



**Mwasighwa & 55 others v Mbulia Community Land & 3 others (Petition E007 of 2024)
[2024] KEELC 5862 (KLR) (Environment and Land) (30 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
PETITION E007 OF 2024
EK WABWOTO, J
AUGUST 30, 2024**

BETWEEN

**GEORGE MWASIGHWA 1ST PETITIONER
GILBERT MGHANA 2ND PETITIONER
OHANE KATEMBO & 53 OTHERS & 53 OTHERS 3RD PETITIONER**

AND

**MBULIA COMMUNITY LAND 1ST RESPONDENT
DEVKI STEEL MILLS LIMITED 2ND RESPONDENT
THE COMMUNITY LAND REGISTRAR TAITA TAVETA
COUNTY 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The Petitioners instituted this Petition vide a Petition dated 8th August 2024. Contemporaneous to the filing of the said Petition, the Petitioners also filed a Notice of Motion dated 16th August 2024 seeking inter alia conservatory orders against the Respondents. The firm of Mwazighe & Co. Advocates filed the said pleadings on behalf of the Petitioners.
2. Upon service of the said pleadings to the Respondents, the 1st Respondent filed an application dated 16th August 2024 objecting to the representation of the Petitioners by the firm of Mwazighe & Co Advocates. The application sought the following orders:
 - a.Spent.



- b. That the law firm of Mwazighe & Co. Advocates be disqualified and barred from continuing to act as legal representatives in the current position, having previously entered into a binding and enforceable retainer agreement with Mbulia community dated 29th March 2021.
 - c. That the law firm of Mwazighe & Co. Advocates be restrained, whether by itself, its partners, associates, or agents from advising, acting for, or assisting the opposing party in any manner related to this petition or any matter arising therefrom.
 - d. That an order directing the law firm of Mwazighe & Co. Advocates to immediately cease and desist from representing or associating with the Petitioners herein or any other party opposing the interests of the Mbulia Community in any related proceedings until the final determination of this matter.
 - e. That the costs of this application be provided for by the Respondents;
3. The application is premised on the grounds appearing on its face together with the supporting affidavit of Charles Mwaizinga sworn on 16th August 2024.
 4. It was the Applicant's case that the law firm of Mwazighe & Co. Advocates entered into a retainer agreement dated 29th March 2021 with Mbulia Community under which the said firm committed to act in the best interests of the community without compromise or conflict in all legal and advisory matters. The said retainer agreement is still in force and has not been terminated thereby binding the firm to its obligations therein. It was averred that clause 13 of the said retainer agreement prohibited the firm from acting, advising, assisting, or representing any party that may oppose or have adverse interests to those of the Mbulia Community. The firm's current representation of the of the Petition herein in this petition constitutes a glaring and unequivocal conflict of interest, in direct violation of the said clause.
 5. It was contended by the 1st Respondent/Applicant that the law firm of Mwazighe & Co. Advocates, by representing the Petitioners herein, is in breach of its fiduciary duty to the Mbulia Community, having previously undertaken to notify the community in writing of any matters or issues that may prejudice their interests. The firm has failed to uphold this duty, further undermining the trust reposed in it by the Mbulia Community and that the actions of Mwazighe & Co. Advocates in representing an opposing party in a matter directly affecting the Mbulia Community erode the trust and confidence that clients place in their legal representatives and bring the legal profession into disrepute and further that the continued involvement of Mwazighe & Co. Advocates in this matter contravenes the rules of professional conduct governing advocates. The court was urged to allow the application as prayed.
 6. The application was opposed by the Petitioners vide a Replying Affidavit sworn by Mwazighe Micar Advocate on 16th August 2024. It was deponed that the firm of Mwazighe & Co. Advocates has not received any instructions from the 1st Respondent from May 2021 to date. It was contended that the 1st Respondent had not demonstrated how the fact of the concluded instructions between the firm and the 1st Respondent would bring a conflict of interest in the present matter which was a distinct suit and further that the Petitioners are entitled to a counsel of their choice.
 7. The application was canvassed by way of oral submissions made by Counsel for the parties on 19th August 2024. Learned Counsel Mr. Mburu made oral submissions on behalf of the Applicant while Learned Counsel Mr. Wambua made oral submissions on behalf of the 2nd Respondent in support of the application. Lead Counsel, Ms. Waswa appeared on behalf of the 3rd and 4th Respondents but did not make any oral submissions in respect to the application, leaving it to the Court to decide.



Learned Counsel Mr. Mwazighe made oral submissions on behalf of the Petitioners in opposition to the application.

8. The Court having considered the application and oral submissions made by the parties is of the view that the main issue for consideration at this stage is whether the firm of Mwazighe & Co. Advocates should be disqualified from acting for the Petitioners.
9. The right to legal representation is a fundamental principle of *the Constitution*. In the case of *William Audi Odode & Another v John Yier & Another, Court of Appeal Civil Application No. NAI 360 of 2004*, the court held: -

“I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law 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”.

10. The Court of Appeal in *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* [2005] eKLR laid out the test which must be demonstrated when considering an application for the disqualification of an advocate from representing a litigant. The Court of Appeal aptly held as follows: -

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are *King Woolen Mills Ltd & Anor vs. M/S Kaplan & Stratton* [1993] LLR 2170 (CAK), (C.A 55/93) and *Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2)*, [2002] 2 EA 654.”

11. Regarding conflict of interest and client confidentiality Halsbury Laws of England 4th Edition at paragraph 527, page 353 states:

“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.”

8. Black’s Law Dictionary Tenth Edition defines conflict of interest as:

- “1. A real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.
2. 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”.

12. In the same vein, The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016 defines conflict of interest in Rule 6 paragraph 96 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.”

13. In the instant application, the evidence tendered herein only shows that the firm of Mwzighe & Co. Advocates were only engaged in April 2021 in a transaction to register the conversion of Mbulia Group Ranch to Mbulia Community Land wherein a sum of Kshs 40,000 was paid to them as fees. In May 2021, the Secretary of the 1st Respondent, Mr. Gerald Kishushu informed Mr. Mwzighe Advocate that the 1st Respondent had already engaged another firm to act for them in their issues and to date the firm of Mwzighe & Co. Advocates has never been engaged further by the 1st Respondent.

14. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel.

15. From the evidence on record, the events leading to the current petition were post May 2021 and the 1st Respondent has not adduced any cogent evidence to demonstrate any mischief, conflict of interest or prejudice that may be suffered if the firm of Mwzighe & Co. Advocates continues to act for the Petitioners. Given the role of the concerned advocates and the nature of the claim herein, there is no possibility of conflict of interest arising herein as it has not been shown they have any particular personal interest which will collide with their fiduciary duties as advocates.

16. In view of the foregoing, it is the finding of this Court that the 1st Respondent/Applicant’s application dated 16th August 2024 is unmeritorious and, in the circumstances, the said application is dismissed in its entirety with an order that each party do bear own costs of the same.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 30TH AUGUST 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Mwzighe for the Petitioners.

Mr. Mburu for the 1st Respondent/Applicant.

Mr. Wambua for the 2nd Respondent.

No Appearance for the 3rd and 4th Respondents.

Court Assistant: Patrick Maina.

