



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, J.J.A)

ELECTION PETITION APPEAL (APPLICATION) NO. 17 OF 2018

BETWEEN

ABDIRAHMAN HUSSEINWEYTAN MOHAMED.....APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION ..... 1<sup>ST</sup> RESPONDENT

ADAN HARAR NOOR; RETURNING OFFICER MANDERA EAST

CONSTITUENCY .....2<sup>ND</sup> RESPONDENT

HON. HASSAN OMAR MOHAMED MAALIM.....3<sup>RD</sup> RESPONDENT

ABDIKADIR SHEIKH HASSAN.....4<sup>TH</sup> RESPONDENT

AHMED JIMALDIN ADAN.....5<sup>TH</sup> RESPONDENT

(Being an appeal from the judgment and Decree of the High Court of Kenya at Nairobi (Hedwig Ong’udi, J.) delivered on 27<sup>th</sup> February, 2018 in Election Petition No. 9 of 2017)

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#### RULING OF THE COURT

#### INTRODUCTION

1. This ruling is in respect of an application dated 20<sup>th</sup> April, 2018 by **Abdirahman Husseinweytan Mohamed (the appellant)**, seeking the following orders:

***“1. HAT the Honorable (sic) Court do order that the firm of KAGO MUTHAMA & COMPANY ADVOCATES appearing for the 4<sup>th</sup> Respondent in this matter cease to appear for the 4<sup>th</sup> Respondent in this Appeal.***

**2. THAT these (sic) Honorable court do stay the representation by the firm of KAGO, MUTHAMA & COMPANY ADVCOATES for the 4<sup>th</sup> Respondent.**

**3. THAT the firm of KAGO, MUTHAMA & COMPANY ADVOCATES be restrained by an injunction whether by themselves, their partner’s, (sic) servants and/or agents from representing the 4<sup>th</sup> Respondent in this action.**

**4. THAT the Honorable (sic) Court do issue such or consequential orders as it may deem fit.**

5. THAT costs of this application be provided for.”

**BACKGROUND**

2. It is important that we set out the background that gave rise to the above application. Following the election of **Hassan Omar Mohammed Maalim**, the 3<sup>rd</sup> respondent, as member of the National Assembly for Mandera East Constituency in the general election held on 8<sup>th</sup> August, 2017, two election petitions were filed in the High Court of Kenya at Nairobi. The first one was **Election Petition No. 3 of 2017** that was instituted by the appellant herein. The second one was **Election Petition No. 9 of 2017**, filed by **ABDIKADIR SHEIKH HASSAN**, the 4<sup>th</sup> respondent herein.

3. Although the two petitions were consolidated and heard together, each petitioner was represented by different firms of advocates. The appellant was represented by **Odiya & Associates** while the 4<sup>th</sup> respondent was represented by the firm of **Ndegwa & Ndegwa Advocates**.

4. In a judgment delivered by **Ong’udi, J.** on 27<sup>th</sup> February, 2018, the election petitions were dismissed with costs. Both appellants were aggrieved by the said judgment. Consequently, on 5<sup>th</sup> March, 2018, the appellant, through his advocates, Odiya & Associates, filed a notice of appeal. On 13<sup>th</sup> March, 2018, the 4<sup>th</sup> respondent, through his advocates, **Ndegwa & Ndegwa**, also filed a notice of appeal.

5. On 28<sup>th</sup> March, 2018, the appellant filed the record of appeal. The appeal came up for directions on 16<sup>th</sup> April, 2018. But before directions were given, the appellant had a change of mind. By a letter dated 11<sup>th</sup> April, 2018 addressed to this Court’s Deputy Registrar and copied to all the advocates for the parties in the appeal, the appellant indicated that he intended to withdraw the appeal.

