



Wasike & 2 others (On their own Behalf and on Behalf of M/S 1992 Squatters Sacco) v Attorney General & 2 others (Environment & Land Petition E001 of 2020) [2022] KEELC 3204 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3204 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND PETITION E001 OF 2020**

DO OHUNGO, J

MAY 18, 2022

BETWEEN

JOSAM WANJALA WASIKE 1ST PETITIONER

ALEXANDER AMUKUNE 2ND PETITIONER

JACKSON OKUMU NANUNYU 3RD PETITIONER

ON THEIR OWN BEHALF AND ON BEHALF OF M/S 1992 SQUATTERS SACCO

AND

ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL LAND COMMISSION (NLC) 2ND RESPONDENT

KENYA FOREST SERVICE 3RD RESPONDENT

RULING

1. Proceedings in this matter commenced on 4th November 2020 when the petitioners filed their petition dated 3rd November 2020. The petition was drawn by M/s Ngigi Mbugua & Co. Advocates. The petitioners averred at paragraph 1 of the petition that they brought the petition on their own behalf and on behalf of M/s 1992 Squatters Sacco.
2. On 7th October 2021, the firm of Omwando Mbaka & Co. Advocates filed a Notice of Change of Advocates stating that the petitioners had appointed the said firm to act for them in the matter. When the matter came up for mention on 1st November 2021, on 29th November 2021 and on 25th January 2022, it was apparent that there was a dispute between M/s Ngigi Mbugua & Co. Advocates and M/s Omwando Mbaka & Co. Advocates as regards representation of the petitioners. Since the advocates and the petitioners were unable to resolve the dispute despite being given opportunities to do so, I



- ordered parties to file and exchange affidavits giving reasons why their respective firm should be deemed to be the one properly on record. This ruling is on the said issue of representation of the petitioners.
3. M/s Omwando Mbaka & Co. Advocates filed an affidavit sworn on 30th November 2021 by Josam Wanjala Wasike. He deposed that he was the chairperson of the 1992 Squatter Sacco Society and the 1st petitioner herein. That the 1992 Squatter Sacco Society is a Sacco registered under the Co-operative Societies Act whose office bearers pursuant to elections conducted on 29th June 2021 were Josam Wanjala Wasike as Chairman, Lydia Naliaka Soita as Vice Chairman, James Luyali Shidolwa as Secretary and Harun Munyeti Vindolo as Treasurer. He annexed a copy of a letter from Lugari Sub-County Co-operative Officer dated 15th July 2021 and stated that during the said elections, members voted out the 2nd and 3rd petitioners as secretary and treasurer respectively and that they never challenged the results through the established channels.
 4. Mr Wasike further deposed that the said fired officials have been masquerading as the society's secretary and treasurer to unsuspecting members of the public and government offices and that as a result the Sacco wrote to them demand letters requiring them to voluntarily refrain from such conduct. That the 2nd and 3rd petitioners did not heed the demand and as a result the Sacco moved to court in Kakamega CMCC No. E270 of 2021 and obtained an injunction on 18th November 2021 restraining them from carrying out activities of the Sacco. That when the Sacco learnt that their then advocates Ngigi Mbugua & Co Advocates were entertaining and conniving with the 2nd and 3rd petitioners it swiftly called for a meeting to disengage the aforementioned firm from all services. That in a meeting of the Sacco held on 29th September 2021 the Sacco unanimously resolved that the firm of Omwando Mbaka & Co. Advocates should come on record in place of Ngigi Mbugua & Co. Advocates with immediate effect. That it is therefore prudent and in the interest of justice to confirm the firm of Omwando Mbaka & Co. Advocates as the firm on record since enjoys the company's confidence.
 5. In response, Allan Rimui Mbugua Ngigi, Advocate, filed an affidavit in which he deposed that the petitioners filed the petition on their own behalf and on behalf of the entire membership of 1992 Squatter Sacco Society. That the issue of the correct officials of the Sacco was clarified in a letter from Lugari Sub-County Co-operative Officer dated 1st November 2021. That when the petitioners were rocked by leadership wrangles pitting the 1st petitioner on one side and the 2nd and 3rd petitioners on the opposite side, he demanded and obtained resolutions of retainer from the rank-and-file of 1992 Squatter Sacco Society which included a complaint by members against the 1st petitioner, minutes of the petitioners meeting held on 3rd November 2021, letter from Lugari Sub-County Co-operative officer dated 6th December 2018, letter from Lugari Sub County Co-operative dated 19th July 2018 effecting change from group to Sacco and minutes of executive meeting of the petitioners of 15th April 2021.
 6. Mr Ngigi further deposed that the letters purporting to sack 2nd and 3rd petitioners were never dispatched to them, that they have defended Kakamega CMCC No. E270 of 2021 and there are no subsisting orders in the said case. That there should be an orderly take-over of representation upon settlement of all outstanding issues including fees balances. That the petition belongs to all members of 1992 Squatter Sacco Society and should not be monopolized by either of the officials.
 7. In brief oral submissions, Mr Mbaka argued that the only issue Mr Ngigi is raising is one of fees, an issue which should be resolved elsewhere by the Deputy Registrar. On his part, Mr Ngigi argued that this is a representative action involving a big group of squatters and that Mr Mbaka had not obtained instructions from the entire group but was only instructed by the 1st petitioner. In response, Mr Mbaka quipped that the 1st petitioner is the only current official among the listed petitioners.



