



**Orata & another v County Assembly Service Board, Homabay County & another  
(Petition E010 of 2022) [2022] KEELRC 13434 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13434 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E010 OF 2022  
CN BAARI, J  
DECEMBER 8, 2022**

**BETWEEN**

**HEZRON OCHIENG ORATA ..... 1<sup>ST</sup> PETITIONER**

**ELLY ODOYO OYIER ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COUNTY ASSEMBLY SERVICE BOARD, HOMABAY COUNTY .... 1<sup>ST</sup>  
RESPONDENT**

**COUNTY ASSEMBLY CLERK, HOMABAY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before court is the respondents' notice of motion application dated October 7, 2022, brought pursuant to rules 6 and 95-100 of the *Code of Standards of Professional Practice and Ethical Conduct*, June, 2016, and sections 1A, 1B and 3B of the *Civil Procedure Act*, 2010. The Applicants seeks orders That:
  - i. Spent
  - ii. The honourabl court be pleased to order that MR Bruce Odenyand all Advocates practicing in the name and style of Bruce Odeny & Company Advocates be disqualified from representing the petitioners in this matter.
  - iii. That the costs of this application be provided for.
2. The motion is supported by grounds on the face of it and the affidavit of Faith Adhiambo Apuko. The crux of the application is that the firm that is currently representing the petitioners acted for the respondents or parties relating with the respondents in another matter that holds similar facts.



3. The respondents/applicants argue that in Petition No 27 of 2020, amended, annexure RA2 filed with the affidavit of the respondents, is a notice of appointment of advocates, stating that the firm of Bruce Odeny & Company Advocates had come on record to represent the Speaker of Homabay County.
4. The respondents/applicants aver that paragraph 34 to 48 of Petition No 27 of 2020, where Mr Odeny acted for the Speaker of Homabay County, shows details of facts of what was a photocopied sequence of events to the current petition. The respondents further state that Petition No 27/2020, was concluded, and that the firm of Odeny & Company Advocates participated to the conclusion of the matter.
5. It is the respondents' submissions that in the current petition, the County Assembly Service Board (respondent) that executed the recruitment process of the Clerk of the Assembly, was being chaired by the Speaker who was then represented by the firm of Odeny & Co Advocates. It is the respondents' assertion that the firm of Odeny gained privileged information through the Speaker whom he represented, and who sat in the recruitment meetings.
6. The respondents further submit that the firm of Odeny & Co Advocates should disclose the level of conflict of interest having gained privileged information in the earlier suits.
7. It is the respondents' contention that the firm's position in Petition No 27/2020, is in conflict with the position they are taking in the current petition, and that their continued acting in this matter will prejudice their client.
8. The petitioners opposed the motion vide grounds of opposition dated October 19, 2022. The petitioners aver that there is no conflict of interest demonstrated in the application as the firm of Odeny & Co Advocates has never represented the respondents.
9. The petitioners submit that the application herein is fatally defected for reason that this court is governed by the *Employment and Labour Relations Court (Procedure) Rules*, and that none of the rules have been invoked in relation to the instant application.
10. It is further submitted that what is in the court record is a notice of change of Advocates where the firm of Odeny & Co Advocates had been retained to represent the speaker of Homabay County in Petition No 27/2020, and further that the respondents herein are not parties to that petition.
11. Counsel for the petitioners further submits that instructions were withdrawn from him and thus, he did not participate in Petition No 27/2020. Counsel further argues that the cause of action in the two petition is also different. It is his assertion that in Petition No 27/2020, the Clerk was challenging his removal, and that pleadings are clear that the Speaker was not part of that removal.
12. The petitioners further argue that the cause of action in the instant petition concerns the appointment of Clerk of the Assembly. Counsel further urged that the deponent herein has not alleged that they retained their services, nor that he received confidential information which he can use to her detriment.
13. The petitioners pray that the application be dismissed for being vexatious.

### **Determination**

14. I have carefully considered the application, the grounds and affidavit in support, the grounds of opposition and the oral submissions by both counsels. The issue for determination is whether the firm acting for the petitioners has a conflicted of interest that will prejudice the respondents' case.
15. The *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."
16. Further, 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.”
17. Rule 6 paragraph 95 of the [Code](#) provides that an 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.
18. Rule 6 paragraph 99 of the 2016 [Code](#) goes on to enumerates instances in which a conflict of interest might arise, as follows: -
- “(a) Where the interests of one client are directly adverse to those of another client being represented by the advocate or the firm, for instance in situations where the representation involves 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.”
19. In an application such as the one before this court, the onus is placed on the applicant to provide evidence of the asserted conflict of interest, and not merely cite apprehension of possible conflict or prejudice. (See [British-American Investments Company \(K\) Limited v Njomaitba Investments Limited & another](#) [2014] eKLR)
20. The notice of change of advocates referred to herein, indicates that the firm Bruce Odeny & Compnay Advocates came on record to represent the Speaker of Homabay County Assembly, who is not a party to the current petition.
21. In Petition No 27/2020 as amended, the petitioner was seeking reinstatement to the position of Clerk of Homabay County Assembly, while in the instant petition, the issue relates to the procedure of recruitment of Clerk of the County Assembly.
22. Advocates are general bound not to disclose confidential information that is given to them by clients in the cause of duty. In [King Woolen Mills Ltd \[formerly known as Manchester Outfitters Suiting Division Ltd\] v Kaplan and Stratton Advocates](#) [1993] eKLR , also cited by the respondents, Muli JA stated:
- “[T]he information imparted to (him) by the individual clients was confidential. [He] owed a duty to his individual clients not to disclose or divulge any confidential or secret information imparted to him in confidence to anyone else including the clients in the (common)



transaction without the consent of the client imparting the confidential information... nor do I think for a moment that it can be argued that the duty and obligations imposed on him as a common advocate ceased after conclusion of the transaction for which returns were made.”

23. The English Court of Appeal in *Rukusen v Ellis, Munday & Clerke* (1912) 1 Ch 831 stated:

“...The law as laid down there is that there is no absolute bar on a solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause real prejudice to the former client. ....”
24. The process of recruitment of Clerk is a statutory process and the statute creating the position provides clear steps for accomplishing the recruitment. Whether or not the Firm now on record for the petitioners has any information, will not in my view affect the just determination of this instant petition.
25. O’Kubasu JA (as he then was) in *William Audi Odode & another v John Yier & another* Court of Appeal Civil Application No NAI 360 of 2004, had this to say on representation of parties: -

“...it is not the business of the courts to tell litigants which advocate should or 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 a matter, the parties must be allowed to choose their own counsel.”
26. In the instant case, I do not see real mischief and/or prejudice that will result if the firm of Bruce Odeny & Company Advocates is allowed to act for the petitioners herein.
27. In the upshot, I find and hold that the respondents/applicants’ motion is devoid of merit and is for dismissal. Accordingly, the motion dated October 7, 2022, is dismissed.
28. The costs of the application shall abide the petition.
29. Orders of the court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2022.**

**CHRISTINE N BAARI**

**JUDGE**

**Appearance:**

Ms Mwangi present for the petitioners/respondents

Mr Otieno Obiero present for the respondents/applicants

Ms Christine Omollo-C/A

