



REPUBLIC OF KENYA



**Omufwoko v Osabwa & 9 others (Succession Cause 15 of 2023)
[2023] KEHC 25843 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 15 OF 2023
JN KAMAU, J
NOVEMBER 28, 2023
(FORMERLY ELC PETITION NO E001 OF 2022)**

BETWEEN

WILSON MUKUNA OMUFWOKO APPLICANT

AND

JACKSON AYIEKO OSABWA 1ST RESPONDENT
ZEBEDEE DANSON OSABWA 2ND RESPONDENT
RUTH ESITOKO OYA 3RD RESPONDENT
VELMA ECHALEKA KOLI 4TH RESPONDENT
THE COUNTY LAND REGISTRAR, VIHIGA 5TH RESPONDENT
DORCAS NELIMA OSABWA 6TH RESPONDENT
OSABWA SANDYS & COMPANY ADVOCATES 7TH RESPONDENT
ONDIEKI, ADVOCATE 8TH RESPONDENT
P.S. ONDIEKI & COMPANY ADVOCATES 9TH RESPONDENT
MORIGORI ONDIEKI & COMPANY ADVOCATES 10TH RESPONDENT

RULING

1. In his Notice of Motion application dated 4th March 2023 and filed on 7th March 2023, the Applicant herein sought the following orders:-
 1. Spent.
 2. Spent.



3. That Dorcas Nelima Osabwa be ordered to produce her degree certificate to show that she is qualified to practise as an advocate pursuant to Section 13 of the [Advocates Act](#).
 4. That in case she fails to do so, the court makes a finding that the firm of Osabwa Sandys & Company Advocates is fictitious and non-existent.
 5. That the court makes a finding that the person appearing for the defendants herein who is practising as Ondieki, Advocate and/or P.S. I. Ondieki Advocate and/or Morigori Ondieki Advocate, has no right to submit and is doing so illegally.
 6. That pursuant to the finding in the prayer in Paragraph 1 above, the court expunges any and all submissions made in this matter by the said Ondieki Advocates and/or P.S. Ondieki Advocate and/or Morigori Ondieki Advocate from the court record.
 7. That the court makes a finding that the appearance of Dorcas Nelima Osabwa and/or Osabwa Sandys & Co Advocates as advocates in this matter contravenes Section 4 of the [Oaths and Statutory Declarations Act](#) Cap 15 Laws of Kenya and strikes out all pleadings filed in this matter and filed by them.
 8. That the court makes a finding that the advocate allegedly known as J.M Aunga Advocate Commissioner for Oaths and whose address is given as P.O. Box 952 Kisii is not the same as Joseph Momanyi Aunga whose address is P.O. Box 971 Kisii and whose practising status is “inactive.”
 9. That pursuant to the finding in the prayers in Paragraph 7 above, the court makes a finding that the replying affidavits were commissioned by an unqualified person and/or a person whose practising license is not valid.
 10. That this Honourable Court makes a finding that the address for service provided by the defendants is fictitious and/or illusionary and proceeds to strike out the appearance and defence herein pursuant to Order 6 Rule 4 of the [Civil Procedure Rules](#).
 11. That pursuant to the finding in the prayers in Paragraph (sic) 3,4,5,6,7,8,9 and 10 above, the court strikes out the whole defense filed herein.
 12. That on striking out the whole defense, the Petitioner herein prays that this court grants his prayers in this petition in full.
 13. That the 1st, 2nd, 3rd and 4th Respondents be ordered to meet the costs of the application.
2. In his Affidavit that he swore on 7th March 2023 in support of the application herein, he stated that he obtained a Land Sale Agreement that was executed by the 2nd Respondent herein on one part and by one Nancy Owendi Otwoma, 3rd and 4th Respondents and noted that the same was drawn by the 7th Respondent who gave their physical address as Maragoli Plaza 1st Floor, Majengo Market, Vihiga County.
 3. He added that when the matter came up in court for hearing for the first time, the 9th Respondent whose office was at Repha Ambuli House at Luanda held brief for the 7th Respondent whose address he noted from the defense was given as Frejan Wing, Kose Heights 5th Floor, Hurlingham, Nairobi. He said that he travelled to the said offices but found that the same did not exist.
 4. He then wrote to the 9th Advocate to inform him that the said office did not exist and that when he took the letter to his office to Repha Ambuli House, he noted that he was said to have been practising as the 10th Respondent herein. However, when the 9th Respondent’s office acknowledged receipt of



his letter, it bore the 8th Respondent's stamp whose postal address was indicated as having been P.O. Box 901 Luanda. The 9th Respondent also wrote to him in the 8th Respondent's letterhead indicating that all documents meant for 7th Respondent ought to be delivered at the 8th Respondent's offices at Repha Ambuli House at Luanda.

