



**Mudanya v Ericsson Kenya Limited (Cause E794 of 2023)
[2025] KEELRC 1442 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1442 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E794 OF 2023**

**CN BAARI, J
MAY 15, 2025**

BETWEEN

DONALD MUDANYA CLAIMANT

AND

ERICSSON KENYA LIMITED RESPONDENT

RULING

1. This ruling relates to the Respondent's notice of motion application dated 5th February, 2025, brought pursuant Sections IA, 1B, 3 & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Section 81 (1) of the Advocates Act and Rule 8 of the Advocates (Practice) Rules. The Applicant seeks orders: -
 - i. The law firm of Henia Anzala & Associates be barred from acting as advocates and/or legal counsels for the Claimant in respect of the claim herein, whether by themselves, associates, employees, servants, agents, and/or proxies.
 - ii. All documents filed herein by the law firm of Henia Anzala & Associates be expunged from the court record.
 - iii. The costs of this Application be provided for.
2. The application is supported by grounds on the face thereof and the affidavit of Abraham Hoffman sworn on 31st January, 2025 and a further affidavit by the same deponent. The Respondent/Applicant avers that the claim herein revolves around the fairness and justification of the Claimant's termination of his employment contract with the Respondent following disciplinary hearings by the Respondent, and that the Claimant's advocates on record, Henia Anzala & Associates acted for and represented the Claimant in the disciplinary hearings.



3. It avers further that the firm of Henia Anzala & Associates was so intricately involved in the disciplinary proceedings against the Claimant, as particularized in the affidavit of Abraham Hoffman, and that in being so involved, members from the firm of Henia Anzala & Associates are potential witnesses in the present claim.
4. It is the Respondent/Applicant's position that the participation of the firm of Henia Anzala & Associates in these proceedings is prejudicial to the Respondent, as there is real apprehension that the said firm will essentially be testifying through the Claimant while at the same time acting as legal counsels.
5. The Claimant/Respondent opposed the motion vide the replying affidavit of Donald Mudanya sworn on 17th February, 2025.
6. The Claimant/Respondent argues that the subject of this suit is the unfair manner in which the Respondent conducted the disciplinary proceedings against him and the subsequent unfair termination of his employment contract. He avers that during the disciplinary process, he retained the services of the firm of Henia Anzala & Associates.
7. The Claimant avers that on 29th November, 2022, together with his advocate, he attended the disciplinary proceedings, but that his advocate was not allowed to speak and was eventually asked to leave the room.
8. It is the Claimant's case that when he was unfairly terminated by the disciplinary committee on 5th December 2022, he lodged an appeal which the Respondent unilaterally decided to ignore, and elected instead, to rehear the matter. He avers further, that this information was relayed to his Advocates by the firm of Coulson Harney Advocates.
9. It is his position that from the correspondence in this matter, it is evident that the Respondent retained the services of the firm of Coulson Harney Advocates during the disciplinary process, and has continued to retain their services in this suit.
10. The Claimant states that he chose the firm of Henia Anzala & Associates to represent him in this matter because they are well versed with the facts having given him advice through the unfair disciplinary proceedings conducted by the Respondent.
11. He avers that Article 50 of *the Constitution* of Kenya, 2010 guarantees every person the right to fair trial, which includes the right to choose, and be represented by an Advocate of his or her choice, and that it is therefore my constitutional right to have legal representation of his choice.
12. The Claimant states that he is aware that the parties in this suit have already filed their lists of witnesses and witness statements, and that he does not intend to call any Advocate as his witness. He avers further, that the Respondent's list of witnesses also does not contain the name of any Advocate from the firm of Henia Anzala & Associates as a witness, and the claim that Advocates from the firm of Henia Anzala & Associates are potential witnesses is an afterthought by the Respondent, meant to delay the hearing of this case.
13. The Claimant further states that the Respondent has neither deponed to, nor demonstrated any issues that would require any Advocate from the firm of Henia Anzala & Associates to be summoned as a witness in the matter.
14. He avers that Rule 8 of the Advocates (Practice) Rules which is the basis of the application, is specific to instances where an advocate has been summoned as a witness. He contends further that the mischief behind Rule 8 of the Advocates (Practice) Rules is to protect an Advocate's client against breach of



confidentiality that would occasion prejudice if an Advocate were to be called upon to give testimony, and not merely for the benefit of the opposing litigant to choose and pick who can represent their opponent.

15. The Claimant avers that he is aware that none of the Advocates from the firm of Henia Anzala & Associates either represented the Respondent or were involved in the Respondent's decision making, hence issues of conflict of interest does not arise. He avers that to successfully bar an Advocate from acting for a client, an Applicant must demonstrate to the Court that real prejudice will in all human probability result if the Advocate is allowed to act.
16. He avers that the Respondent has not demonstrated any prejudice it is likely to suffer if the firm of Henia Anzala & Associates continues acting for and on his behalf in this matter, and barring his Advocates from acting for him, will be a gross violation of his Constitutional right to legal representation and to a fair hearing and will greatly undermine his access to justice.
17. Parties urged the motion by way of written submissions and submissions were received from both parties.

