



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**CONSTITUTIONAL PETITION NO. 6 OF 2020**

**CROSSLEY HOLDINGS LTD.....PETITIONER**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE,**

**LIVESTOCK, FISHERIES & COOPERATIVES.....1<sup>ST</sup> RESPONDENT**

**THE AGRICULTURE AND FOOD AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KISUMU.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RICHARD OCHIENG OGENDO.....1<sup>ST</sup> INTERESTED PARTY**

**JULIUS OKELLO KUNGU.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**introduction**

The **The Agriculture and Food Authority** has brought an application before court dated 30/11/2020 seeking orders that the Honourable Court be pleased to make an order to bar and or disqualify Senior Counsel Honourable Senator James Aggrey Bob Orenge and or the firm of Messrs J. A. B. Orenge Advocates from acting for the Petitioner in this Petition and the Cross Petition. That the Honourable Court be pleased to grant leave to the Respondent to orally examine on oath Mr. Buggar Singh on the contents of his affidavits sworn on 26<sup>th</sup> August, 2020 and 19<sup>th</sup> October, 2020 respectively. The costs of this application do abide by the outcome of the petition.

The application is based on grounds at the time the Petitioner alleges to have purported to purchase the suit premises and obtained a Provisional Title, Senior Counsel Honourable Senator James Aggrey Bob Orenge was a Minister for Lands & settlement duly appointed by His Excellency President (rtd) Mwai Kibaki President of the Republic of Kenya and he was the overall coordinator and Policy Maker and he had access to confidential communication entrusted to him in that capacity.

The applicant contends that Senior Counsel Honourable Senator James Aggrey Bob Orenge received and or was entrusted with the documents now being tendered by the Petitioner in his capacity as cabinet Minister entrusted to protect the interests of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and more so the suit property which is a public property and has now purported to share the documents to the Petitioner and represent the Petitioner who was an adversary all the time when the dispute subject of the Petition arose.

The applicant further contends that there is a glaring and manifest conflict of interest and breach of trust by the firm of Messrs J. A. B. Orenge Advocates and it is the interest of justice that the said firm of advocates be barred from acting for the Petitioner.

Lastly, that the Petitioner's deponent, Mr. Buggar Singh, in his affidavits has deponed on matters beyond his knowledge and cast aspersions on the 2<sup>nd</sup> Respondent's conduct and it is in the interest of justice that the 2<sup>nd</sup> Respondent be granted leave to orally examine the said deponent on the veracity of his allegations. It is in the interest of justice that the orders sought be granted.

In the supporting affidavit, Rose Atieno Owino states that the 2<sup>nd</sup> Respondent's application herein seeks orders for the Firm of J. A. B. Orenge Advocates to be barred or disqualified from acting for the Petitioner and for the 2<sup>nd</sup> Respondent to be granted leave to examine on oath the Petitioner's deponent, Mr. Buggar Singh, on certain aspects of his affidavits.

The Petitioner in the affidavit sworn by Mr. Buggar Singh on 26<sup>th</sup> August, 2020 has at pages 281 to 295 (Exhibit BS17) tendered a Cabinet Memorandum dated 20<sup>th</sup> May, 2020 signed by Hon. James Aggrey Orenge in his capacity as the then Minister for Lands.

At page 246 to 248 (Exhibit BS13) the said Deponent has tendered a letter dated 24<sup>th</sup> February, 2014 from Cabinet Secretary Ministry of Agriculture, Livestock and Fisheries addressed to the Attorney General and at 250 to 259 (Exhibit BS14) the Deponent has tendered a letter dated 16<sup>th</sup> May, 2014 from the Attorney general addressed to Cabinet Secretary Ministry of agriculture.

The Petitioner's Deponent does not state in any manner that the Petitioner obtained the Government's internal correspondence in an official manner or through a lawful source and it is evident from the petitioner's Advocates letter dated 17<sup>th</sup> July, 2020 tendered in the Deponent's affidavit sworn on 26<sup>th</sup> August, 2020 at Pages 378 to 381 that the Petitioner's Advocates obtained the said confidential correspondence in his capacity as the then Minister for lands.

The matters subject of the Petitioner's petition and dispute herein took place at a time when the Petitioner's Advocate was the Minister in charge of the Ministry of Lands and which Ministry issued the Petitioner with a Provisional title at the material time.

The Petitioner's Advocate was all along aware that the Petitioner's claim over the suit land was vehemently disputed by the 2<sup>nd</sup> and 5<sup>th</sup> Respondents and he was further aware that vide a letter dated 22<sup>nd</sup> August, 2011 the 5<sup>th</sup> Respondent petitioned his office to cancel the Provisional Title.

It is quite evident that the Petitioner's Advocate has breached his fiduciary duty which he owed to the public entities owned by the Government of the Republic of Kenya and more so the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents by using his office and position and obtaining internal correspondence entrusted to him in his capacity as the then Minister of Lands and supplying the same to the Petitioner and even more worse and shocking proceeded to act for the Petitioner.

