



**Kimondo Gachoka & Co. Advocates v Kenya Medical Supplies Authority (Miscellaneous Application E410 of 2021) [2024] KEHC 1752 (KLR) (Civ) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1752 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS APPLICATION E410 OF 2021  
JN MULWA, J  
FEBRUARY 22, 2024**

**BETWEEN**

**KIMONDO GACHOKA & CO. ADVOCATES ..... APPLICANT**

**AND**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... RESPONDENT**

**RULING**

1. The Application before the court is dated 16/03/2023 brought by Kimondo Gachoka & Co. Advocates under provisions of Order 50 Rule 1 and Sections 1A, 3A of the *Civil Procedure Act*. The advocates seek orders: -
  1. That Miss Anne Munene and the firm of Anne Munene & Company Advocates be barred, restrained and/or disqualified from representing and/or appearing for the Respondent in this matter and in any other related proceedings in any manner whatsoever.
  2. The costs of the Application be provided for.
2. The grounds for the Application are stated at the face thereof, and Supporting Affidavit sworn by Irene Mburu, an Advocate and partner in the Applicants law firm on 10/03/2022.  
The Respondent filed grounds of opposition dated 4/05/2022 and a Replying Affidavit sworn on 4/05/2022, as well as submissions.
3. The Applicants case is that both itself and the firm of Anne Munene & Company Advocates represented the Respondents, Kenya Medical Supplies Authority (KEMSA) in a case at the Public Procurement and Administrative Review Board Application no. 81 of 2020 - Tusasco Insaat Anonim Sirketi v The Accounting Officer, KEMSA & China Railways No. 10 Engineering Group Company



Ltd wherein they were successful by a judgment dated 9/07/2020 but the Respondent failed to pay their fees.

4. Upon such failure the Respondent –KEMSA- instructed M/S Anne Munene & Company Advocates to act for it in taxation of their Bill of Costs and upon being successful, the KEMSA paid the legal fees to the firm of Munene & Company Advocates to its exclusion prompting the Applicant to file the instant Application.
5. It is the Applicants submissions that M/S. Anne Munene & Company Advocates having acted for the Respondent in the proceedings before the Review Board in the Application No. 81 of 2020 (cited above), the said law firm should be barred or restrained and/or disqualified from representing and/or appearing for the Respondent in this matter and in any other matter in related proceedings.
6. Citing Rule 8 of the *Advocates (Practice) Rules* 1966, the Applicant submits that an advocate should disqualify himself or herself if it appears that either party in the suit of application is likely to call them as witnesses in the matter. In support, the case *Jacob Muriungi v Mbaya M'mwendwa* [2009] eKLR for the proposition that where it appears that an advocate may be called as a witness for any of the parties in a matter where the Advocate has represented either of them to give evidence against the allegations of fraud, such advocate should cease acting for the parties.

Additionally, the applicant submits that having represented the Respondent together with the law firm and in particular Anne Munene Advocate, she should together with her law firm be barred and restrained from acting for the Respondent in the matter or any other related matter.

7. In the grounds of opposition M/S Anne Munene the Advocate opposes the Application stating that the Respondent has a constitutional right to counsel of its choice; that the Applicant has not demonstrated any intention to summon the advocate as a witness in any matter related to the Respondents case, nor has it demonstrated any mischief or real prejudice it is likely to suffer.
8. The Respondent law firm has thus urged for dismissal of the Application as premature and an abuse of court process.
9. What is at issue in my view is whether the Applicant has put forth and demonstrated reasonable and sufficient grounds upon which M/S Anne Munene & Company Advocates should be barred and/or restrained from acting or representing the Respondent-KEMSA- in the matter or any other related suit.

It is trite that a litigant has a right to choose its own Advocate to represent itself in any court of law or tribunal.

Indeed Article 50(2)(g) of the *Constitution* 2010 provides that an accused person and any other litigant a right “to choose, and be represented by an advocate and to be informed of his right promptly.”

10. That right to choose an advocate of one’s choice has been upheld in a myriad of decisions of superior courts to name a few: -
  1. *Delphis Bank Limited v Bhatt & 6 Others* [2005] eKLR.
  2. *Republic v Silas Mutuma Marinu & 2 others* [2016] eKLR.
  3. *Mereka t/a Mereka & Co. Advocates, v County Government of Nairobi* [2021] eKLR.

However, there are exemptions where there could be a conflict of interest which may give rise to substantial risk that the advocates representation of the client will or may materially and adversely affect the Advocates own interest or his duties as stated in *Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct*, 2016, Rule 6.



11. *Black's Law Dictionary 10<sup>th</sup> Edition* defines conflict of interest as
- i. Real or seeming incompatibility between ones private interests and one's public or fiduciary duties.
  - ii. A real or seeming incompatibility between the interests of two of a lawyer's client, such that the lawyer disqualifies from representing both client if the dual representation adversely affects either client or if the clients do not consent.

Additionally, the fact that the impugned law firm acted for the Respondent does not and cannot be a reason to bar it from further acting for the same client in any related matter unless there are concrete reasons to be apprehensive that the said advocate would be called upon to testify in a disclosed matter in future.

12. The applicant has not in my view demonstrated any adverse effect that the Respondent would suffer if the Respondent client choses the said Advocate to act for it. It would appear that the Applicants wish to have M/S Anne Munene & Company Advocates barred from acting for the Respondent upon reasons not known in law as no reasons at all has been advanced. Even if the Respondent failed to pay legal fees to itself, and opted to pay M/S Munene Advocates alone that cannot be a reason to bar her from representing the same Respondent if she is the advocate of its choice as per the *constitution*. The Applicant is at liberty to claims its fees from the Respondent
13. No risks or adverse effects have been disclosed in the application to persuade this court to allow its application.
- Throwing allegations to the court without an iota of evidence to proof the same cannot be entertained. It has not been demonstrated for instance that the Advocate Anne Munene is likely or it is likely that she would disclose any communication made to her in the course of her representation of the Respondent in the Board that if disclosed, would negatively affect the Applicant as provided at Section 134 of the *Evidence Act* which provides protection of client advocate communication, save for communication in furtherance of any illegal purpose or fraud.
14. It is also trite that an advocate is bound to a duty of confidentiality in relation to privileged information arising from his communication with a client. Applying the above legal principles backed up by Legal decisions, I am not satisfied with the Applicants very scanty submissions and disclosures of real or perceived mischief if the advocate is permitted to act or continue to act and represent the Respondent in the cited matter or any other involving the Respondent
15. The Application dated 16/03/2023 is dismissed with costs to the Advocate, Anne Munene t/a Anne Munene & Company Advocates.

Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**J. N. MULWA**  
**JUDGE**

