



REPUBLIC OF KENYA



KENYA LAW
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**Code for Africa v Mugure (Cause E757 of 2023)
[2025] KEELRC 268 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 268 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E757 OF 2023
L NDOLO, J
FEBRUARY 6, 2025**

BETWEEN

CODE FOR AFRICA CLAIMANT

AND

NYAWIRA MUGURE RESPONDENT

RULING

1. This ruling flows from the Claimant's application brought by Notice of Motion dated 25th September 2024, seeking orders to bar Calvin Otieno, Advocate and all other Advocates practicing in the name and style of M/S COL Advocates LLP, from representing the Respondent in this matter.
2. The application is supported by an affidavit sworn by the Claimant's Chief Operating Officer, Jessica Manim and is premised on the grounds that:
 - a. There is an existing advocate-client relationship between the Claimant and the Respondent's Counsel. The Respondent's Counsel, Calvin Otieno and his law firm, COL Advocates, have previously been instructed by the Claimant to represent them in a number of employment matters;
 - b. While under the instruction of the Claimant, the Respondent was the Claimant's liaison with Calvin Otieno, Advocate. The said Advocate and the Respondent were therefore in direct contact at all material times;
 - c. The Respondent's Counsel is the custodian of several of the Claimant's legal documents in relation to various employment matters;
 - d. The Claimant has confided a lot of privileged information to Counsel for the Respondent, on various employment matters;



- e. It is evident that the Claimant's interests in the matters where the Respondent's Counsel has represented them are in direct conflict with the Respondent's interests herein;
 - f. The Respondent's Counsel has not made adequate disclosure to the Claimant regarding his representation of the Respondent nor has he obtained the Claimant's consent to represent the Respondent, despite the apparent conflict of interest;
 - g. Conflict of interest will arise if Counsel for the Respondent is allowed to represent the Respondent herein;
 - h. There is likelihood of real mischief that the Respondent's Counsel will consciously, unconsciously or inadvertently use the confidential information acquired from the Claimant's previous employment matters, against and to the detriment of the Claimant in the present suit;
 - i. There is a real danger that the relevant and confidential information gained while acting for the Claimant will be used against the Claimant in this dispute;
 - j. The Claimant is apprehensive that the Respondent's Counsel's ability to fairly participate in these proceedings will be materially and adversely affected, as his judgment and freedom of action are not completely free from compromising influences, due to conflicting interests of the parties herein;
 - k. The interests of justice will not be served if the Respondent's Advocate is allowed to continue to act for the Respondent in this matter;
 - l. The Claimant will be greatly prejudiced if the orders sought are not granted.
3. The Claimant's Notice of Motion is opposed by a replying affidavit sworn by Calvin Otieno, Advocate on 8th October 2024.
 4. Counsel depones that he acted for the Claimant in Small Claims Comm. No E6269 of 2022: Code for Africa v Collins Nasibwa, a claim concerning debt collection of Kshs. 7,840 only. He points out that the Claimant's witness in the present case, Jessica Manim was not a witness in Small Claims Comm. No E6269 of 2022.
 5. Counsel maintains that Small Claims Comm. No E6269 of 2022 is in no way similar to the present case, where he acts for the Respondent. He adds that the Claimant has not demonstrated how or if he can be called as a witness in the case.
 6. It is deponed that the Claimant has not placed any material before the Court pointing to disclosure of any confidential information by Counsel for the Respondent.
 7. Counsel asserts the Respondent's right to be represented by Counsel of her choice.
 8. The gist of the Claimant's application is that Counsel on record for the Respondent, Calvin Otieno is conflicted, by virtue of having acted for the Claimant in the past.
 9. Black's Law Dictionary (Tenth Edition) defines conflict of interest as:

“ A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.”



10. In its written submissions dated 25th October 2024, the Claimant refers to the following excerpt from Halsbury’s Laws of England, 4th Edition at page 353:

“ A practicing barrister must not accept any instruction if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients, unless all relevant persons consent to the barrister accepting the instructions. A barrister must also not accept instructions if there is a risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent.”
11. In his replying affidavit in opposition to the Claimant’s application, Calvin Otieno, Advocate admits having acted for the Claimant in the past. He specifically points out a debt collection claim filed in the Small Claims Court, being Small Claims Comm. No E6269 of 2022: Code for Africa v Collins Nasibwa. He however asserts that this matter, in which he had represented the Claimant, has no nexus with the present dispute between the Claimant and the Respondent.
12. In the written submissions dated 15th November 2024, filed on behalf of the Respondent by COL Advocates LLP, there is a further admission that Calvin Otieno, Advocate had provided legal advice to the Claimant in three employment matters. It is also admitted that the Respondent, a former Human Resource Manager of the Claimant, acted as the liaison person for purposes of providing the required information to Calvin Otieno, Advocate.
13. With this background, the question for determination is whether Calvin Otieno, Advocate has the necessary ‘arms-length’ margin to represent the Respondent in these proceedings.
14. The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, at Rule 6 paragraph 96 sets out the following situations in which a conflict of interest, as it relates to Counsel, might arise:
 - a. Where the interests of one client are directly adverse to those of another client being represented by the Advocate or firm, for instance in situations where the representation involved the assertion of a claim by one client against another client;
 - b. Where the nature or scope of representation of one client will be materially limited by the Advocate’s responsibilities to another client, a former client, a third person or by the personal interests of the Advocate;
 - c. Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.
15. The dispute between the Claimant and the Respondent springs from an employment relationship apparently gone sour. Significantly, the Respondent occupied the senior management position of Human Resource Manager and in this capacity, she acted as the Claimant’s liaison with external Counsel, Calvin Otieno.
16. As Human Resource Manager, the Respondent would have come into contact with confidential information relating to the Claimant and its employees.



17. In its decision in *SBI International Holdings Kenya Ag (Kenya) v Amos Hadar* [2015] eKLR this Court stated the following:

“In the normal course of employment, the employee will get to learn their employer’s confidential information and as long as the information is proprietary in nature and is revealed in confidence, then the employee has a common law duty not to reveal the information. This duty applies irrespective of whether there exists a confidentiality agreement or clause in the employee’s employment contract and generally extends beyond the life of the employment relationship.”

18. As external Counsel for the Claimant, Calvin Otieno had access to the Claimant’s confidential information, a fact he does not deny. Considering the position held by the Respondent prior to her exit from the Claimant’s employment and the proximate working relationship she had with Calvin Otieno, I am satisfied that a case of conflict of interest has been made.

19. In reaching this decision, I have avoided the submission by the Claimant that the Advocate is a potential witness in the dispute, for the simple reason that this submission was not part of the Claimant’s pleadings.

20. Finally, I make an order barring Calvin Otieno, Advocate and all other Advocates practicing in the name and style of M/S COL Advocates LLP, from representing the Respondent in this matter.

21. The costs of the application will be in the cause.

22. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF FEBRUARY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Mitullah for the Claimant

Mr. Otieno for the Respondent