The Petitioner's Advocate's conduct and act is highly prejudicial to the 2<sup>nd</sup> Respondent and she prays that the said Senior Counsel and or his Firm of Advocates be barred from representing the Petitioner.

The Petitioner's aforesaid Deponent has at paragraphs 13, 14, 15, 16, 17, 22, 23, 24, 25, 26 and 27 of his affidavit sworn on 26<sup>th</sup> August, 2020 and paragraph 8, 9, 10, 11, 12, 13 14, 15, 16 and 17 of his affidavit sworn on 19<sup>th</sup> October, 2020 affirmed facts that are not within his knowledge and it is in the interest of justice that he be examined on oath on the veracity of his averments and the justification thereof.

#### **RIVAL SUBMISSIONS**

**Mr Bundotich, learned counsel for the 2<sup>nd</sup> Respondent** submits that the Petitioner's advocate is a potential witness in the Petition to explain the basis of his justification for the compensation to the petition as advocated in the Cabinet memo. The continued representation of the Petitioner by the Petitioner's advocate is a cross contradiction of rule 8 of the advocates (practice) Rules which states that no advocate may appear as such before any Court or Tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit and if while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear; provided that the Rule does not prevent an Advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

According to the 2<sup>nd</sup> Respondent's advocate he has demonstrated and laid out a glaring conflict of interest and breach of trust on the part of petitioner's advocate and gross contravention of regulation of 8 aforesaid.

In regard to the application to cross examine the petitioner's deponent, the 2<sup>nd</sup> Respondent argues that the affidavit of Mr. Buggar Singh contain averment not within his knowledge and which is contrary to the provision of order 19 rule 3 (1) of the Civil Procedure Rules 2020 which states that:

**“1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable: Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an**

**order shall not be made authorizing the evidence of such witness to be given by affidavit.**

**2. (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.**

**(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”**

On conflict of interest, the applicant relies on the case of King Woolen Mills Ltd vs Kaplan and Stratton advocates Court of Appeal Civil appeal no. 55 of 1993 in which the court held that:

**“The fiduciary relationship created by the retainer between Client and Advocate demand that the knowledge acquired by**

the Advocate while acting for the Client be treated as confidential and should not be disclosed to anyone else without that Client's consent. That fiduciary relationship exists even where an Advocate acts for two or more clients in the same transaction or subject matter because the retainer is specific between the individual client and the common Advocate. There exists no fiduciary relationship between the two or more clients of the common Advocate. Any knowledge received from each client and their common Advocate, although the common Advocate acting for the two or more clients will be able to complete the transaction speedily and save the clients expense by engaging one common Advocate; this fact alone is for convenience only and does not affect the general principle that he should not so act or divulge the confidential information received by him from one client to the other client or clients without the consent of the client in the retainer imparting the confidential information. The corollary to this cardinal principle is that the Advocate having so acted for two or more clients should be wary to act for one client against the other client or clients in a subsequent action or litigation concerning the original transaction or the subject matter for which he acted for the clients as their common Advocate. The reason for this is not far-fetched."

Mr. Eredi, Learned Senior Principal States Counsel in support of the application argues that what is critical is the information Senior Counsel obtained while he was a Minister that it was relevant, and could cause their client to have an unfair advantage in respect to these proceedings. The information referred to is the cabinet memorandum and other confidential documents which came to the attention of Counsel in his capacity as the Minister for Lands then.

In the year 2008 when the court delivered its judgment in HCCC 225 of 1993, the Petitioner's Advocate was the then Minister for Lands. The Petitioner's Advocate in his position as the Minister was required to give approval to have the Land registry records changed to reflect the Court's decision. As the then Minister for Lands, the Petitioner's Advocate refused to authorize the land registrar to cancel the entries in the title showing that the petitioner is the registered owner of the parcel of land in conformity with the judgment of the court.

The Exhibits marked BS13, BS14, BS15, BS17 and BS19 in support of the petition and the Notice of Motion Application are privileged and classified documents and the Petitioner has not established how the documents came into his possession. For instance, exhibit B13 is a letter dated 26<sup>th</sup> February, 2014 from the CS. Agriculture addressed to the Honourable the Attorney General. It is not copied to the Petitioner. The Petitioner has not stated how he came into possession of that document. Similarly, the Exhibit marked BS14 is a letter dated 16<sup>th</sup> May, 2014 by the Honourable the Attorney General to the CS. Agriculture and the same is not marked or addressed to the Petitioner, similarly is exhibit marked BS15.

Similarly, but more poignant is the document of exhibit marked BS17 is a Cabinet Memorandum the same is co-sponsored by none other than the Hon. James Aggrey Orenge, Minister for Lands. By their very nature cabinet memorandum are classified and cannot be used without the authority of the President. This document having come into possession of the Petitioner's Counsel by virtue of his position as the Cabinet Minister is now deployed to advance the Petitioner's interest and this clearly constitutes a case of breach of trust and conflict of interest which are designed to defeat public interest.