5. He contended that the 8th Respondent was ambiguous and did not specifically commit itself as to whether the 7th Respondent had offices elsewhere. He stated that he tried to serve the 7th Respondent at Maragoli Plaza and Kose House once again and established that it did not exist. It was his assertion that the 7th Respondent did not exist.
6. He further stated that the 6th Respondent had never appeared in this matter since it commenced and that the 7th Respondent had never filed or served him with a Notice of Appointment of Advocates.
7. He asserted that on 6th February 2023 he was directed by the court to serve the 9th Respondent who was holding brief for the 7th Respondent. He stated that on 9th February 2023, the 9th Respondent did not come to court and an advocate told the court that she was holding brief for the 10th Respondent. When he served the 9th Respondent's Legal Assistant, she acknowledged receipt on behalf of the 10th Respondent. He pointed out that the 8th and 9th Respondents had transformed themselves into substantive advocates and that the 9th Respondent was now making submissions before this court.
8. He further stated that he did a search at the Law Society of Kenya (LSK) and ascertained that the advocate allegedly known as J.M. Aunga Advocate and Commissioner for Oaths did not exist in the advocates' register. He also stated that he conducted an official search and established that the said advocate had different offices from those of Joseph Momanyi Aunga whose status was shown to have been "inactive."
9. In opposition to the said application, on 15th March 2023, the 3rd Respondent swore a Replying Affidavit. The same was filed on 16th March 2023.
10. The 3rd Respondent stated that the Applicant's present application was bad in law, an afterthought and an abuse of the court process.
11. She averred that together with the other Respondents, they appointed the 7th Respondent to act for them in this matter and that the 7th Respondent instructed the 9th Advocate to conduct the matter on its behalf.
12. It was her contention that the 6th Respondent, 9th Respondent and Joseph Momanyi Aunga were competent and qualified advocates to act and that it was normal for an advocate to ask another advocate to hold his or her brief. She added that the Applicant did not offer any evidence to show that M.J. Aunga was not one and the same person as Aunga Joseph Momanyi Advocate and that he was not a Commissioner for Oaths. She thus urged this court to dismiss the present application with costs.
13. The Applicant's undated Written Submissions were filed on 7th March 2023. The Respondents' Written Submissions were dated 15th March 2023 and filed on 16th March 2023. The Ruling herein is based on the said Written Submissions that all parties relied upon in their entirety.

Legal Analysis

14. The Applicant reiterated the averments in his Support Affidavit in his Written Submissions. He cast doubt as to whether the 6th Respondent ever studied law to be qualified to act as an advocate and invoked the provisions of Section 112 of the Evidence Act to prove that she indeed had a formal degree. He was categorical that her offices were fictitious.



15. He further submitted that the 7th Respondent had not filed a Notice of Appointment of Advocates and yet the 8th and 9th Respondents were submitting on it. He asserted that the 9th Respondent ought to have stated that he was the advocate on record and not for the advocates to change their identities.
16. It was his further submission that the delay in filing a Notice of Appointment of Advocates was because the 6th and 9th Respondents could not figure out who was to be on record. He emphasised that the 7th Respondent was non-existent anyway and the 8th Respondent was therefore holding brief for a non-existent firm of advocates.
17. He further argued that the 6th Respondent could not represent the Respondents herein as she was the one who drew the Land Sale Agreement.
18. On their part, the Respondents submitted that the 6th Respondent was an advocate of the High Court of Kenya with a valid Practising Certificate for 2022 when she filed the pleadings herein and she instructed the 9th Respondent to hold her brief. They also asserted that the LSK confirmed that the 6th and 9th Respondents as well as Momanyi Joseph Aunga were all advocates of the High Court.
19. This court found it prudent to set out the prayers in full with a view to giving clarity to the orders the Applicant herein had sought in his present application. It was evident to this court that his application turned to the question of whether the pleadings the 1st, 2nd, 3rd and 4th Respondents' advocates had filed were proper and if not, if the same ought to be struck out on account that the 7th Respondent had not filed a Notice of Appointment of Advocates and on the ground that the 6th and 9th Respondents and Joseph Momanyi Advocates were not competent and quailed to act as advocates and hence all their pleadings were incompetent.
20. This court therefore found it prudent to deal with the issues under the following and distinct heads.