8. I have carefully considered the affidavits and the submissions.
9. It has been held by various superior courts that a court would always be reluctant to dictate which advocate may or may not represent a litigant in a matter, unless where there is a real likelihood that prejudice would arise. In the case of *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* [2005] eKLR the Court of Appeal stated:

The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness.

10. The above position was stressed in the case of *William Audi Odode & Another-vs-John Yier & Another* Court of Appeal Civil Application No. NAI 360 of 2004 (unreported) (O’Kubasu, JA) as follows:

I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.

11. The above decisions demonstrate that there is no hard and fast rule to determine whether or not an advocate should be allowed to act for a particular litigant. Each case has to be determined on its own facts and circumstances.

12. Order 9 Rule 5 of the *Civil Procedure Rules*, 2010 provides for change of advocates as follows:

A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an Order for that purpose, but unless and until Notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to Rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

13. In this matter, a Notice of Change of Advocates was filed on behalf of the petitioners on 7th October 2021 by the firm of Omwando Mbaka & Co. Advocates. There is on record the affidavit sworn on 30th November 2021 by Josam Wanjala Wasike, one of the petitioners herein, confirming that the petitioners instructed the firm of Omwando Mbaka & Co. Advocates to take over conduct of the matter on their behalf. On the other hand, Mr Ngigi filed his own affidavit. There is nothing on record from the petitioners vouching for his contention that he should remain on record. I am aware that he has argued that the order of the court required that the advocates swear affidavits to demonstrate that they have instructions. I see nothing in the order that limited the deponent of the affidavits to the advocates. I am sure that Mr Ngigi knows that what the court was looking for was evidence and consequently, the advocates were under duty to place before the court the best evidence on the issue of instructions. If Mr Ngigi found it necessary to swear his own affidavit, nothing would have stopped him from annexing to it an affidavit from the clients vouching for his instructions. I am satisfied that Mr Mbaka has availed better evidence on the issue of instructions. Further, I agree with Mr Mbaka that Mr Ngigi’s concern seems to be advocate/client fees, a matter that has ample avenues for resolution elsewhere.



14. In view of the foregoing discourse, I find that the firm of M/s Omwando Mbaka & Co. Advocates is properly on record for the petitioners and shall so remain on record until a valid change of representation is effected. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the petitioners

No appearance for the 1st respondent

No appearance for the 2nd and 3rd respondents

Court Assistant: E. Juma