The aforementioned documents are classified and protected under the Official Secrets Act and it is unlawful for the Petitioner to rely on them without establishing a chain of custody. This is totally contrary to the Official Secrets Act., Public Officers Ethics Act, Advocates Professional ethics and Chapter six of the Constitution of Kenya on leadership and integrity. In the circumstances, the offending documents annexed to the Petitioner's affidavit should be expunged from record.

Learned counsel relied on the case of Francis Mugo & 22 others vs James Bress Muthee & 3 others [2005] eKLR Justice Daniel Musinga (as he then was) as sighted in Shalimar Limited & 2 others vs Sadrudin Kurji & Another [2015] eKLR noted that

**"... an advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by Richard Du Cann in "THE ART OF THE ADVOCATE." As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth."**

Learned Senior Litigation Counsel submits that the Petitioner's Advocate as an Officer of the court, has the duty to disclose his apparent conflict in the issues arising in this petition and the duty to protect the interests of the Public and interests of the state as a State Officer and currently a senator. Counsel for the Petitioner should not appear in this matter as he is privy to information that came to his possession by virtue of being the Minister for Lands. The Petitioner's Counsel has not established that the documents in his possession were legally obtained. The very nature of the contract of retainer imposed a duty on Senior Counsel to treat the information imparted to him by the state as confidential.

A conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways pick up different aspects of the three main ways in which the problem can arise. To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client. This is the basis of the conflict of interest problem. The four elements of the fiduciary duty are the duty of loyalty to the client. The duty of confidentiality. The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests. The duty not to put your own or anyone else's interests before those of the client.

On whether the deponent should be called to be cross-examined, the Senior Principal Litigation Counsel submits that Order 19 rule 2 of the Civil Procedure Rules gives the court the power to allow the cross-examination of a deponent on the contents of an affidavit. Order 19 Rule 2(1) provides as follows:

**"Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent."**

The court retains the discretion whether to allow or not to allow the cross-examination. However, that discretion must be exercised

judiciously upon demonstration of sufficient grounds in reference to the contents of the affidavit in question. To allow cross-examination on the contents of an affidavit, the Court must be satisfied that the cross-examination is necessary in the interest of justice. The decision in G.G.R vs H.P S [2012] eKLR states the general rule with respect to cross-examination. According to the learned Judge:

**“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”**

Mr Eredi submits further that this is a proper case where the court should allow the deponent of the affidavit to be cross-examined to clarify on all the issues raised and shed light as they came into possession of various classified documents and prays that the application is merited and the same be allowed with costs.

**Mr. Sala learned counsel for the 3<sup>rd</sup> Respondent** relies on grounds of opposition and submissions filed. According to Sala Learned Counsel for the 3<sup>rd</sup> Respondent, the Jurisdiction of the court is not properly invoked to grant the draconian orders sought. The provision of Order 51 rule 1, Order 1 rule 2 of the Civil Procedure Rules, Section 1A, 1B, 3A and 65 (e) of the Civil Procedure Act do not donate any jurisdiction to the court to issue any of the orders sought. The court can only issue orders when its jurisdiction is properly and legally invoked. Mr. Sala argues that the constitution law of Kenya (protection of rights and fundamental freedoms practice and procedure Rules) exclusively applies.

The Counsel for the 3<sup>rd</sup> Respondent relies on the case of *Rose Jebor Kipngok vs Kiplaga Kotut* (2020) eKLR where the Supreme Court held

**“9. The question to consider then is, whether having been dismissed by the Appellate Court on grounds of incompetence and voidability ab initio, this application has any grounds on which to stand. As already settled this Court in *Suleian Mwamlole Warrakah & 2 Others vs Mwamlole Tchappu Mbwana & 4 Others, Sup Petition No. 12 of 2018 [2018] eKLR and Daniel Kimani vs Francis Mwangi Kimani & Another, Civil Application 3 of 2014 [2015] eKLR, in seeking to invoke a court’s jurisdiction, a litigant must invoke the relevant constitutional or statutory provisions. It cannot be in doubt that the Applicant herein ought to have based her application for certification at the Court of Appeal on Article 163 (5) of the Constitution. This she didn’t, thereby inviting the wrath of the Appellate Court which had no option but to dismiss her application. Towards this end therefore, we agree with the Respondent that having been dismissed for incompetence at the appellate stage, this application is dead on arrival and no life can be breathed into it”.***

The Supreme Court in *Daniel Kimani Njihia vs Francis Mwangi Kimani & another* [2015] eKLR, on the core issue of failure to cite correct provisions of law held:

**“14] This Court’s jurisdiction is exercisable only on the basis of express provisions of the Constitution and the law.**

**“[15]..... The Appellate Jurisdiction Act is not applicable when moving this Court. Neither is the Civil Procedure Code. In the *Hermanus* case, this Court had indicated how it should be moved, thus [paragraph 23]:**

**“... It is trite law that a Court of law has to be moved under the correct provisions of the law.”**

**Hence, without thus identifying the proper legal framework for the motion, an application is liable to be struck out”.**

**In *Daniel Kimani Njihia (Supra)* this Court was categorical that**

**“a litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution.”**

Learned counsel for the 3<sup>rd</sup> respondent urged me to hold that there is no competent application before me and the application should be dismissed with costs.