6. It appears that the appellant’s change of mind did not go down well with the 4<sup>th</sup> respondent because on the same day, that is, 11<sup>th</sup> April, 2018, the 4<sup>th</sup> respondent filed a notice of cross-appeal. The cross-appeal was filed through **Kago, Muthama & Company Advocates**, whose chambers were shown to be located at Kenindia House, Loita Street, Nairobi. The notice was to be served upon several firms of advocates who are on record for various parties, among them, **K. Muthama & Company Advocates**, whose physical address was given as Shankardass House, 3<sup>rd</sup> Floor, Moi Avenue, Nairobi.

7. When the appeal came up for directions on the aforesaid date before one judge as per the norm in such instances, **Mr. Kinaro**, learned counsel for the appellant, drew the court’s attention to the letter of 11<sup>th</sup> April, 2018, intimating his client’s intent to withdraw the appeal with no order as to costs.

8. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents, through their respective advocates, told the court that they had no objection to the withdrawal of the appeal with no order as to costs. The 5<sup>th</sup> respondent, **Ahmed Jamaldin Adan**, was represented by **Mr. David Muthama**, a partner in the firm of **Kago, Muthama & Company Advocates**. The other partner in the said law firm is **Mr. Eric Kago**, who appears for the 4<sup>th</sup> respondent.

9. Mr. Kago, who teamed up with **Mr. Simon Mburu**, told the Court that the 4<sup>th</sup> respondent was not agreeable to the withdrawal of the appeal. Counsel further told the court that the 4<sup>th</sup> respondent had filed a notice of cross-appeal which he intended to pursue in the event that the appellant was not willing to proceed with his appeal.

10. In view of the position that was taken by the 4<sup>th</sup> respondent, **Mr. Biriq**, learned counsel for the 3<sup>rd</sup> respondent, told the court that he had been instructed to file a preliminary objection regarding the validity of the cross-appeal.

11. Given the above scenario, the court, as then constituted, was unable to make any orders or give comprehensive directions. The single judge directed that the appeal be set down for directions before a full bench.

12. When the appeal came up for directions on 24<sup>th</sup> May, 2018, the appellant, through Mr. Kinaro, applied to withdraw the appeal with no order as to costs. He also sought release of the sum of **Kshs. 500,000/-** that had been deposited in court by the appellant as security for costs in terms of the provisions of **Rule 27 (1) of The Court of Appeal (Election Petition) Rules, 2017**.

13. As was the case earlier, counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents had no objection whatsoever to the said application. On the other hand, Mr. Kago told the court that while the 4<sup>th</sup> respondent had no objection to the withdrawal of the appeal, he intended to proceed with the cross-appeal in terms of **Rule 97(1)** of this **Court’s Rules** which states as follows:

**“97(1) If an appeal is withdrawn under rule 96 after notice of cross-appeal has been given, the respondent who gave the notice may withdraw it within fourteen days of the service on him of the notice of withdrawal; if it is not so withdrawn, the cross-appeal shall proceed to hearing and the provision of these Rules shall apply as if the cross-appellant were an appellant and the appellant a respondent.”**

14. The Court marked the appeal by Abdirahman Husseinweytan Mohamed as withdrawn with no order as to costs. Further, it ordered a refund of the Kshs. 500,000/- deposited as security for costs. The court also directed that an application by the appellant seeking disqualification of the firm of Kago, Muthama & Company Advocates as the representatives of the 4<sup>th</sup> respondent be heard and determined

before the cross-appeal and a preliminary objection to the validity of the cross-appeal by the 3<sup>rd</sup> respondent are set down for hearing.

