



**Ogiek Independent Council of South West Mau Forest (Konoin-Bomet)
 & 7 others v Principal Secretary Ministry of Lands, Housing & Urban
 Development & 6 others (Petition 5 of 2017 & Constitutional Petition 6 of 2017
 (Consolidated)) [2022] KEELC 14458 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14458 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT KERICHO
 PETITION 5 OF 2017 & CONSTITUTIONAL PETITION 6 OF 2017 (CONSOLIDATED)**

MC OUNDO, J

OCTOBER 27, 2022

BETWEEN

**OGIEK INDEPENDENT COUNCIL OF SOUTH WEST MAU FOREST
 (KONAIN-BOMET) PETITIONER**

AND

**THE PRINCIPAL SECRETARY MINISTRY OF LANDS, HOUSING & URBAN
 DEVELOPMENT 1ST RESPONDENT**

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

KENYA FOREST SERVICE 3RD RESPONDENT

THE DIRECTOR KENYA SURVEY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

**AS CONSOLIDATED WITH
 CONSTITUTIONAL PETITION 6 OF 2017**

BETWEEN

JOHN K KENY 1ST PETITIONER

RICHARD CHEPKWONY 2ND PETITIONER

RICHARD KIBET TOO 3RD PETITIONER

WILSON MARITIM ARAP MAGEREO 4TH PETITIONER

DANIEL KIPKEMBOI SAWE 5TH PETITIONER



SAMWEL KIPNGETICH TUM 6TH PETITIONER
SAMWEL KIPLANGAT SANG 7TH PETITIONER

AND

THE PRINCIPAL SECRETARY MINISTRY OF LANDS, HOUSING & URBAN
DEVELOPMENT 1ST RESPONDENT
THE NATIONAL LAND COMMISSION 2ND RESPONDENT
KENYA FOREST SERVICE 3RD RESPONDENT
THE DIRECTOR KENYA SURVEY 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. Before me for determination are two applications, the first being an Application by way of a Notice of Motion dated the March 25, 2022, brought pursuant to the provisions of Section 1A, 2A & 3A of the *Civil Procedure Act*, Order 9 Rule 9, Order 9 Rule 5 and Order 51 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law wherein the Applicant therein sought that the Application for change of Advocates dated January 14, 2022 drawn and filed by the firm of M/S Koech Gideon & Company Advocates as well as all documents filed by the said firm, be expunged from the record with costs.
2. The application is supported by the grounds therein as well as the supporting affidavit of Mr Rogers Mugumya Advocate sworn on the March 25, 2022.
3. The Application was opposed through the Replying Affidavit of Reuben Kiprotich Talam the Chairman of the Ogiek Independent Council of South West Mau Forest sworn on the May 9, 2022 to the effect that both Mr Rogers Mugumya and the firm of M/s P.S Sang & Co Advocates were strangers to them, that there had never been any correspondence between them nor a resolution by his members to appoint either Mr Rogers Mugumya Advocate or the of firm of M/s P.S Sang & Co Advocates to act for them and this could be confirmed by the proceedings of the court of July 3, 2018.
4. The through a resolution, his members had resolved to appoint the firm of M/s. Koech JK & Co Advocates to represent them in place of Bitala & Co Advocates and EK Korir & Co Advocates wherein a Notice of Change dated 25th of October 2017 had been filed. That later via another Notice of Change of Advocates dated January 14, 2022, the firm of M/s Koech Gideon & Co Advocates came on record in place of the firm of M/s Koech JK & Co Advocates.
5. That Mr Rogers Mugumya Advocate without their consent took over the matter and initiated contempt of court proceedings against the Chairman of the National Land Commission, despite a task force being in place and which task force was conducting public participation in an attempt to resettle the members of the Ogiek Forest Community of South West Mau forest, members who had no complaint against the National Land Commission, the Principal Secretary Ministry of Lands, the Housing and Urban Development, the Kenya Forest Service, the Director of Survey and the Attorney General.
6. The second Application is the one dated the April 14, 2022 also brought pursuant to the provisions of Order 9 Rule 9, Order 45 and Order 51 of the *Civil Procedure Rules*, Section 80 of the *Civil Procedure*