He referred to the case of *DOSHI IRONMONGERS LIMITED & ANOTHER vs HACO INDUSTRIES KENYA LIMITED & ANOTHER* [2006] eKLR, the court held thus; -

**A failure to comply with this rule means a failure or omission to state the order, rule or other statutory provision under or by virtue of which an application is made. It does not extend to a situation in which an applicant states the wrong order, rule, or other statutory provision as has happened in this instance. Therefore, order L rule 12 does not come to Mr. Ndegwa’s rescue. For invoking the wrong order and rules, the application before the court does not properly invoke the court’s jurisdiction and it is improperly before the court and incompetent”.**

The Counsel further submits that there is no evidence to bar Senior Counsel Orengo from representing the Petitioner.

Counsel relies on Article 50 of the Constitution of Kenya which provides for the right to legal representation of one's choice of advocates in Criminal matters. The same applies to Civil matters.

On cross examination, counsel submits that the Applicant is seeking to Cross Examine Mr. Buggar Singh on the contents of his affidavits sworn on 26<sup>th</sup> August 2020 and 19<sup>th</sup> October, 2020 without specifically pointing out specific paragraphs where there is need to cross examine.

The court had already given directions by consent of all parties to canvass the petition by way of written submissions. That consent has not been varied or set aside. By allowing the application, it will amount to varying a consent entered into without a formal application

The court's jurisdiction as to cross examination is improperly invoked. The court cannot grant substantive orders without proper law on which it can exercise its jurisdiction. The provisions of law cited does not give this court any jurisdiction to issue an order on cross examination.

Further he submits that the application does not meet the threshold for the order for cross examination as set out in a plethora of authorities. Where there is no allegation of inconsistency in the affidavit the court cannot order cross examination as that will amount to a mistrial. In the case of **SOY Developers Limited vs Kenagri Products Limited & 3 others [2017] eKLR** Hon. Justice L. Gacheru J had this to say

***"... there is no inconsistency in the Affidavits and there would be no reason to summon the deponent Sammy Boit in court for Cross examination..., the court should ensure that the judicial time is saved and that matters before the court are dealt with expeditiously. By summoning the deponent to Court for cross examination, the court may fall in a trap of having a mini trial or trial within a trial."***

In the case of **Mansukhalal Jesang Maru vs Frank Wafula [2020] eKLR** the court held that

***"In R vs Constituency development fund Board & Another Ex-parte Robert Itaramwa Ochale & 5 Others [2012] eKLR the court dismissing an application for orders allowing cross-examination stated as follows:***

***"They (the applicants) seem to clearly know what is not right about those affidavits. What they should have done is to seek leave so that they can file further affidavits to countermand the falsehoods in the affidavits. In my view they have not advanced any good reason for wanting to cross examine the deponents."***

The court in the case of **Kenya Deposit Insurance Corporation vs Hassan Ahmed Abdul Hafedi Zubeidi & 5 others [2017] eKLR** on the issue whether the Applicant has pointed out impugned paragraphs he wanted to cross examine on, Hon. G. L. NZIOKA J. held

***"The 1<sup>st</sup> Defendant submitted that, the Applicant has not specified the paragraphs that is intends to cross-examine him on. He relied on the case of Malindi Succession cause no. 89 of 2010. The Courts have held that the Applicant as herein, has to identify the paragraphs of the Affidavit they intent to cross examine the Deponent on. In the matter of the Estate of Annelies Ann Graff and Nancy Wanja Gatabakii vs Ashford Muriuki Jugwuku, the Learned Judge observed that, the Application for cross examination did not specify: "the portion of the two Affidavits of the Respondent she needed to cross-examine him upon and why it is necessary to cross examine". He went on to conclude the general cross examination of the deponent would unduly prolong the matter. Am inclined to agree with the sentiments of the Court above that, if the Courts allows the Applicant to cross examine the Deponent on the expansive affidavit herein, it may unduly prolong the trial"***

***David Otieno Learned Counsel for 5<sup>th</sup> Respondent submits*** that the application must succeed on grounds that Section 81 of the Advocates Act mandates the Law Society of Kenya to make rules with regard to the professional practice, conduct and discipline of advocates. Clause 11 of the Code states that it ***"is intended to apply to all members of the society, in this case all persons who fall within the provisions of section 7 of the Law Society of Kenya act. Thus the Code is intended to guide practising Advocates, in-house counsel and others who while not actively engaged in the practice, are members of the Law Society"***.