#### **APPLICATION FOR DISQUALIFICATION OF KAGO, MUTHAMA & COMPANY ADVOCATES**

15. The appellant's objection to the continued representation of the 4<sup>th</sup> and 5<sup>th</sup> respondents by the law firm of Kago, Muthama & Company Advocates is premised on the reasons that: the notice of appeal was filed by **Ndegwa & Ndegwa Advocates** and the same was served upon the appellant's advocates on 20<sup>th</sup> March, 2018; the firm of Kago Muthama & Company Advocates are not properly on record as they had not filed any notice of change of advocates, the firm of Kago, Muthama & Company Advocates cannot represent both a cross appellant (for all intents and purposes the only appellant) and the 5<sup>th</sup> respondent, who had no objection to the withdrawal of the initial appeal as that presents a conflict of interests; that the notice of cross-appeal, which is drawn and filed by Kago, Muthama & Company Advocates, **"is mischievously stated that it is intended to be served upon the firm of K. MUTHAMA & COMPANY ADVOCATES, a firm which does not exist and is only meant to hoodwink the court on the issue of representation on the part of the 4<sup>th</sup> respondent."** (Emphasis supplied).

16. In his brief submissions, Mr. Kinaro told the Court that it is unethical for two partners in a law firm to represent both an appellant and a respondent in the same appeal, each taking a completely divergent view of the appeal from the other. Counsel pointed out that the 5<sup>th</sup> respondent, having been served with the 4<sup>th</sup> respondent's notice of cross-appeal, filed by Kago, Muthama & Company Advocates, had filed a notice of address on 16<sup>th</sup> April, 2018. Among the firms that were to be served with that notice of address are Ndegwa & Ndegwa Advocates. The notice of address is drawn by Kago Muthama & Company Advocates. Counsel submitted that the above kind of representation was untidy and could lead to compromise of the greater interests of justice.

17. Citing this court's decision in **DELPHIS BANK LIMITED v CHATTHE & 6 OTHERS [2005] 1KLR**, counsel submitted that unless the orders sought are granted, there was possibility of real mischief or real prejudice being occasioned. Counsel further cited a High Court decision, **FRANCIS MUGO & 22 OTHERS v JAMES BRESS MUTHEE & 3 OTHERS [2005] eKLR**, where the court observed that in the discharge of his office, an advocate has a duty to his client, to his opponent, to the court, to himself and to the State. In instances where there is likelihood of a conflict of interest that may be prejudicial to the wider cause of justice, an advocate may be disqualified from representing a party to a dispute, Mr. Kinaro submitted, urging this Court to disqualify the said firm of advocates.

**18. Mr. Ondieki**, learned counsel, who held brief for **Mr. Orare** for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, was indifferent and chose not to make any submissions.

19. Mr. Biriq, learned counsel for the 3<sup>rd</sup> respondent, supported the appellant's counsel's submissions. He added that the notice of appeal filed by the 4<sup>th</sup> respondent on 13<sup>th</sup> March, 2018 violated the provisions of **rule 6(2)** of this **Court's Election Petition Rules**. The rule is couched in mandatory terms and since the notice was filed out of time, the High Court decision having been delivered on 27<sup>th</sup> February, 2018, the cross-appeal is invalid. Counsel urged this Court to find that the issue of invalidity of the cross-appeal was not a technicality as the Constitution requires electoral disputes to be determined expeditiously.

**20. Mr. Mburu**, learned counsel instructed by Kago, Muthama & Company Advocates, told the Court that the said firm is the same as K. Muthama & Company Advocates that operates from Shankardass House, Moi Avenue, Nairobi; that Kago, Muthama & Company Advocates is based at Kenindia House, Loita Street, Nairobi.

21. Mr. Mburu submitted that the application had been brought under the wrong provisions of the law; and that no cogent grounds had been advanced in respect of the alleged conflict of interest and prejudice the appellant was likely to suffer. In support of that submission counsel cited **DELPHIS BANK LIMITED v CHANNAN SINGH CHATTHE & 6 OTHERS (Supra)** and **TASH GOEL VEDPRAKASH v MOSES WAMBUA MUTUA & ANOTHER [2014] eKLR**.

