



**Ndemo v Ondoro & 4 others (Environment & Land Case
E004 of 2022) [2024] KEELC 6850 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E004 OF 2022**

**JM KAMAU, J
OCTOBER 17, 2024**

BETWEEN

MICHAEL MOTURI NDEMO PLAINTIFF

AND

RHODA MONGINA ONDORO 1ST DEFENDANT

JOHNSTONE NYANYUKI MENGE 2ND DEFENDANT

JAMES ONGERA KEMONI 3RD DEFENDANT

HELLEN ACHINGA MAKORI 4TH DEFENDANT

YUNES BOERA NYAMWANGE 5TH DEFENDANT

RULING

1. Before me is an Application dated 13/4/2024 which questions the suitability of the firm of Bosire Gichana & co. Advocates and all other Advocate s practicing in the name and style of M/s Bosire Gichana & Co. Advocate s representing the Plaintiff in this case. The said Application, by the 2nd Defendant is premised on the grounds that the said firm had been retained by the 5th Defendant, Yunes Boera Nyamwange in Nyamira ELC case No. 60 of 2021 and therefore there existed Advocate - client relationship between the 2 and consequently there would be conflict if the firm of M/s Bosire Gichana & Co. Advocates did represent the Plaintiff against the 5th Defendant. In ELC Case No. 60 of 2021 the subject matter was the parcel of land No.L.R. GESIMA Settlement Scheme/5 where among the orders sought was the order of cancellation of the resultant sub-division of L.R. NO. Gesima Settlement Scheme/2 where Judgment was to be delivered on 9/5/2024. Therefore, there is a likelihood of conflict of interest since the firm of Advocates still holds information and documents belonging to the 5th Defendant that would aid the Advocates in acting for the Plaintiff. In his Supporting Affidavit sworn on the 13/4/2024 by Johnstone Nyanyuki, the 2nd Defendant it is deponed that L.R. NO. Gesima



Settlement Scheme/2 was sub-divided to produce L.R. No. Gesima Settlement Scheme/338, 339 and 342 registered in the names of the 5th Defendant.

2. In the current case, the Plaintiff, through Bosire Gichana & Co. Advocates unsuccessfully sought to have the 5th Defendant struck out of the suit. Documents to that effect were attached to the Affidavit in support of the Application.
3. The Plaintiff filed Grounds of Opposition dated 8/5/2024 arguing that the Plaintiff had sought to have the case against the 5th Defendant withdrawn but which Ms. Ochwal reminded the Court was disallowed by this Court on 30/1/2024.
4. The Application was opposed by the Plaintiff vide his Grounds of Opposition dated 8th May, 2024 on the following points;
 - a. That the Application is misconceived and otherwise an abuse of the court machinery.
 - b. That the Application lacks merit.
 - c. That the Applicant does not have the locus standi to question the representation of the Plaintiff's Advocate on behalf of the Plaintiff.
 - d. The Plaintiff withdrew the case against the 5th Defendant who he intends to use as a witness.
 - e. The Application is bad in law and unconstitutional.
5. Rule 9 of the Advocates (Practice Rules) basically prevents an Advocate appearing as Advocate in a case in which it is known, or becomes apparent, that the Practitioner will be required to give evidence material to the determination of contested issues before the Court. Rule 9 of the Advocates (Practice Rules) provides as follows:

“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 verbal or 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.”
6. The case of *William Audi Odede & Another vs John Vier & Another* Court of Appeal Civil Application No.NA1 360 of 2004 (KSM33/04) is instructive with regard to Rule 9 of the *Advocates Act* in declining to bar an Advocate from acting for some of the parties in the matter, the Court succinctly stated that;

“it is not the business of the Courts to tell litigants which Advocate should and should not act in a particular matter.”
7. Each party to litigation has a constitutional right (expressed or implied) to choose his/her own Advocate. As observed by the Court of Appeal in *Delphis Bank Limited vs Channan Singh Chatthe and 6 Others* (2005) IKLR, the right to a legal representative or Advocate of his choice is a litigant's most valued constitutional right. 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. 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.



8. The Rule is however not absolute. Exceptions must be made for instance where Counsel may discover much later, or probably through oversight, that he may be required to testify in a matter or circumstances change during the proceedings drawing focus on Counsel, then in such instances Counsel may be required to cease acting. Each case should however be decided on its own merits and peculiar facts.
9. But the Court ought to also interrogate further to determine whether the aggrieved Applicant's Application has merit or it is just being made -
 1. to derail the proceedings one way or the other.
 2. to defeat justice.
 3. to deliberately deprive the opponent of the services of an Advocate of their choice or in other words is a technical maneuver by the Applicant to disqualify the opposing party's Advocate from representing that party.
 4. to settle personal scores.
 5. With the aim of abusing the Judicial system or is an opportunistic abuse of Rule 9 of the Advocates (Practice Rules) by the Applicant
10. As held in *Rakusen vs Ellis Munday and Clarke* (1912) 1 Ch.831(1911-1913) ALL ER Rep 813, the Court has to be satisfied that real mischief and real prejudice will, in all human probability, result if the Advocate is allowed to act. As a general rule, the Court will not interfere unless there be a case where mischief is rightly anticipated.
11. On the other hand, it was held by the Court of Appeal in the case of *Kings Woolen Ltd (Formerly known s Manchester Suiting Division Ltd) & Another vs M/s Kaplan & Stratton Advocates* (1993)KLR 273 that once a retainer is established, then the general principle is that an Advocate should not accept any instructions to act for two or more clients where there is a conflict of interest between those clients. It is important to however note that retainer or proof of employment alone will not amount to conflict of interest. There must be a demonstration of the existence of information which could prejudice the party seeking disqualification. I find that the 5th Defendant has not raised any concern of conflict of interest and the 2nd Defendant cannot speak for her. The 2nd Defendant has not demonstrated how he stands to suffer from the conflict of interest occasioned to the 5th Defendant, if at all. And I agree with Ms Ochwal that the case of Nairobi HCCC No. 570 Of 2011 (Milimani), *British -American Investments Co. (K) Ltd -Vs.- Njomaitba Investments Ltd & Another* is applicable to the effect that:

.....where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.....”
12. However, although the 2nd Defendant does not bring out this point clearly, there is a nexus between the interests of the 5th Defendant and those of the 2nd Defendant and this is what the 2nd Defendant fears. The information in the ambit of the firm of Advocates obtained from the 5th Defendant would be lethal to the 2nd Defendant's case and it is only fair that the firm of M/s Bosire Gichana & Co.



Advocates graciously donates her client to a different firm of Advocates. I hope the endowment of the client will not be intimately and inextricably intertwined with the confidentiality.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 17TH DAY OF OCTOBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Ms. Bosire ; for the Plaintiff

Mr. Okenye holding brief for mr. Mokuu for the 1st Defendant

Ms. Mosomi for the 3rd Defendant

Mr. Mulisa for the 2nd Defendant