That the **Leadership and Integrity Act No. 19 of 2012** is an Act of Parliament that was passed to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution. By reason of Article 260 of the Constitution. Mr. James Orengo, SC is and has been at all material times a State Officer. **Section 7 (1)** of the act enjoins a State Officer to comply with the law. It is important to note that it makes no distinction that the Officer is acting in the discharge of his official duties. And where he is a member of a professional body, **Section 11** of the Act enjoins him to observe and subscribe to the ethical and professional requirements of that body in so far as the requirements do not contravene the Constitution or the Act. And to be even more specific and relevant to the matter at hand, **Section 22** of the Act prohibits, **the use by a State Officer directly or indirectly, of any information obtained through or in connection with the office, which is not available in the public domain, for the furthering of any private interest, whether financial or otherwise.**

From the foregoing, he urged the court to debar Mr. James Orengo, SC from representing the Petitioner on grounds that there is no question that the Petitioner's counsel has contravened Sections 7 (1) and 22 of the Leadership and Integrity Act No. 19 of 2012 and therefore Chapter 6 of the Constitution. The Documents marked 'B17' (Page 281 of the Petitioner's Bundle of Documents) is a Cabinet Memorandum that is not ordinarily available to the public unless an application is made for access to it under Article 35 of the Constitution. There are other documents marked 'BS 13', "BS14", 'BS15', 'BS16' and 'BS19' which the 1<sup>st</sup> and 4<sup>th</sup> Respondents (being the Government) have stated in the Cross-Petition filed on 19<sup>th</sup> November 2020, as being classified documents (Paragraph 20) and sought to have them struck out. There is no question that the Petitioner made no such application. The Petitioner has not explained in the affidavit in support of the petition the circumstances under which he obtained the document. It has failed to offer any explanation as to how it laid its hands on the documents even after the issue was raised by the 1<sup>st</sup> and 4<sup>th</sup> Respondent. 'BS 17' was actually signed by Mr. James Orengo in his capacity as the Minister for

Lands. A complaint was raised in court that he is the source of those documents. There is no denial of this fact and in the absence of any explanation by the petitioner as to how it came by these documents, the court has no option but to accept that the advocate is the source of the documents. He has contravened the Leadership and Integrity act by placing documents and information he obtained as a State Officer or in connection with the office and which is not available in the public domain in the hands of his client in pursuit of a private interest. By doing this, the counsel has:

That he has contravened the “Fidelity to the law and due process” principle in the Code of Conduct which enjoins him to an officer of the court to discharge his duty to represent the client by fair and honourable means and without illegality or subversion of the due processes of the law.

That he has conducted himself in a manner that does no good to the image of the legal profession in the eyes of the public. His conduct flies in the face of “The Lawyer in Society” overriding principle and objective of the Code. He has not set a good example as expected under that principle. His conduct undermines the dignity and honour of the profession as well as the standing of the legal profession.

**The gravamen of the submissions by hon. J. A. D Orenge Senior Counsel for Petitioner** is that the mere fact that its advocate was the Minister for Lands and Settlement at the time when the dispute between the Petitioner and the 5<sup>th</sup> Respondent was allegedly on-going by itself; without any other substantiated ground or basis presented to the Court to demonstrate that the Petitioner’s advocate abused his position at the time or any other time thereafter to interfere with the dispute herein; is not a sufficient ground to seek the barring of the petitioner’s advocate from acting in the matter herein.

The Petitioner reiterates the position of the UK Court of Appeal Civil Division in *Re A Firm of Solicitors* (1992) 1 All ER 353, (1992) 2 QB 959 (1992) 2 WLR (this authority is at pages 57 to 74 of the Petitioner’s Supplementary Submissions dated 8<sup>th</sup> December 2020) in which the Court stated:

**“To deprive a litigant of his chosen solicitor may cause him inconvenience, expense and dismay, which may be why as we are told) it is not uncommon practice for his opponent to attempt to do so in the United states. It is a step which should only be taken on solid grounds.” (Emphasis added)**

The petitioners counsel submits that contrary to the Court’s finding in the above mentioned authority, other than the allusion that the Petitioner’s advocate was the Minister for Lands and Settlement at the time when the dispute herein was on-going, the 2<sup>nd</sup> Respondent has not presented to the Court any solid ground for the Petitioner’s advocate to stop acting for the Petitioner.

In response to the 2<sup>nd</sup> Respondent’s submissions and allegations that the Petitioner’s advocate is using the documents it authored on behalf of the 2<sup>nd</sup> and the 5<sup>th</sup> Respondents’ to persuade the court that the Petitioner ‘is the rightful owner of the suit parcel counsel submits that the 2<sup>nd</sup> Respondent has neither specified the documents which the Petitioner’s advocate allegedly authored on behalf of the said Respondents nor has the 2<sup>nd</sup> Respondent demonstrated that it is the Petitioner’s advocate who procured the documents complained of for the Petitioner to use in relation to the subject matter of this Petition.

Counsel refers to paragraphs 24 and 25 of the Petitioner’s Supporting affidavit in Support of the Notice of Motion dated 8<sup>th</sup> December 2020 to strike out the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents’ cross Petitions, the Petitioner’s deponent states that the Petitioner obtained all the documents complained of in the Cross Petitions by itself and that it is the Petitioner who supplied the said documents to the Petitioner’s advocate for representation in the matter.