- Rules (sic) and all enabling provisions of the law wherein the Applicant herein seeks that the firm of M/s. Koech Gideon & Co Advocates comes on record for the Petitioners in Petition No 5 of 2017 and thereafter all the documents filed by Mr Rogers Mugumya and/or the firm of M/S P.S Sang & Co Advocates be expunged from the record.
7. The Applicant herein also sought for the court to review its decision to consolidate Petition No 5 of 2017 with Petition No 6 of 2017 and to dismiss the contempt of court application dated the October 10, 2019.
 8. This application is also supported by the grounds therein as well as the Supporting Affidavit of Reuben Kiprotich Talam, the Chairman of the Ogiek Independent Council of South West Mau Forest, sworn on the April 14, 2022.
 9. There was no response to the said application.
 10. On the April 25, 2022, the court directed that both the applications be disposed of by way of written submissions wherein as I write this ruling, the registry has only received the written submissions by the firm of Koech Gideon and & Co Advocate's dated the June 23, 2022 in support of the application dated the April 14, 2022 to which I shall summarize as herein under;
 11. The Applicant's submission to the second application dated the April 14, 2022 is to the effect that the Petitioners had appointed the firm of M/s JK & Co Advocates to represent them in place of Bitala & Co Advocates as per a Notice of Change dated October 25, 2017. From the year 2017 to 2022, the firm of P Sang & Co Advocates did not object to the said Notice of Change of Advocates and therefore the firm of M/s JK & Co Advocates remained on record for the Ogiek Independent Council.
 12. Indeed from the proceedings of July 3, 2018, the court had been informed that there had been an issue of representation of the Petitioners, between Mr Koech Advocate and Mr Mugumya Advocate who both seemed to be appearing for the Petitioners, although the Petitioners' stand was that they had not instructed Mr Mugumya Advocate.
 13. The matter was slated for mention for the July 5, 2018 and in the absence of Mr Koech Advocate, Mr Mugumya Advocate had informed the court that they had talked and it had been agreed that he remains on record. There was however no indication that the said Mr Mugumya advocate had consulted the Petitioners for instructions to proceed with the matter. That subsequently the matter had proceeded up to its judgment.
 14. That the Petitioners had a right to choose Counsel to represent them for which they had instructed M/s Koech JK & Co Advocates and later the firm of M/s Koech Gideon & Co Advocates.
 15. That there was no evidence of retainer submitted by Mr Rogers Mugumya Advocate to justify the existence of Advocate-Client relationship with the Petitioners. Reliance was placed on the decided case in *Obaga and Akiba Bank* [2008] 1EA cited in the case of *Mereka & Company Advocates vs Zakhem construction (Kenya)* [2014] eKLR as well as the provisions of Section 107 of the Evidence Act to submit that Mr Rogers Mugumya Advocate had to discharge the burden of proof that he had received instructions from the Petitioners.
 16. That it therefore followed that since there were no instructions from the Petitioners to Mr Rogers Mugumya Advocate, the contempt of court application dated October 10, 2019, was not commenced by the Petitioners and therefore the same ought to be dismissed with costs as provided for under Section 27(1) of the Civil Procedure Act.



Determination.