I. Notice of Appointment of Advocates

21. This court noted that in the 3rd Respondent's Replying Affidavit, the 1st, 2nd, 3rd and 4th Respondents instructed the 7th Respondent to act for them in this matter. The 7th Respondent filed a Notice of Appointment dated 26th September 2022 on 27th September 2022. This was in response to the Applicant's undated Notice of Motion application that was filed on 22nd September 2022. The Applicant's assertions that the 7th Respondent did not file a Notice of Appointment of Advocates was therefore incorrect.
22. The question of where the 7th and 9th Respondents' offices were situated was neither here nor there as the aforesaid Notice of Appointment of Advocates was clear that for purposes of service in Western Services, all documents would be served at M/S Godia & Associates Advocates Cherry House 2nd Floor Suite 201 Mbale Town Vihiga County P.O. Box 736- 50300 Vihiga Mbale. The 7th Respondent had also provided an email address as doryosamwa@gmail.com.
23. It was not clear to this court why the Applicant had to travel to Nairobi to serve the 7th Respondent with any documents. This court was also baffled as to why the Applicant had to serve the documents on the 9th Respondent when all he did was to hold brief for the 7th Respondent on 6th February 2023. The question of whether his firm of advocates operated as the 8th or 9th Respondent was immaterial.
24. The enquiries the Applicant made regarding the existence of the offices for the 6th and 9th respondents went far beyond what would have been expected of a party to any proceeding. In the absence of proof to the contrary, this court was not persuaded to find and hold that the 7th Respondent was non-existent and that the 9th Respondent held brief for a phantom firm of advocates as the Applicant had contended.



25. In this regard, the provisions of Order 6 Rule 4 of the Civil Procedure Rules, 2010 that the Applicant had relied upon regarding a fictitious office where a memorandum of appearance was filed were thus rendered irrelevant and immaterial in the circumstances of the case herein.
26. Without belabouring the point, this court to the firm conclusion that the 1st, 2nd, 3rd and 4th Respondents were represented by counsel. The question as to whether that counsel could represent them in the proceedings herein was a different matter altogether.

II. Competence Of Advocates To Act

27. Section 9 of the *Advocates Act* Cap 16 (Laws of Kenya) provides as follows:-

“Subject to this Act, no person shall be qualified to act as an advocate unless:-

- a. he has been admitted as an advocate; and
- b. his name is for the time being on the Roll; and
- c. he has in force a practising certificate;

and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4).”

28. The 1st, 2nd, 3rd and 4th Respondents annexed copies of the Practising Certificates of the 6th and 9th Respondents. They were dated 20th April 2022 and 27th April 2022 respectively. By the time the 7th Respondent filed a Notice of Appointment of Advocates on 26th September 2022, the 6th Respondent was competent and authorised to act as an advocate of the High Court of Kenya.
29. The Applicant did not provide any proof that it had inspected the roll of advocates kept by the Chief Registrar of the High Court and confirmed that the 6th and 9th Advocates were not advocates of the High Court as provided in Section 16 of the *Advocates Act* which states that:-

“The Registrar shall keep the Roll of Advocates in accordance with this Act and any directions as to its form and the information to be recorded as the Chief Justice may give, and shall allow any person to inspect the Roll during office hours without payment.”

30. The Applicant had therefore attempted to mislead the court that the 6th Respondent was not a competent advocate by failing to providing her status from LSK as he had done in the case of the said J.M. Aunga Advocate and Commissioner for Oaths.
31. Going further, the Applicant submitted an engine search of Momanyi Aunga Advocate showing his practising status as “inactive.” It was not clear which document he was said to have commissioned when he was inactive. Be that as it may, this court noted that the Applicant attached Replying Affidavits of the 1st, 2nd and 3rd and 4th Respondents and that of Enos Okola Ottichilo in his Supporting Affidavit which showed that one J.M. Aunga commissioned them on 3rd October 2022.
32. It was evident that the said J. M. Aunga commissioned the said Replying Affidavits in 2022. This court noted in the letter dated 16th February 2023 and filed on 7th March 2023, the LSK confirmed that Aunga Joseph Momanyi was an advocate of the High Court and that his practising certificate for 2022 had declared to be a sole proprietor in the name of M/S Momanyi Aunga & Co Advocates.



