

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELCLA NO. E246 OF 2025**

**FATUMA ALI ABDALA**

**NASIDAI MANAGEMENT CO. LTD .....**

**APPELLANT**

**=VERSUS=**

**ANTHONY KIMANI .....**

**RESPONDENT**

***(Being an appeal from the ruling and orders of Hon. M. A. Otindo in MCELC Case No. E029 of 2024 Antony Kimani vs Fatuma Ali Abdala & Nasidai Management Co. Ltd)***

**JUDGMENT**

1. This is an appeal from the Ruling of the learned **Senior Principal Magistrate, Hon. M.A. Otindo, (Ms.)** delivered on **7th November 2025 in Milimani CMELC No. E029 of 2024**. By that Ruling, the learned Magistrate allowed the Respondent's Notice of Motion dated 27th May 2025 and barred the firm of KRK Advocates LLP from acting for or representing the Appellants (Defendants in the suit) in the said proceedings. The Appellants were

granted 14 days to appoint alternative counsel, with costs of the application awarded to the Respondent.

2. Aggrieved by the said decision, the Appellants lodged the instant appeal vide a Memorandum of Appeal dated 19th November 2025 containing twelve (12) grounds. Pursuant to directions of this Court, the appeal was canvassed by way of written submissions. Only the Appellants filed submissions dated 12th March 2026. The Respondent filed none. The appeal is nevertheless determined on the basis of the record, the Magistrate's Ruling, the Appellants' Memorandum and submissions, and the applicable law.
3. The underlying suit (CMELC No. E029 of 2024) concerns a lease agreement dated 13th June 2022 in respect of House No. 5 on L.R. No. 3734/1444 between the Respondent (Plaintiff/tenant) and the 1st Appellant (1st Defendant/landlord). The 2nd Appellant is sued as the property manager.
4. It is common ground that the firm of KRK Advocates LLP prepared, stamped, and facilitated the execution of the lease agreement. The lease bears the firm's stamp, and Mr. Benson Kuria (an advocate in the firm) witnessed the Respondent's execution of the document. The Respondent

paid the legal fees associated with the preparation of the lease. The suit itself revolves around the interpretation, enforcement, and/or validity of the very lease prepared by the firm. The firm has also continued to collect rent on behalf of the 1st Appellant.

5. The Respondent moved the trial court under **Article 50(1) of the Constitution, Section 3A of the Civil Procedure Act (Cap 21), and Rule 9 of the Advocates (Practice) Rules** seeking to bar the firm on grounds of conflict of interest and the likelihood that its members would be required as witnesses.
6. The Appellants contend that the firm was instructed solely by the 1st Appellant (landlord). There was never an express or implied retainer with the Respondent. Payment of fees by the Respondent was purely “contractual and administrative” and did not create a client relationship. The mere drafting and witnessing of the lease does not, without more, constitute conflict of interest or bring the matter within Rule 9. No confidential information capable of prejudicing the Respondent was shown; the lease itself is a public document known to both parties.

7. They rely on the principle that disqualification of counsel is a serious step that interferes with the constitutional right to legal representation of choice under **Article 50(2)(g) of the Constitution** and must be exercised sparingly. They cite **Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others (2015) eKLR** for the proposition that mere drafting of documents does not automatically create conflict and **William Audi Ododa & another v John Yier & another, Civil Appeal No. NAI 360 of 2004**, where the Court of Appeal held that courts should not dictate counsel unless the interests of justice so demand. They distinguish **King Woollen Mills Ltd (formerly Manchester Outfitters Suiting Division Ltd) & Galot Industries Ltd v Kaplan & Stratton Advocates [1993] eKLR**, arguing that the cited authority involved an advocate who acted substantively for both parties in a commercial transaction with possession of confidential information, which is absent here.
8. The Respondent did not file submissions in this appeal. However, the trial court record and the Magistrate's Ruling sufficiently articulate his position. He maintained that the firm acted for both parties in the preparation and

execution of the lease, created an implied retainer through conduct (drafting, facilitation, witnessing, and receipt of fees from him), and is now in a position of conflict and potential witness in the very matter arising from that lease. He invoked Rule 9 and the principles in **King Woollen Mills (supra)** and **Omulele & Tollo Advocates v Mount Holdings Ltd [2016] KECA 523 (KLR)**.