17. I have considered the applications herein. There is no dispute that the Petition herein is dated the May 30, 2017 and that the dispute in the applications subsequently filed relate to the representation of the Petitioners herein by Counsel. It is further not in dispute that Petition No 5 of 2017 and 6 of 2017 were by consent consolidated at the time of delivery of the judgment which had been delivered on the July 27, 2018 and amended on the October 25, 2018.
18. What is therefore due for determination by the court is who between Mr Rogers Mugumya Advocate and the firm of M/s. Koech Gideon & Co Advocates is properly on record for the Petitioners.
19. From the proceedings herein, I note that on the October 30, 2017 there had been a Notice of Change of Advocates dated October 25, 2017 filed by the firm of M/S Koech JK & Co Advocates seeking to act for the Petitioners in place of the firms of EK Korir & Co Advocates and Bitala & Company Advocates.
20. On the January 18, 2018, however there had been filed in court, another Notice of Change of Advocates dated the January 11, 2018 by the firms of EK Korir & Co Advocates and Bitala & Company Advocates who sought to come on record for the Petitioners in place of the firm of M/s JK Koech & Co Advocates.
21. I note that the Petition dated May 30, 2017 was drawn and filed by Bitala & Company Advocates and E K & Company Advocates and filed on the June 13, 2017. Subsequently the submissions to the same had been drawn on May 10, 2018 and filed on May 11, 2018 by Mr Mugumya Advocate of Bitala & Company Advocates.
22. Indeed on the July 3, 2018 when the issue of representation arose, the court had been informed that although it seemed that the Petitioners were being represented by both Mr Koech and Mr Mugumya Advocates and although the Petitioners' claim was that they never instructed Mr Mugumya Advocate, Counsel Mr Mugumya had responded that they were the ones on record, Mr Koech having served them with a Notice of Change of Advocates. That Mr Koech Advocate had neither appeared in court nor filed any documents on behalf of the Petitioners.
23. The matter was slated for mention on July 5, 2018 so as to clear the issue of representation but on which date Mr Koech Advocate failed to appear, and Mr Mugumya Advocate appearing alongside Mr Nyadimo Advocate for the Petitioners informed the court that they had agreed with Mr Koech Advocate that since Mr Mugumya had filed the Petitioners' submissions, that he should remain on record.
24. On the July 24, 2018, in the proceedings in Petition No 6 of 2017, by consent parties agreed to have the judgment in Petition No 5 of 2017 and No 6 of 2017 delivered together wherein the court obliged.
25. Indeed judgment was delivered on July 27, 2018 in the presence of Mr Koko Advocate who held brief for Mr Mugumya Advocate for the Petitioners, and the State Counsel Ms. Langat for the 1st, 3rd, 4th and 5th Respondents. There was no appearance for the 2nd Respondents.
26. That even after the judgment had been delivered, Mr Mugumya Advocate of Bitala & Company Advocates had sought for its rectification through an application dated the August 22, 2018 wherein on October 24, 2018 the same was amended.
27. The court proceedings therefore bear witness that all along Mr Mugumya Advocate has been appearing for the Petitioners through the firm of Bitala & Company Advocates who came on record via their Notice of Change of Advocates dated the January 11, 2018.



28. After judgment had been delivered, the firm of Koech Gideon & C Advocates vide a Notice of Change of Advocates dated the January 14, 2022 purported to come on record in place of the firm of M/s JK Koech & Co Advocates who had since been replaced through a Notice of Change of Advocates dated the January 11, 2018, by the firms of EK Korir & Co Advocates and Bitala & Company Advocates.
29. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* are clear and provides as follows: -
- 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”
30. Clearly 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, then 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 proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of *SK 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....”
31. In the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR the Court held as follows:
- “A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”
32. The court went further to quote with approval the holding by Hon. Sitati Judge, in *Monica Moraa v Kenindia Assurance Co Ltd.* [2010] eKLR where the court held as follows:
- “.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”
33. In the present case, there was a determination of the Petition through a judgment that was delivered on the July 27, 2018 and amended on the October 25, 2018 therefore the provision of Order 9 Rule



- 9 were applicable herein. The correct procedure that was to be followed in the present case was that Counsel seeking to come on record ought to have sought leave of the court to do so, then file and serve the Notice of Change of Advocates before filing the application herein above stated.
34. Instead, the Petitioners' incoming Counsel, without leave of the Court, filed their Certificate of Urgency dated the April 14, 2022 wherein he purported to come on record and sought orders to expunge all the documents filed by Mr Rogers Mugumya Advocate and the firm of M/S PS Sang & Co Advocates. He also sought that the court reviews its decision of consolidating the Petition No 5 of 2017 with Petition No 6 of 2017, and finally for orders dismissing the contempt of court application dated the October 10, 2019. This clearly offends the express provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, and is defiantly a flagrant abuse of the court process.
35. The provisions of Order 9 of the *Civil Procedure Rules* do not impede the Constitutional right of the Petitioners to be represented by an Advocate of their choice, but sets out the procedure to be adhered to when a party wants to change Counsel so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the court and other parties. The procedure set out under Order 9 Rule 9 of the *Civil Procedure Rules* is mandatory and thus cannot be termed as a mere technicality.
36. Having found that the procedure envisaged above was not followed by firm of M/S. Koech Gideon & Company Advocates, I find that the said firm is not properly on record, and has no legal standing to move the court on behalf of the Petitioners and therefore all pleadings filed by it ought and are hereby struck out.
37. Consequently, and in the absence of the leave of court as provided by the law, the application by Notice of motion under certificate of urgency dated the March 25, 2022 is allowed whereas the application dated the April 14, 2022 filed by the firm of M/S Koech Gideon & Company Advocates is hereby struck out with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF OCTOBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