33. The “inactive” status the Applicant alluded to and attached a copy of the search engine in his Supporting Affidavit was for 2023. The scope and relevance of commissioning was limited to the year 2022 when the said J.M. Aunga had a valid Practising Certificate.
34. Notably, Section 107 (1) and (2) of the Evidence Act Cap 80 (Laws of Kenya) stipulates as follows:-
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
35. Section 108 of the Evidence Act further states that:-
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
36. Further, Section 109 of the evidence Act provides that:-
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
37. The Applicant had asserted certain facts. However, he was unable to prove that any of the advocates were incompetent to act as all documentary evidence showed that all the advocates who handled the matter herein had valid practising certificates for the year 2022 when the pleadings herein were drawn. His reliance on Section 112 of the Evidence Act thus fell by the wayside.
38. The question as to whether or not the 6th Respondent had a degree to practise law was not within the purview of this court. The Council of Legal Education was the entity which had mandate to ascertain whether or not a person had qualified to be an advocate as provided in Section 13(2) of the Advocates Act. Enquiring into whether or not the 6th Respondent graduated with a law degree would therefore be beyond the jurisdiction of this court.
39. Having said so, it was correct as he had stated that the 6th and 7th Respondents ought not to have acted for the 1st, 2nd, 3rd and 4th Advocates as drew the Agreement of Sale in respect of L.R. No East Bunyore/ Eburnangwe/1248 which was the subject matter of the Petition the Applicant initially filed at the Environment and Land Court (ELC). This is because the 6th Respondent was a potential witness in any disputes that would arise between the parties to the Agreement for Sale and she would be embarrassed if she was called to be a witness in a case while acting as an advocate for the 1st, 2nd, 3rd and 4th Respondents herein.
40. Be that as it may, the Applicant’s argument that she could not represent the 1st, 2nd, 3rd and 4th Respondents had been overtaken by events as the 10th Respondent herein filed a Notice of Change of Advocates replacing the 7th Respondent herein as advocates of the said Respondents. This was an irregularity that did not go to the competence of filing and substance of pleadings but rather went into the ethical question as to whether advocates who had drafted a document could act for the parties therein in a matter that went to court for resolution of a dispute. In any event, there was no prayer that had sought to strike out the 1st, 2nd, 3rd and 4th Respondents’ pleadings on the ground that the 6th Respondent was incapable of drawing the pleadings herein.



41. The Applicant enjoined the 6th, 7th, 8th, 9th and 10th Respondents without leave of this court. They were unnecessary parties to the instant proceedings. However, in the event he wanted them enjoined, then he ought to have followed the correct procedure as provided in Order 1 Rule 3 of the Civil Procedure Rules that states that:-

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

42. As the Applicant had not demonstrated any common question of fact or law to be determined involving all the Respondents herein, it was persuaded that it should strike out the names of the 6th, 7th, 8th, 9th and 10th Respondents from the proceedings herein on its own motion so as not to cloud the real issues before it for determination. This was in line with the provisions of Order 1 Rule 10 (2) which provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

43. Having carefully considered the affidavit evidence and the Written Submissions by the respective parties herein, this court came to the firm conclusion that the present application was frivolous and an abuse of the court process. The Applicant herein did not prove any of the assertions that he made in his present application and none of the prayers he had sought was capable of being granted.

Disposition

44. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 4th March 2023 and filed on 7th March 2023 was not merited and the same be and is hereby dismissed with costs to the 1st, 2nd, 3rd, 4th, 6th and 9th Respondents.

45. In view of the irregular misjoinder of the 6th, 7th, 8th, 9th and 10th Respondents herein, it is hereby directed that their names be and are hereby struck out from future pleadings herein forthwith.

46. As the parties have filed already their respective Written Submissions in respect of the undated Petition that was filed on 22nd September 2022 and Asati J who was seized of this matter at the ELC had on 9th February 2023 reserved the matter for delivery of judgment but had to transfer the file herein to the High Court due to lack of jurisdiction, it is hereby directed that judgment herein will be delivered online on 31st January 2024 at 9.00 am.

47. It is so ordered.

DATED and DELIVERED at VIHIGA THIS 28TH DAY OF NOVEMBER 2023.

J. KAMAU
JUDGE