22. Counsel submitted that the notice of appeal filed on behalf of the 4<sup>th</sup> respondent by Ndegwa & Ndegwa Advocates was of no legal effect, having been filed out of time and therefore it was not necessary for Kago, Muthama & Company Advocates to file a notice of change of advocates for the 4<sup>th</sup> respondent before the filing of the notice of cross-appeal. He urged the Court to disregard the aforesaid notice of appeal.

23. Lastly, Mr. Mburu submitted that the appellant's application amounted to an attack on the 4<sup>th</sup> respondent's right of representation by an advocate of his choice. In that regard, he cited the High Court decision in **SHALIMAR LIMITED & 2 OTHERS v SADRUDIN KURJI & ANOTHER [2015] eKLR**, where it was held that constitutionally a party has a right to be represented by a counsel of his choice.

24. Mr. Kago, who teamed up with Mr. Mburu for the 4<sup>th</sup> respondent, chose to make just a few comments on the legal authorities cited by the 4<sup>th</sup> respondent in his written submissions. He reiterated that the appellant had not demonstrated that any mischief or prejudice would be occasioned to him if Kago, Muthama & Company Advocates were to continue to act for both the 4<sup>th</sup> and 5<sup>th</sup> respondents.

25. Mr. Kago added that there was no risk of disclosure of any confidential information that may have come to the knowledge of Kago, Muthama & Company Advocates. Counsel urged the Court to dismiss the application.

26. We have carefully considered the submissions on record as well as the various authorities cited by all the counsel. The appellant has urged us to disqualify the firm of Kago, Muthama & Company Advocates from representing the 4<sup>th</sup> respondent. It is not in dispute that a party has a constitutional right to be represented by an advocate of his or her choice and ordinarily the Court has no business in interfering with a party's freedom of choice of counsel. However, where it is demonstrated that representation by a particular advocate may pose a conflict of interest or occasion a miscarriage of justice, or where such representation is contrary to legal ethics, the Court can intervene. We

may also add that representation by counsel before this Court must be in conformity with the applicable Rules of the Court.

27. It is common ground that in the election petition that gave rise to this appeal the 4<sup>th</sup> respondent was represented by Ndegwa & Ndegwa Advocates. The High Court judgment was delivered on 27<sup>th</sup> February, 2018. According to **rule 6(1) (2)** of this **Court's Election Petition Rules**, a person who desires to appeal against a decision of the High Court in an election petition should file a notice of appeal within seven days of the date of the decision. The notice of appeal that was filed by the 4<sup>th</sup> respondent through Ndegwa & Ndegwa Advocates on 13<sup>th</sup> March, 2018 was clearly filed outside the stipulated period of time.

28. That notwithstanding, Ndegwa & Ndegwa Advocates remained the advocates who are on record for the 4<sup>th</sup> respondent. **Rule 22 (1)** of this **Court's Rules** states that a party to any proceedings may appear in person or by advocate. However, under **rule 23(1)**, where a party changes his advocate, he must lodge with the Court's Registrar a notice of change of advocates. The notice of change of advocates must also be served upon all the other parties in the matter.

29. In this appeal, the 4<sup>th</sup> respondent was well aware of the legal requirements regarding representation. When he realized that his advocates, Ndegwa & Ndegwa Advocates, had not filed the notice of appeal in time, he consulted Kago, Muthama & Company Advocates. They advised him that since the notice of appeal had not been filed in time, he should instead file a notice of cross-appeal. The said firm of advocates were instructed to file a notice of cross-appeal. The advocates did not however tell the 4<sup>th</sup> respondent that the notice of address that was on record on his behalf was that of Ndegwa & Ndegwa Advocates.

30. The explanation given by Mr. Mburu as to why Kago, Muthama & Company Advocates did not comply with **rule 23(1)** regarding the filing of the notice of change of advocates is that since the notice of appeal that had been filed by Ndegwa & Ndegwa Advocates was late, it was of no legal effect, and there was therefore no need for the 4<sup>th</sup> respondent to file a notice of change of advocates. We do not agree. Rules of this Court regulate the mode of practice and are intended to bring order and must therefore be obeyed. They cannot be disobeyed willy nilly.

