



Okwarere alias John Wycliffe Okware v Emongor (Environmental and Land Originating Summons 5 of 2019) [2025] KEELC 162 (KLR) (29 January 2025) (Ruling)

Neutral citation: [2025] KEELC 162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 5 OF 2019**

**BN OLAO, J
JANUARY 29, 2025**

BETWEEN

**JOHN WYCLIFFE OKWARERE ALIAS JOHN WYCLIFFE
OKWARE PLAINTIFF**

AND

ELUSEO EMONGOR DEFENDANT

RULING

1. The dispute between John Wycliffe Okwarere Alias John Wycliffe Okware (the Plaintiff) and Eluseo Emongor (the Defendant) with respect to the land parcel NO South Teso/Amukura/711 was listed for hearing on 13th December 2023. On that day the plaintiff and his witness Ernest Itima Omoding (PW2) testified and were cross-examined by Mr Ashioya (SNR) counsel for the defendant. Thereafter, Mr Wanyama counsel for the plaintiff closed his case. The Defendant's case was listed for hearing on 29th January 2024.
2. On that day, Mr Olaka holding brief for Mr Ashioya for the Defendant informed the court that the defendant could not be traced. He therefore closed the defendant's case and parties were given upto 12th February 2024 to file their submissions. Mr Wanyama complied and filed his submissions dated 12th November 2024 although the date of filing is not indicated.
3. The Defendant has now filed a Notice of Motion dated 9th February 2023 but filed on 12th February 2024 (this must be an error). The application is anchored on the provisions of Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* as read with Section 159 (2) of *the Constitution*. It is premised on the grounds set out therein and supported by the Defendant's affidavit dated 9th February 2024.
4. The gravamen of the application which the Defendant seeks to have the orders closing his case on 12th February 2024 set aside and the case be re-opened so that he and his witness can testify is that he has been sick, bed-ridden and out of communication with his counsel. That he was also not getting the



letters or calls by his counsel to attend court. He has now partly recovered and donated a Power of Attorney to one Michael Okiring Emongor to take over the conduct of this matter on his behalf.

5. The following documents are annexed to the application:

1. Copies of medical chits.
2. Photograph of a person bed ridden and looking ill (I haven't met the defendant so I don't know if the person in the photograph is him but that is not really in dispute).
3. A Power of Attorney executed by the Defendant as Donor in favour of one Michael Okoring Emongor as Donee on 3rd February 2024 which is however not registered.
4. Copy of the Defendant's reply to the Plaintiff's Originating Summons.
5. Copies of the Defendant's Identity Card.
6. Copy of the Defendant's PIN.

In a short response, the Plaintiff filed a replying affidavit dated 13th November 2024. He has deposed, therein, that he testified and closed his case on 13th December 2023. The Defendant was absent but was granted upto 9th February 2024 to testify but on that day, he was absent and his advocate closed the defence case. Submissions were then filed and this application is aimed at further delaying this case.

6. The application has been canvassed by way of written submissions. The same have been filed by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the plaintiff and by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Defendant.
7. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
8. It is common ground that the plaintiff testified and closed his case way back on 13th December 2023. The defence was listed for hearing on 29th January 2024 but the Defendant's counsel was forced to close his case citing challenges in communicating with his client. The defendant now seeks to re-open his case and be allowed to testify. He has deposed in his affidavit in support of this application, that he was un-well and bed-ridden hence his inability to communicate with his counsel. He has now partially recovered and donated a Power of Attorney to one Michael Okiring Emongor dated 3rd February 2024.
9. What has concerned me is that the Power of Attorney was not registered. By filing the said Power of Attorney, the Defendant no doubt would wish that the donee Michael Okiring Emongor acts in his place in these proceedings. This suit involves a dispute over registered land and under Section 4 of the *Registration of Documents Act*, the Power of Attorney must be registered since it confers upon the said Michael Okoring Emongor the right to deal with the subject land in dispute. It follows therefore that even if this court was to allow the Notice of Motion herein, it will be an act in futility because Michael Okoring Emongor will lack the capacity to testify on behalf of the defendant unless the Power of Attorney dated 3rd February 2024 is registered. The defendant has been sued as the registered proprietor of the land parcel NO South Teso/Amukura/711. The plaintiff claims to have acquired by way of adverse possession, a portion of the said land. However, in the absence of registration of the said Power of Attorney, the said Michael Okoring Emongor will lack the capacity to testify on behalf of



the defendant. In the case of *Euton Njuki Makungo -v- R & 2 Others C.a. Civil Appeal No 35 of 2013* [2014 eKLR], the Court of Appeal addressed that issue as follows:

“ A Power of Attorney must be registered under the *Registration of Documents Act* (Cap 285 Laws of Kenya), in the Registry of Documents. The instrument of Power of Attorney must also be registered in the land registry relating to the property that is the subject matter of the transaction.”

The Power of Attorney dated 3rd February 2024 not having been registered, this application has no foundation on which it can stand.

10. The Notice of Motion dated 9th February 2024 and filed herein on 12th February 2024 is accordingly struck out with costs.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 29TH DAY OF JANUARY 2025.

BOAZ N. OLAO

JUDGE

29TH JANUARY 2025