The 2<sup>nd</sup> Respondent has not demonstrated that the documents it complains of were personally prepared by the Petitioner’s advocate. The 2<sup>nd</sup> Respondent has also not demonstrated that the said documents were prepared particularly for and only for use in relation to any or all of the matters the subject matter of this petition.

He submits that the Petitioner should not be denied its constitutional right to choose and be represented by a counsel of his choice as provided for in article 50 (2) (g) of the Constitution of Kenya, 2010 based on mere speculations.

Similarly, with evidence lacking from the 2<sup>nd</sup> Respondent that the Petitioner’s advocate procured any documents for the petitioner for use in the petition, the Court cannot speculate on the likelihood of the 2<sup>nd</sup> Respondent’s allegation.

Further, no basis at all has been laid by the 2<sup>nd</sup> Respondent to demonstrate that real mischief and or real prejudice will occur should the Petitioner’s advocate continue acting in the matter herein. The mere fact that the Petitioner’s advocate could have played a part in the preparation of documents which at the time were not made in relation to the matters subject in this Petition but only that the documents are now relevant, is not a sufficient ground for the Petitioner’s advocate to be barred from acting in this petition; without any demonstration that real prejudice and or real mischief will be suffered by the 2<sup>nd</sup> Respondent or any other party in this petition, should the said counsel continue acting for the Petitioner.

From 29<sup>th</sup> January 2008 when the Petitioner was registered as the proprietor of the property subject of the Petition herein and in any matter in the Petition or in relation thereto which is on-going or has been concluded in the Courts of law, the Petitioner’s advocate has never been a witness nor are there summons for him to appear as witness.

Even if the Petitioner’s advocate was to be called as a witness in relation to this petition or any other related matters, the 2<sup>nd</sup> Respondent has not demonstrated which other matter the advocate would be required to testify about, other than producing any of the documents which were purportedly prepared by the said advocate, if any.

The Courts have held that if an advocate's role is only confined to producing a document which it prepared in relation to a matter in which is acting, the possibility of such an advocate being required to produce the document it prepared without any other ground and or proof that the advocate has been called as a witness in relation to the matter in question, is not a sufficient ground to bar an advocate from acting for a party in the matter in a Court of law. **(section 147 of evidence act)**

He submits that the Petitioner's advocate was bound by the doctrine of confidentiality as a public officer when discharging his duties as the Minister for Lands and Settlement. However, the said advocate was not under a retainer by his appointing authority or any of its agencies including the 2<sup>nd</sup> Respondent. Therefore, there was no advocate-client relationship between the advocate and his appointing authority or any of its agencies as implied by the 2<sup>nd</sup> Respondent in its submissions.

The 2<sup>nd</sup> Respondent has not proven that the Petitioner's advocate while serving as the Minister for Lands and Settlement and in relation to the confidentiality legally required of him in the said office, contravened any law and or regulation with regard to his appointive role. Thus, the 2<sup>nd</sup> Respondent cannot now turn and attempt to rely on a non-existent advocate-client relationship between the advocate and the 2<sup>nd</sup> Respondent which it purports and or implies to have existed. In any event, the advocate has also not breached any law, regulation or code in relation to any such advocate-client relationship, had it existed.

On cross- examination by the defendant's counsel submits that on 25<sup>th</sup> November 2020, all the parties to this Petition consented to dispense of the Petition by way of written submissions.

The Petitioner's deponent, Buggar Singh has sworn several affidavits in this petition, the first is the Supporting affidavit dated 26<sup>th</sup> August 2020 in support of the petition, the second is the Supplementary Affidavit in response to the Respondents' Replying affidavit which is dated 19<sup>th</sup> October 2020.

These are the two affidavits which the 2<sup>nd</sup> Respondent has complained of in paragraphs 10 and 11 of its Supporting Affidavit of its Application dated 30<sup>th</sup> November 2020 to bar the Petitioner's advocate from acting in this petition.

The two said affidavits were sworn by Buggar Singh on 26<sup>th</sup> August 2020 and 19<sup>th</sup> October 2020, which is two months and one month respectively before all the parties in the petition consented to dispensing of the petition by way of written submission as recorded by the Court on 25<sup>th</sup> November 2020.

He submits that the prayer to cross examine the deponent made in an Application dated 22<sup>nd</sup> December 2020, well after the said consent is not only spent but is a dilatory tactic meant to delay the expeditious hearing and determination of this petition.

The payer to cross examine the petitioner's deponent is not in the interest of Justice. The 2<sup>nd</sup> Respondent's in its submissions alleges that, 'it is the 2<sup>nd</sup> Respondent's position that the affidavit of Buggar Singh contains averments not within his knowledge and which is contrary to the provisions of Order 19 rule 3 91) of the Civil Procedure Rules 2020.'

Other than the aforesaid unsubstantiated allegation that the averments are not within the knowledge of the deponent, the 2<sup>nd</sup> Respondent has not placed any material before the court to show how the intended cross examination would serve the interest of justice.