The Respondent/Applicant's Submissions

18. It is the Applicant's submission that per Rule 8 of the Advocate (Practice) Rule, an advocate may be barred from appearing in Court where there is an apparent conflict of interest making them a potential witness in a contentious matter. It placed reliance in the case of *Serve in Love Africa (Silo) Trust v David Kipsang Kipyego & 7 others* [2017] eKLR to support this position.
19. It submits that the firm of Henia Anzala & Associates having been so intricately involved in the disciplinary processes, it is only reasonable to assert that the Claimant's Advocates have knowledge of the facts leading to the termination of the Claimant's termination, making them potential witnesses.
20. It is the Applicant's submission that the Employment and Labour Relations Court (Procedure) Rules allow for a witness to be called at any point of the proceedings, so long as leave of Court is sought and obtained, and therefore, it is not a legal requirement under Rule 8 of the Advocates (Practice) Rules to have issued summons to an advocate to appear as witness, prior to making the application.
21. It is submitted that the Respondent has provided sufficient basis to make the application, and it would be very prejudicial to the Respondent if the Claimant's Advocates continue to represent the Claimant despite its intricate involve in the facts in contention.

The Claimant/Respondent's Submissions

22. The Claimant submits that each party to a litigation has the right to choose his or her own Advocate, and unless it is demonstrated that the interests of justice would not be served if a particular Advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel. He sought to rely in the case of *William Audi Odode & Another-v- John Yier & Another* Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) to buttress this position.
23. He submits that the right to legal representation by counsel of one's choice is implicit in the Constitutional provisions with regard to access to justice, and particularly Articles 48, 50 (1) and 159(2)(a) of *the Constitution* of Kenya, 2010, and it is only in exceptional circumstances that this right should be taken away.
24. It is his submission that the general principles guiding the disqualification of Advocates from appearing in a matter were summed in the case of *Murgor & Murgor Advocates v Kenya Pipeline Co. Ltd* [2021]



eKLR, where the Court held that it must be apparent that the Advocate sought to be disqualified will be required as a witness to give evidence in the matter; and it is desirable that when the principle of confidentiality in an Advocate/ Client fiduciary relationship will be prejudiced or where there is a possibility of real conflict of interest.

25. The Claimant submits that in an occasion in which the Advocate's testimony is sought by an adverse party, the threshold question would be whether the testimony is covered by Advocate client- privilege or is purely an evidential question as was held in the case of *In re Estate of Michael John Kiplimo Sang*.
26. He submits that there is no evidence to show that testimony from any Advocate from the firm of Henia Anzala & Associates is relevant, material or necessary in this suit, and that without showing the relevance of any Advocate's testimony, there is no justification to bar the firm of Henia Anzala & Associates from acting for the Claimant.
27. It is his prayer that the Respondent/Applicant's motion be dismissed with costs.

Determination

28. The singular issued for determination is whether the law firm of Henia Anzala & Associates should be barred from acting for the Claimant/Respondent herein.
29. The application is premised on Rule 8 of the Advocates (Practice) Rules, which states thus: -

“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.”
30. The subject of the suit herein, revolves around the manner in which the Respondent conducted the disciplinary proceedings against the Claimant, and his subsequent termination from the service of the Respondent.
31. The Respondent/Applicant contends that for reason that the firm of Henia Anzala & Associates represented the Claimant in the disciplinary proceedings, it should be barred from representing him in this suit, on the basis that any associate in the said firm may be called as a witness in the matter.
32. The Claimant on his part, maintains that on 29th November, 2022, he together with his advocate, attended the disciplinary proceedings, but that his advocate was not allowed to speak and was eventually asked to leave the room. It is his contention that when he was unfairly terminated by the disciplinary committee on 5th December 2022, he lodged an appeal which the Respondent unilaterally decided to ignore, and elected instead, to rehear the matter, and that this information was relayed to his Advocates by the firm of Coulson Harney Advocates.
33. The Claimant asserts that Rule 8 of the Advocates (Practice) Rules which is the basis of the application, is specific to instances where an advocate has been summoned as a witness.
34. It is apparently clear that at no point did the Claimant's advocates, the firm of Henia Anzala & Associates appear to represent both parties in this matter, and therefore, the issue of conflict of interest does not in my view arise.



35. There is also nothing in the firm's participation in the Claimant's disciplinary hearing that shows that any advocate from the said firm may be called as a witness in the matter.
36. *The constitution* expressly shields one's right of access to justice under Articles 48, 50 (1) and 159(2) (a), and it is therefore only in exceptional circumstances that this right can be taken away. As correctly submitted by the Claimant, the witness statements for both parties have already been filed and none of the statements was made by an associate from the firm of Henia Anzala & Associates.
37. The Respondent/Applicant has also not led evidence of any issues that would require any Advocate from the firm of Henia Anzala & Associates to be summoned as a witness in the matter, nor demonstrated the purpose of the testimony of any Advocate from the said firm, if summoned, will serve in the determination of this Suit. (See re Estate of Michael John Kiplimo Sang [2022]).
38. It is further not lost on this court that the rationale for Rule 8 of the Advocates (Practice) Rules is to protect an Advocate's client against breach of confidentiality that would occasion prejudice if an Advocate were to be called upon to give testimony, and not merely for the benefit of the opposing litigant to choose and pick who can represent their opponent.
39. It is my considered view that the Respondent/Applicant has not demonstrated sufficient basis to bar the firm of Henia Anzala & Associates from acting as advocates and/or legal counsels for the Claimant in respect of the claim herein.
40. In whole, the Respondent/Applicant's Motion dated 5th February, 2025 is found to be devoid of merit and is dismissed.
41. Costs shall be in the cause.
42. Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY, 2025

C. N. BAARI

JUDGE

Appearance:

Ms. Mumbi Present for the Claimant

Ms. Omondi Present for the Respondent

Ms. Esther S - CA