9. In her Ruling, the learned Magistrate identified the sole issue for determination as whether the firm of KRK Advocates LLP should be barred from representing the Defendants on account of conflict of interest. She observed that it was not disputed that the firm had drafted, stamped, and witnessed the lease agreement between the Plaintiff and the 1st Defendant, with Mr. Benson Kuria personally witnessing the Plaintiff's execution of the document. The Magistrate found that the firm had facilitated communication, documentation, and execution of the lease by both parties, thereby creating, at the very least, an implied retainer relationship with both. She relied on the decision in **Omulele & Tollo Advocates v Mount Holdings Ltd [2016] KECA 523**

**(KLR)** for the proposition that a retainer may be express or implied from conduct, and that once established, it creates a fiduciary duty and an obligation of confidentiality.

10. The Magistrate further noted that the subject matter of the suit revolves around the interpretation and enforcement of the very lease prepared by the firm, and that members of the firm were likely to be called upon as witnesses regarding the intention of the parties and the terms of the lease. This situation, in her view, placed the firm in a position where it may be required to give evidence in a matter in which it also appears as counsel, rendering the position untenable under **Rule 9 of the Advocates (Practice) Rules**. She was persuaded that the circumstances presented a real likelihood of conflict of interest and a possibility of prejudice to the Plaintiff's right to a fair and impartial hearing as guaranteed under **Article 50(1) of the Constitution**. The Magistrate rejected the Respondents' argument that there was no prejudice because the firm acted only for the 1st Defendant, holding that the correspondence and the lease agreement itself demonstrated dual involvement, and that

the payment of legal fees by the Plaintiff further reinforced the implied dual retainer. In the end, she found merit in the Plaintiff's application, allowed it, barred the firm of KRK Advocates LLP from acting for or representing the 1st and 2nd Defendants, directed the Defendants to appoint any other firm of advocates of their choice within 14 days, and ordered the Defendants to bear the costs of the application.

11. Having considered the record of appeal, the Memorandum of Appeal, the Ruling of the learned Magistrate and the written submissions filed by the Appellants, the appeal raises a single issue for determination being; **whether the learned Magistrate erred in law and fact in barring the firm of KRK Advocates LLP from representing the Appellants in CMELC No. E029 of 2024 on account of conflict of interest.**

12. The power to disqualify an advocate flows from the Court's inherent jurisdiction to protect the administration of justice, reinforced by **Article 50(1)** and **Article 159(2) (d) of the Constitution, Section 3A of the Civil**

**Procedure Act**, and the professional rules governing advocates.

13. **Rule 9 of the Advocates (Practice) Rules** expressly provides that:

***“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... and if, while appearing, it becomes apparent that he will be required as a witness, he shall not continue to appear.”***

14. Beyond Rule 9, the common law principles of fiduciary duty, confidentiality, and avoidance of conflict of interest apply. An advocate-client relationship may be express or implied from conduct as was stated in the case of **Omulele & Tollo Advocates v Mount Holdings Ltd [2016] KECA 523 (KLR)**, affirming that a retainer arises from the instruction, employment or engagement of an advocate, which can be inferred from the parties’ conduct and payment of fees). Once established, it imposes a continuing duty of loyalty and confidentiality. These principles align squarely with English common law on joint

retainers, as authoritatively stated in **TSB Bank Plc v Robert Irving & Burns [2000] 2 All ER 826**, where it was held that where a solicitor accepts instructions under a joint retainer for parties to the same transaction, the emergence of an actual conflict of interest in subsequent litigation arising from that transaction obliges the solicitor to cease acting for all parties so as to preserve fiduciary duties and the integrity of the judicial process. More recently, the Court of Appeal has reaffirmed the strict application of these principles in **Turea Ltd t/a Dr. Mattress v Mohamed [2022] KECA 1271 (KLR) and Ibrahim & another v Muhsin & another (Civil Application E058 of 2024) [2024] KECA 862 (KLR)**, underscoring that Rule 9 is engaged wherever an advocate's prior involvement in a transaction creates a real likelihood that he or she may be required as a witness or where continued representation would undermine the fair administration of justice and the parties' constitutional rights under Article 50.

