



**Edambo & 2 others v Choge & 6 others (Environment & Land Case  
122 of 2021) [2022] KEELC 2461 (KLR) (19 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2461 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 122 OF 2021**

**MN MWANYALE, J**

**JULY 19, 2022**

**BETWEEN**

**SINGA HAM EDAMBO ..... 1<sup>ST</sup> APPLICANT  
(ALSO JOINED AS LEGAL REPRESENTATIVE OF THE ESTATE OF WILSON  
OMOKE ODAMBO) AGGREY OYAVO EDAMBO ..... 2<sup>ND</sup> APPLICANT  
ALBERT MADETE EDAMBO ..... 3<sup>RD</sup> APPLICANT**

**AND**

**EGLYNE CHEPCHIRCHIR CHOGE ..... 1<sup>ST</sup> RESPONDENT  
MIRRIAM ARUM CHOGE ..... 2<sup>ND</sup> RESPONDENT  
CHRISTINE CHOGE ..... 3<sup>RD</sup> RESPONDENT  
JOSEPH ANG'ANG'A ..... 4<sup>TH</sup> RESPONDENT  
(SUED AS ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE  
ESTATE KIPTUM CHOGE (DECEASED)V.K. LAMU ..... 5<sup>TH</sup> RESPONDENT  
NANDI COUNTY LAND REGISTRAR ..... 6<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. The Court has been called to determine the Notice of Motion application dated 31<sup>st</sup> January 2022, which seeks the main substantive order in terms;
  1. Spent



2. That this Honourable Court be pleased, to order that Counsel for the Plaintiff/Respondents Mr. ABL Musiega do cease to represent the Plaintiffs in this matter as he is a potential witness and will be required to testify at the trial as a witness.
  3. Costs of the application
  4. Any other and further relief that this honorable Court shall deem fit and expedient to grant.
2. The said application taken out by the 1<sup>st</sup> to 4<sup>th</sup> Defendants is opposed by the plaintiff/Respondents but the 6<sup>th</sup> and 7<sup>th</sup> Defendants represented by the office of the Attorney General chose not to participate in the application.
  3. The application is grounded on grounds on the face of it, but the main ground is that the Applicants wish to call Mr. ABL Musiega Advocate as their witness, and that since he currently presents the Plaintiffs, there is a likely hood of a conflict of interest, hence their prayer.
  4. Further the application is supported by the Supporting Affidavit of Miriam Arum Choge who depones the grounds in support of the application and specifically depones at paragraph 29 that “I wish to point out the Advocates representing the Plaintiffs then in Kisumu Misc. Civil Application No. 160 of 2009 is the same one representing them currently that is Advocate ABL Nusiega, who ought to have informed the Court that the Minister’s verdict was indeed lodged at the Registry and was annexed to the caution” and at paragraph 37 depones that “in the circumstances, we hereby move the Court to have the Plaintiff’s Advocate disqualify himself from these proceedings as he is now a potential witness who appears to have more interest in the suit land, even more than the Plaintiff’s themselves and was instrumental in handling both the Succession Case being No. Kisumu HC. Succession Cause No. 58 of 2004, and the Miscellaneous Case where parties were never served being Kisumu Misc. Civil Appeal No. 160 of 2009).”
  5. For the above reasons deponed in the application, the 1<sup>st</sup> to 4<sup>th</sup> Defendant’s seek the orders in the Notice of Motion.
  6. On his part the Advocate for the Plaintiff/Respondent, filed Preliminary Objection to the application.
  7. In the objection, the Plaintiff/Respondent has indicated that the Court lacks jurisdiction to hear and determine the application and that the application is an abuse of the Court process; the objection further states that there is a misapprehension of the issues and that the application is incompetent.
  8. From the Application, the Supporting Affidavit as well as the Notice of Preliminary Objection, the Court frames the following as the issues for determination.
    - i) Whether the Court has jurisdiction to determine the application
    - ii) Whether Mr. A.B.L Musiega Advocate cited as a potential witness shall be conflicted if he continues to act as an Advocate for the Plaintiff.
    - iii) Whether the grounds to call Mr. ABL Musiega Advocate as a witness are justified?
    - iv) Whether the application is merited?
  9. The parties herein canvassed the application by way of filing of written submissions.
  10. On jurisdiction, the Applicant submits that the Court has jurisdiction to determine the application and cites Section 19 (2) of the *Environment and Land Court Act*, which provides that the Court shall be bound by the procedure laid down by the *Civil Procedure Act*.



11. On their part the Respondent submits that under Article 50 of *the Constitution*, a litigant may be represented by a Counsel of their choice, hence Article 50 of *the Constitution* would bar this Court from pronouncing itself on the application.
12. The application before Court is a procedural application, seeking to bar a counsel from representing a client and does not go to the substance and/or merits of the matter. I agree with counsel for the Applicant that Article 50, of *the Constitution* affords rights to an accused person in criminal proceedings and is not applicable in the instant case.
13. As observed earlier, the application seeks to define procedure as opposed to the substance of the suit and Section 19 (2) of the *Environment and Land Court Act* would thus vest the Court with the requisite jurisdiction. Accordingly the Court has jurisdiction to deal with the application and the Court proceeds to consider issue No. 2.
14. If Mr. ABL Musega Advocate, is called as a witness in the matter, the Applicant submits that he will be conflicted; the Applicant cites Rule 9 of the *Advocate practice Rule* in support of this submission.
15. The Respondent has not submitted on the issue of whether he will be conflicted if called upon the testify, but submits that there is a misapprehension of issues herein as the issue in the main suit is an explanation of how the Register was changed and the fake title deed in question and in possession of the Defendants.
16. Indeed if an Advocate was to be called as a witness in a matter, he would be conflicted. And in this case Mr. ABL Musiega if called as a witness would indeed be conflicted.
17. In the affidavit of Miriam Choge at paragraphs 29, 30 and 37, lays the reason, why Mr. ABL Musiega Advocate shall be called as a witness. At paragraph 13, and 14 of the Notice of Motion, the reasons why MR. ABL Musiega is sought to be disqualified.
18. The reason as appearing in the aforementioned paragraphs, deal mainly with the conduct of Mr. ABL Musiega in concealing vital information before the Court in Kisumu Misc. Civil Application No. 160 of 2009. This concealed information however is in the custody of the Defendants and they are able to adduce the same before this Court. Such that the conduct and/or misconduct of Mr. A.B.L Musiega is thus not an issue for determination in this suit.
19. Since the information that is said to have been concealed by Mr. ABL Musiega relates to the verdict of the Minister, the Defendants are able to adduce without calling Mr. Musiega and the Court therefore finds that Mr. Busiega shall not be a necessary and/or potential witness in the matter, and there is thus n justification to call him as a witness and to disqualify him, more so since he did not act for the 1<sup>st</sup> to 4<sup>th</sup> Defendants in the previous matters to prejudice them by revealing privileged information contrary to Section 134 of the *Evidence Act*.
20. Accordingly there is no merit in the Application before Court and the same is dismissed.

**DATED AT KAPSABET 19<sup>TH</sup> THIS JULY 2022.**

**HON. M. N. MWANYALE,**

**JUDGE.**

**In the presence of;**

Mr. Otieno for 1<sup>st</sup> to 4<sup>th</sup> Defendants/Applicant

Ms. Shijenje for the Plaintiff/Respondent



Copy of the ruling to be supplied to parties via email.