31. In effect, the firm of Kago, Muthama & Company Advocates is not properly on record for the 4<sup>th</sup> respondent in this appeal and cannot disregard the rules of this Court. For them to be properly on record, they must comply with **rule 23 (1)** of this **Court's Rules**. But that is not all. The appellant has further complaints regarding the said firm's representation of the 4<sup>th</sup> respondent.

32. As earlier stated, the appellant withdrew his appeal. The 4<sup>th</sup> respondent, who had filed a notice of appeal and a notice of cross-appeal is now the appellant and the original appellant is one of the respondents. The firm of Kago, Muthama & Company Advocates insists on representing the cross-appellant (the 4<sup>th</sup> respondent as per the record of appeal) and the 5<sup>th</sup> respondent, whose position as regards the cross-appeal may be different from that of the cross-appellant. The law firm has two partners, Mr. Kago and Mr. Muthama. Mr. Kago is on record for the cross-appellant while his partner, Mr. Muthama, is appearing for the 5<sup>th</sup> respondent. It is unfortunate that Mr. Muthama chose not to appear before this Court for the hearing of the application, although the hearing date was fixed in his presence. He did not also file any submissions on behalf of the 5<sup>th</sup> respondent as directed by this Court.

33. The picture that is painted by this kind of representation is rather untidy. We have documents filed on behalf of the cross-appellant by Kago, Muthama & Company Advocates that are being served upon the same firm of advocates, ostensibly as the 5<sup>th</sup> respondent's advocates. The law firm may have two physical addresses but it remains one and the same firm.

34. The question that must be determined is whether ethically a law firm can represent both an appellant and a respondent who have conflicting positions in the same matter. The plain answer to us is in the negative. It is simply contrary to the **Code of Standards of Professional Practice and Ethical Conduct of the Law Society of Kenya, 2016**. **Rule 95** thereof states as follows:

**“95. The advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to both clients and obtains their consent.”**

35. As long as Mr. Kago and Mr. Muthama are in a partnership as a law firm, as we understand they currently are, they cannot, ethically, represent two parties in adversarial positions and who have conflicting interests in the same matter. They must choose one over the other or cease from representing both.

36. Ordinarily, a law firm owes a duty of loyalty to a client and it is that duty of loyalty that prohibits the firm from representing any other party with interests that are at variance with those of its client. Initially the 4<sup>th</sup> and 5<sup>th</sup> respondents were on one side, and had taken the same position as regards the appeal that had been brought by Abdirahman H. Mohamed, the appellant. At that time there was no conflict of interest between them and the law firm could represent both of them. But the moment that the interests of the 5<sup>th</sup> respondent became adverse to those of the 4<sup>th</sup> respondent that is when Kago, Muthama & Company Advocates ought to have made an election as to who, between the 4<sup>th</sup> and 5<sup>th</sup> respondents, they were going to act for.

37. The 4<sup>th</sup> respondent's contention that the appellant has not tabled any evidence that his representation by Kago, Muthama & Company Advocates will occasion any prejudice to any one is not, in itself decisive.

38. Simply put, it is unethical and untenable in the circumstances of this case for two advocates or partners in the same law firm to represent two parties with conflicting interests in the same matter. The representation is by the firm, not by the individual advocates, whether as employees in the firm or as partners in the firm.

39. Having come to that firm conclusion, the orders sought by the appellant must be granted as prayed. Consequently, the firm of Kago, Muthama & Company Advocates alias K. Muthama & Company Advocates is hereby restrained by an order of injunction from representing the 4<sup>th</sup> respondent in this appeal. The costs of the application shall be in the appeal. It is so ordered.

**Dated and Delivered at Nairobi this 27<sup>th</sup> Day of June, 2018.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**