



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 419 OF 2016**

**(FORMERLY HCCC NO. 44 OF 2011)**

WILSON ONYANGO OKUMU.....1<sup>ST</sup> PLAINTIFF/RESPONDENT

BENSON MAGEMBE ONYANGO.....2<sup>ND</sup> PLAINTIFF/RESPONDENT

KEFAH OGANDA ONYANGO.....3<sup>RD</sup> PLAINTIFF/RESPONDENT

EDGAH OKONGO ONYANGO.....4<sup>TH</sup> PLAINTIFF/RESPONDENT

OMBOGO ONYANGO.....5<sup>TH</sup> PLAINTIFF/RESPONDENT

EDWARD MICHIEKA ONYANGO.....6<sup>TH</sup> PLAINTIFF/RESPONDENT

VERSUS

TOWN COUNCIL OF NYAMACHE.....1<sup>ST</sup> DEFENDANT/APPLICANT

THE COUNTY

GOVERNMENT OF KISII.....2<sup>ND</sup> DEFENDANT/APPLICANT

THE NATIONAL LAND COMMISSION..... 3<sup>RD</sup> DEFENDANT

THE KISII LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT

THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT

THE DIRECTOR OF LAND ADJUDICATION.....6<sup>TH</sup> DEFENDANT

**RULING**

**INTRODUCTION**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants herein filed a Notice of Motion dated 9<sup>th</sup> May, 2021 seeking that the County Attorney to be granted leave to come on record on their behalf in place of the firm of M/s Okong'o Omogeni and Co. Advocates.

2. The application is brought pursuant to Order 51, Rule 1, Order 9 Rule 9 of the Civil Procedure Rules, Section 1A, 1B, 3A, of the Civil Procedure Act. It is premised on the grounds set out on the face of the Notice of Motion as well as the affidavit of Mosota Nyamweya, Advocate sworn on 11<sup>th</sup> May, 2021.

3. The application is opposed vide a Replying Affidavit sworn by Benson Magembe Onyango, the 2<sup>nd</sup> Plaintiff/Respondent herein on 8<sup>th</sup> June, 2021.

4. The court ordered that the application be disposed of by way of written submissions and directed the parties to file their respective written submissions. Both Parties complied with the directions of the court and filed their submissions which I have considered.

#### **ISSUES FOR DETERMINATION**

5. The sole issue for determination is whether County Attorney should be allowed to come on record for the 2<sup>nd</sup> Defendant in place of the firm of Okong'o Omogeni & Co Advocates.

#### **ANALYSIS AND DETERMINATION**

6. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides as follows

*Order 9 rule 9.” 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”*

7. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates **after judgment** has been entered to be effected, there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the incoming Advocate.

8. This provisions does not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any misunderstanding between outgoing and incoming advocate. Thus a party so wishing to change his counsel must notify the Court and other parties. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR** where the judge observed as follows:

*“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...”*

9. In the present case, judgment was rendered on the 21<sup>st</sup> February, 2020 where there was a determination of the Court and therefore the provision of Order 9 Rule 9 are therefore applicable herein.

10. The record reveals that the application was served on all parties including the 1<sup>st</sup> Defendant's former Advocate. Given that the former Advocate did not object to this application or rather did not file a response to it, I see no reason not to allow this application. As I have observed hereinabove, the provisions of Order 9 Rule 9 of the Civil Procedure Rules was to protect a former Advocate *from a mischievous client who will wait until a judgment is delivered and then sack the Advocate and replace him.*

11. I have also considered the contents of the Replying Affidavit filed by the 2<sup>nd</sup> Respondent on behalf of other Respondents. In as much the issues raised are weighty, the instant application relates to change Advocates and the right of a party to be represented by an Advocate of his choice. The court cannot speculate why the 1<sup>st</sup> Defendant finds it necessary to change its advocate at this juncture but I am of the view that it is at liberty to do so. The court is aware of the fact that there is a final judgment in this matter and a mere change of Advocates shall not affect the substance of the judgment as argued by the Respondents.

12. The upshot is that the application is merited. The same is allowed with no orders as to cost.

**Dated, signed and delivered at Kisii this 10<sup>th</sup> day of February, 2022.**

**J.M ONYANGO**

**JUDGE**