



**Ogiek Independent Council of South West Mau Forest (Konoin-Bomet) & 7 others v
Principal Secretary Ministry of Lands, Housing & Urban Development & 5 others (Petition
5 & 6 of 2017 (Consolidated)) [2023] KEELC 17175 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
PETITION 5 & 6 OF 2017 (CONSOLIDATED)**

**MC OUNDO, J
APRIL 27, 2023**

BETWEEN

**OGIEK INDEPENDENT COUNCIL OF SOUTH WEST MAU FOREST
(KONOIN-BOMET) PETITIONER**

AND

**PRINCIPAL SECRETARY MINISTRY OF LANDS, HOUSING & URBAN
DEVELOPMENT 1ST RESPONDENT
THE NATIONAL LAND COMMISSION 2ND RESPONDENT
KENYA FOREST SERVICE 3RD RESPONDENT
THE DIRECTOR KENYA SURVEY 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

**AS CONSOLIDATED WITH
PETITION 6 OF 2017**

BETWEEN

**JOHN K.KENY 1ST PETITIONER
RICHARD CHEPKWONY 2ND PETITIONER
RICHARD KIBET TOO 3RD PETITIONER
WILSON MARITIM ARAP MAGEREO 4TH PETITIONER
DANIEL KIPKEMBOI SAWE 5TH PETITIONER
SAMWEL KIPNGETICH TUM 6TH PETITIONER**



SAMWEL KIPLANGAT SANG 7TH PETITIONER

AND

**THE PRINCIPAL SECRETARY MINISTRY OF LANDS, HOUSING AND
URBAN DEVELOPMENT 1ST RESPONDENT**

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

KENYA FOREST SERVICE 3RD RESPONDENT

THE DIRECTOR KENYA SURVEY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. Before me for determination is an Application by way of a Notice of Motion dated the 5th December 2022, brought pursuant to the provisions of Order 9 rule 9(a) of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act*, and all other enabling provisions of the law where the Applicant seeks leave to act in person.
2. The said Application was supported by the grounds thereto as well as the supporting affidavit of Ruben Kiprotich Talam sworn on the 5th December 2022 to the effect that being the Chairman of Ogiek Independent Council of South West Mau Forest and the custodian of its original certificate of entity, they had learnt that the firm of P. Sang & Company Advocates had been presenting them in the matter wherein Judgment had been entered in 2018. That thereafter contempt proceedings had been filed by the firm of Mr. Mugumya and Company Advocates despite there having been no correspondence between his officials and the said firm of Advocates, to represent them in this matter. That by a resolution meeting of the 28th October (sic), the Council had unanimously decided to act in person post judgment.
3. The Application was opposed through the Grounds of Opposition filed by the firms of Bitala & Company Advocates alongside E.K Korir & Company Advocates who were on record for the Petitioners/Applicants herein, on the grounds that while they had filed the Petition, the supporting affidavits had been executed by Reuben Kiprotich Talam. That these two law firms had been on record for the Petitioners herein until Judgment was delivered.
4. That the Application was an afterthought after court had dismissed an earlier Application dated 14th April 2022 by the law firm of Koech Gideon & Co. Advocates, vide its ruling dated 27th October 2022 wherein no Appeal had since been filed.
5. That the Application was misconceived, incompetent, fatally defective, premature, hollow, bad in law, incurable, frivolous, a non-starter and a clear abuse of the court process and the provisions of Order 9 Rule 9 read together with Order 9 Rule 5 of the *Civil Procedure Rules* and that the Applicants' only intention was to confuse and mislead the court as to the true facts of the case. That there was no sufficient evidence brought before the Court in support of the Application as per the prayers sought. That the Petitioners'/Applicants were yet to comply with the orders of the court dated the 27th July 2018 and 27th October 2022 and an Application dated the 14th April 2022 where they had been condemned to bear the costs of the Petition and where the law firms of Bitala & Co. Advocates and E.K Korir & Company Advocates were yet to be paid their respective legal fees.



6. That the Application was intended to delay the logical finalization of the case herein and was brought by people with their own hidden selfish motives as all the respective parties sought to have the Ruling of Court dated 8th April 2021 enforced so as to enjoy the fruits of the Court's judgment dated 27th July 2018 and 24th October 2018.
7. That the supporting affidavit to the Application by Reuben Kiprotich Talam was full of falsehoods as P. Sang & Company Advocates was not the law firm representing the Petitioners and therefore the Application was intended to propagate a mischief. That the Rules of procedure must be strictly followed and complied with by all litigating parties and the said Application ought to be dismissed with costs.
8. By directions issued on the 7th December 2022, the said Application was to be disposed of by way of written submissions, to which whereas the Applicants filed their submissions, their Counsel on record sought that their Grounds of Opposition having been comprehensive, that the same be construed as their submissions. The 1st Respondent elected not to participate in the Application.

Applicant's submissions.