15. The learned Magistrate did not err. The evidence before her and the lease itself bearing the firm's stamp, Mr. Kuria's attestation of the Respondent's signature, the

firm's role in facilitating execution, and the Respondent's payment of the legal fees objectively demonstrates that the firm positioned itself as the common advocate for the transaction between the two parties. This is not a case of mere "drafting on instructions of one side." The conduct created, at the very least, an implied retainer with the Respondent as was stated in **Omulele & Tollo case (supra)**.

16. The present suit directly arises from the very lease prepared and executed under the firm's hand. The firm's members possess knowledge of the negotiation, drafting, and execution process that goes beyond the four corners of the public document. They are prima facie material witnesses on questions of the parties' intention, due execution, and any collateral terms. Rule 9 is squarely engaged.

17. The Magistrate correctly relied on **King Woollen Mills Ltd & Galot Industries Ltd v Kaplan & Stratton Advocates [1993] eKLR**. In that landmark decision, the Court of Appeal held that an advocate who has acted for two or more clients in a transaction must be wary of later acting for one against the other in litigation arising from

the same transaction, because real prejudice and mischief are anticipated from the possession of confidential information acquired in the fiduciary capacity. The facts here are materially on all fours: the lease was a bilateral commercial transaction prepared by the firm for both contracting parties who have now become adversaries.

18. The Appellants' attempt to distinguish the case fails. The principle does not require proof of "actual" misuse of confidential information at the disqualification stage; it is sufficient that there is a real likelihood of prejudice or the appearance of conflict that undermines the fair administration of justice.

19. The Appellants' reliance on **Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others (2015) eKLR** is misplaced. In that case, the firm had prepared trust deeds and rules for the pension scheme/trustees (one side of an internal governance arrangement). The litigation was between beneficiaries and trustees. The Court of Appeal declined to bar the firm because the drafting did not involve the firm acting as common advocate for opposing parties in a bilateral transaction, nor was there demonstrated real prejudice.

The facts here are materially different: the lease was prepared for the direct contracting parties (landlord and tenant) who later litigate its terms.

20. While the right to legal representation of choice is constitutionally protected the said right is not absolute. It is subject to the overriding interests of justice, the fair hearing rights of the other party, and the integrity of the judicial process. The Magistrate properly balanced both parties' Article 50 rights. Allowing the firm to continue would undermine the Respondent's right to a fair and impartial hearing. The disqualification does not prevent the Appellants from appointing any other competent counsel of their choice.

21. On the aspect of actual prejudice, the law does not require the party seeking disqualification to prove that confidential information has already been misused or that prejudice has occurred. It is enough to show a real likelihood or reasonable apprehension of conflict or prejudice. The Magistrate applied the correct threshold.

22. In conclusion, it is the finding of this court that the learned Magistrate properly evaluated the evidence, correctly applied the law on implied retainers, conflict of

interest, and Rule 9, and reached a decision that is neither perverse nor unreasonable. There is no misdirection, no error of law or fact, and no unjustified interference with the Appellants' rights and hence this court cannot interfere with the said decision.

23. On the question of costs of this appeal, the settled principle is that costs follow the event unless there are compelling reasons to depart from it. In the instant appeal, the Respondent despite being the successful party did not file any written submissions even after being granted the opportunity to do so and in the circumstances this court directs each party to bear own costs of this appeal.

24. In the end, this court makes the following orders;

**(i) The Appeal is hereby dismissed.**

**(ii) The Ruling and Orders of Hon. M.A. Otindo, SPM, delivered on 7th November 2025 in CMELC No. E029 of 2024 are upheld, save that the same are varied only to the extent that the Appellants shall, within 14 days from the date of this Judgment appoint another counsel failing which the suit shall proceed as if they are unrepresented.**

**(iii) Each party shall bear its own costs of this appeal.**

**Dated, Signed and Delivered Virtually this 14<sup>th</sup> day of April 2026.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of:-**

**Ms. Jaleba h/b for Mr. Kuria for the Appellants.**

**Ms. Wamatu h/b for Mr. Mola for the Respondent.**

**Court Assistants: Mary Ngoira and David Ngoosa.**