the meaning contemplated by the Code. The burden lies squarely on them to demonstrate, with precision and particularity, that the firm of Khaminwa & Khaminwa Advocates is in possession of confidential or privileged information

belonging to them, obtained in the course of a prior representation, and that such information is directly relevant to the issues in the present proceedings where the plaintiffs' interests are adverse.

19. Alternatively, the applicants must establish that the firm owes a continuing professional duty or responsibility to them which materially limits its ability to act for the plaintiffs. Absent such evidence, the mere fact of prior representation or involvement in negotiations cannot, in itself, amount to conflict of interest.

20. This principle was reiterated in **Charles Gitonga Kariuki V Akuisi Farmers Co Ltd, [2007] KEHC 1059 (KLR)**, where the Court held as follows:

“It is not enough for the applicant to allege that because an advocate acted for it in several matters, such an advocate was barred from acting against it in other matters. 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 were the advocate is allowed to act for the opposing party against such a litigant.”

21. Against this background, and upon careful consideration of the affidavit evidence and submissions filed by the applicants, I am not satisfied that they have discharged the burden of proof. I have not been shown any previous mention, involvement or engagement of the Firm or person of Dr Khaminwa SC within the parameters contemplated in the Code.

Disposition

22. Accordingly, the application dated 26th November 2025 succeeds only to the extent that the firm of

Khaminwa & Khaminwa Advocates and Dr. Khaminwa, SC are barred from appearing for the plaintiffs unless and until they file the requisite documentation in compliance with **Order 9**. The other prayers stand dismissed.

23. Although the plaintiffs have partly succeeded in resisting the conflict of interest argument, their conduct of failing to respond to the applicants' letter of 18th November 2025 and disregarding the mandatory provisions of **Order 9** necessitated the filing of this application. They shall therefore not have the costs of the application. Instead, each party shall bear their costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 30TH DAY OF JANUARY 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:

SC Dr Khaminwa for the applicant

Mr Gaita for the 1st respondent

Court Assistant: Lillian