9. I have considered the Applicants' rather lengthy submissions to which I have picked out the submissions relevant to this Application as being that it was mandatory to seek leave of court to allow the Petitioners to act in person as judgment has been entered. That Mr. Rogers Mugumya Advocate did not present any evidence of retainer or correspondences between him and the Petitioners so as to justify the existence of Advocates-Client relationship. That the Petitioners' stand to date was that they had neither instructed Mr. Rogers Mugumya Advocate nor Bitala & E.K Korir & Company Advocates to act for them.
10. That there existed an active gazetted taskforce that the Kenyan Government had formed in the year 2018, after the landmark universal judgment of the African Court of Justice based in Arusha-Tanzania, which taskforce had been drawn from National Land Commission (NLC) through the Ministry of Environment and Forestry, to put in place preparation to profile, resettle and compensate the Petitioners/Applicants through public participation.
11. That Mr. Rogera Mugumya Advocate, without the consent of the Petitioners initiated contempt of court proceeding against the National Land Commission wherein there had been no case with them, with an agenda of creating a bridge through Petition No.6 of 2017 of the non-members of the Ogiek so as to benefit and take advantage of the disadvantaged indigenous minority Ogiek forest community who were the Petitioners in Petition No. 5 of 2017.
12. That there was no evidence of the retainer submitted by Mr. Rogers Mugumya Advocate to the court to justify the existence of Advocate - client relationship with the Petitioners (Ogiek Independent Council of South West Mau forest) Konoin Bomet) in Petition No.5 of 2017. The Petitioners/Applicants relied on the provisions of Section 107 of the Evidence Act to task Advocate Rogers Mugumya to discharge the burden of proof that he had received instruction from them upon which he had filed the contempt of Court Application dated 10th October 2019.
13. The Applicants also took issue with the consolidation made by the Counsel, of Petition No 5 of 5 of 2017 and Petition No 6 of 2017 which was done without consultation and consent of the Applicants, in an attempt to sabotage the rights of the genuine Ogiek forest community members and deliberately confer their rights to the Petitioners in Petition No. 6 who were not members of the Ogiek community.



14. That the court was misled by a second Notice of Change of Advocate dated the 11th January 2018 filed by the firm of E.K Kori & Co. Advocates without consent and proper instructions of the Petitioners who had earlier appointed firm of M/s Koech J.K & Company Advocates.
15. That because the provision of Order 9 Rule 9 (a) of the Civil Procedure Rules did not impede the constitutional rights of the Petitioner to be represented by an Advocate of their own choice, but to adhere to the procedure when a party wanted to change Counsel or act in person after Judgment had been delivered, that the Applicants had adhered to the said provisions of the law and their Application should therefore be allowed.

Determination.

16. I have anxiously considered, the Application herein as well as the submissions thereto the Grounds of opposition raised. Suffice to say, it is clear that the said Application, where the Applicants seek leave to act in person, was cunningly filed to indirectly challenge the ruling of the court that was delivered on the 27th day of October 2022.
17. Indeed the provisions of Order 9 Rule 9 of the Civil Procedure Rules are clear and provides as follows: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an Application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”
18. It is clear that these provisions of the law do not do not impede the Constitutional right of the Petitioners to be represented by an Advocate of their choice or to represent themselves, however where a determination on the same issue has been previously made by the court of competent jurisdiction and where the a party is aggrieved with the said decision, the doors are not shut for such who has a leeway to either file a Review to the same court, or file an Appeal to a higher Court, in this case the court of Appeal. There is no evidence that the Applicants followed any of the two avenues open to them.
19. It is clear from the decision of 27th day of October 2022, the court had held as follows:

“Indeed on the 3rd July 2018 when the issue of representation arose, the court had been informed that although it seemed that the Petitioners were being represented by both Mr. Koech and Mr. Mugumya Advocates and although the Petitioners’ claim was that they never instructed Mr. Mugumya Advocate, Counsel Mr. Mugumya had responded that they were the ones on record, Mr. Koech having served them with a Notice of Change of Advocates. That Mr. Koech Advocate had neither appeared in court nor filed any documents on behalf of the Petitioners.

The matter was slated for mention on 5th July 2018 so as to clear the issue of representation but on which date Mr. Koech Advocate failed to appear, and Mr. Mugumya Advocate appearing alongside Mr. Nyadimo Advocate for the Petitioners informed the court that they had agreed with Mr. Koech Advocate that since Mr. Mugumya had filed the Petitioners’ submissions, that he should remain on record.

On the 24th July 2018, in the proceedings in Petition No 6 of 2017, by consent parties agreed to have the judgment in Petition No 5 of 2017 and No. 6 of 2017 delivered together wherein the court obliged.



Indeed judgment was delivered on 27th July 2018 in the presence of Mr. Koko Advocate who held brief for Mr. Mugumya Advocate for the Petitioners, and the State Counsel Ms. Langat for the 1st, 3rd, 4th and 5th Respondents. There was no appearance for the 2nd Respondents.

That even after the judgment had been delivered, Mr. Mugumya Advocate of Bitala & Company Advocates had sought for its rectification through an Application dated the 22nd August 2018 wherein on 24th October 2018 the same was amended.

The court proceedings therefore bear witness that all along Mr. Mugumya Advocate has been appearing for the Petitioners through the firm of Bitala & Company Advocates who came on record via their Notice of Change of Advocates dated the 11th January 2018.”

20. A reading of the said decision is clearly indicative that the issue of representation had been resolved. It is therefore in this regard and in consideration of the Application herein, the grounds as well as the submissions in support thereof, that the court finds that the current Application would best be dealt with at an Appeal level if the Applicants are still bent on challenging the issue of representation and in a decisive way seeking to act in person. I find the Application has been filed by the Applicants as a cunning way to have a second bite of the cherry, the court having dismissed vide a ruling delivered on the 27th October 2022 an earlier Application dated 14th April 2022 by the law firm of Koech Gideon & Company Advocates to come on record for the Applicants post judgment. This Application, I find is brought in bad faith, is an abuse of the court process lacks merit and is hereby dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 27TH DAY OF APRIL 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