Learned counsel submits that the 2<sup>nd</sup> Respondent's allegation that the Petitioner has deponed on facts 'not within his knowledge' is speculative and does not meet the threshold set for ordering a cross examination under Order 19 Rule 2 of the Civil Procedure Rules 2010 and that the 2<sup>nd</sup> Respondent's application to cross-examine the Petitioner's deponent has not met the threshold set **in GGR vs HPS [2012] eKLR** and the 2<sup>nd</sup> Respondent has not placed any material before the Court to demonstrate how the said cross examination would serve the interests of justice. Further, the 2<sup>nd</sup> Respondent has also not shown that the contents of the two affidavits sworn by Buggar Singh are conflicting in any way.

### **ANALYSIS AND DETERMINATION**

The applicant contends that Senior Counsel Honourable Senator James Aggrey Bob Orengo received and or was entrusted with the documents now being tendered by the Petitioner in his capacity as Cabinet Minister entrusted to protect the interests of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and more so the suit property which is a public property and has now purported to share the documents to the Petitioner and represent the Petitioner who was an adversary all the time when the dispute subject of the Petition arose.

The applicant further contends that there is a glaring and manifest conflict of interest and breach of trust by the firm of Messrs J. A. B. Orengo Advocates and it is the interest of justice that the said firm of advocates be barred from acting for the Petitioner.

Lastly, that the Petitioner's deponent, Mr. Buggar Singh, in his affidavits has deponed on matters beyond his knowledge and cast aspersions on the 2<sup>nd</sup> Respondent's conduct and it is in the interest of justice that the 2<sup>nd</sup> Respondent be granted leave to orally examine the said deponent on the veracity of his allegations. It is in the interest of justice that the orders sought be granted.

The issues that arise from the submissions of the parties herein are threefold namely.

I have carefully considered the motion and submissions of parties. In my view, the issue as to whether the application has been brought through the right procedure as raised by Mr Sala for the 2<sup>nd</sup> respondent is a procedural technicality that does not go to the roots of the dispute. According to Mr Sala the Jurisdiction of the court is not properly invoked to grant the draconian orders sought. The provision of

Order 51 rule 1, Order 1 rule 2 of the Civil Procedure Rules, Section 1A, 1B, 3A and 65 (e) of the Civil Procedure Act do not donate any jurisdiction to the court to issue any of the orders sought. The court can only issue orders when its jurisdiction is properly and legally invoked. Mr. Sala argues that the constitution law of Kenya (protection of rights and fundamental freedoms practice and procedure Rules) exclusively applies.

The matter before the court is a petition governed by the so called Mutunga Rules, which are silent on cross –examination of a deponent. The Mutunga Rules are mainly concerned with procedures to protect fundamental rights of parties in a petition. The fact that the said rules are silent in regard to cross-examination of a deponent is not meant, in my view, to deny a party the right to cross examine the deponent of an opposing or supporting affidavit. The Civil Procedure Rules still remain the parent rules in civil matters, and where there is a lacuna in a procedure under the Mutunga Rules, the Civil Procedure Rules must apply. The other way to look at it is like this. The Mutunga Rules deal with issues of procedural justice in petitions.

This court is persuaded by the decision of *Mumbi Ngugi J.*, in the case of *Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR*, where the learned judge observed: --

*“...19. The legal basis of the petitioner’s application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:*

*‘No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.’*

*20. From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others (supra) observed as follows:*

*“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 relationship or where the advocate would double up as a witness.*

*21. The court noted, however, that:*

*‘There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result.’*

*22. The court referred to these authorities as comprising King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd –vs- Kaplan and Stratton Advocates (supra). In this case, in restraining Mr. Keith and any partner of the firm of Kaplan and Stratton Advocates from acting for the defendant in the matter or in any litigation arising from the loan transactions in question, the court applied the test established in England in the case of Supasave Retail Ltd vs. Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER where the court had observed that*

*“The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rakusen vs. Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 -1913) ALL ER Rep 813... The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen’s case itself. Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act....As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated.” (Emphasis added)*

*23. The decision of O’Kubasu, JA in William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) is also instructive with regard to Rule 9 of the Advocates Act. In declining to bar an advocate from acting for some of the parties in the matter, O’Kubasu J stated at page 3 of his ruling states 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.’ (Emphasis added)*

*24. The Learned Judge of Appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the Delphis Bank and King Woolen Mill cases, O’Kubasu J observed at page 7 of his decision as follows:*

*‘The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.’ (Emphasis added)*

25. I wholly agree with the sentiments expressed by the Honourable Judge in the above matter. Like the provisions of Section 77 of the former constitution, the words used in Article 50(2)(g) of the Constitution make it clear that the provision relates to criminal matters:

*‘(2) Every accused person has the right to a fair trial, which includes the right—*

*(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;’*

26. However, I believe that the right to legal representation by counsel of one’s choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2) (a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away.”

Concerning the same issue, in the case of **Dorothy Seyanoi Moschioni v. Andrew Stuart & another** (2014) e KLR, **Gikonyo J.**, stated:-

“[12] I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that “these advocates participated in the drawing and attestation of the Deeds in dispute”; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant says “ I intend to call them as witnesses”. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

[23] In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1<sup>st</sup> Respondent by the said firm of advocates. And I so hold fully aware of the Applicant’s desire to call them as witnesses- and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious.”

**Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others** [2017] eKLR this court held: -

The aforesaid rule attempts to guard against conflict of interest. An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren’t compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate’s may conflict with his client’s, such as where he may be a material witness in his client’s matter.

A conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways pick up different aspects of the three main ways in which the problem can arise. To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client. This is the basis of the conflict of interest problem. The four elements of the fiduciary duty are

This Courts adds that an advocate should not act where justice must not only be done but must be seen to be done. This often makes it easier to decide whether there is or is not a conflict. The public perception of the profession and the damage that might be done to that important perception if an advocate acts having a conflict of interest should be considered. There have been attempts to categorize conflicts of interest as **actual, potential or perceived**. A conflict of interest is such whether or not it actually involves a breach of the fiduciary duty of confidentiality or the duty of loyalty; there is an implied suggestion that all “perceived” conflicts of interest should lead to an advocate withdrawing which is fraught with problems because many assertions of conflict of interest are misguided and many are made for tactical reasons and have no basis.

**Rule 9 of the Advocates (Practice Rules) basically prevents** an advocate appearing as advocate in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court. I have considered the application and the reply by Mr. Korir where he admits transacting the sale on behalf of the defendants and do find that though Mr. Korir has admitted that the dispute revolves on who is the legitimate and bonafide trustees and has also stated that to the best of his knowledge, the defendants are bonafide trustees it has not been demonstrated that he will be called to testify as a material witness as to who is the bonafide trustee. The defendants have a right that is sacrosanct to be represented by an advocate of their choice..., “

In this matter the accusation against Hon J A B Orengo , senior counsel do not hold water as he was not acting as the advocate of the Government at the time he signed the document but was a cabinet secretary. There was no advocate client relationship between Hon Orengo and the 1<sup>st</sup> , 2<sup>nd</sup> 4<sup>th</sup> and 5<sup>th</sup> respondents.

I agree with the petitioner that the petitioners advocate was bound by the doctrine of confidentiality as a state officer when discharging his duties as the Minister for lands and settlement but the said advocate was not under a retainer by his appointing authority and therefore there was no advocate client relationship.

Moreover, the petitioners lawyer has not sworn any affidavit in support of the petition and therefore there is no likelihood that he will be called to give evidence or to be cross- examined.

Barring hon Orengo from representing the petitioner will be denying the petitioners the constitutional right to be represented by an advocate of their choice. On the issue of conflict of interest and breach of trust, I do find that the respondents have not established that the petitioners advocate is in breach of the advocate client trust as the petitioner’s counsel has never had aa relationship of advocate –client with the respondents. The right to be represented by an advocate of your own choice can only be taken away in exceptional cases and where there are justifiable grounds. In this case the Hon Orengo is not the cabinet secretary in the Ministry of lands and housing and though at the time of purchase of the property the petitioners advocate was the Minister for lands there is no nexus between the petitioner’s counsel and the applicant.

In **GGR v HPS** [2012] eKLR, the court held;

***“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, malafides, authenticity of the facts deponed (sic), bad motive among others are raised, cross examination of the deponent of an affidavit may be ordered. This also extends to where there is a conflict of affidavits on record or order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an affidavit. The court must feel that adequate material has been placed before it that shows that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”***

On the issue of cross examination of Mr Buggar Sing on the contents of his affidavits sworn on 26<sup>th</sup> August 2020 and 19<sup>th</sup> October 2020, the applicant alleges that the Petitioner’s deponent, Mr. Buggar Singh, in his affidavits has deponed on matters beyond his knowledge and cast aspersions on the 2<sup>nd</sup> Respondent’s conduct and it is in the interest of justice that the 2<sup>nd</sup> Respondent be granted leave to orally examine the said deponent on the veracity of his allegations. It is in the interest of justice that the orders sought be granted.

In **GGR v HPS** [2012] eKLR, the court held;

***“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, malafides, authenticity of the facts deponed (sic), bad motive among others are raised, cross examination of the deponent of an affidavit may be ordered. This also extends to where there is a conflict of affidavits on record or order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an affidavit. The court must feel that adequate material has been placed before it that shows that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”***

I do find that the reasons given are not sufficient, and that the applicant has not demonstrated that there is any inconsistency in the affidavits and therefore there would be no reasons to summon the deponent. Moreover, the applicant and the respondents can seek leave to file further affidavits. If it is true that the petitioner in the supporting affidavit does not disclose the source of information as required by law, then the issue can be canvassed in submissions as failure to disclose the source of information makes the affidavit worthless. Lastly, the application to cross- examine has come late into the proceedings as the directions have already been given by the consent of the parties and that the parties had already agreed to highlight the submissions on the main petition and that the intended cross examination will delay the hearing of the petition which is a matter of great public interest. The upshot of the above is that the application is dismissed with costs.

**DATED AT KISUMU THIS 24<sup>TH</sup> DAY OF MARCH, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**