



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 136 OF 2016**

JACOB OMONDI NYAMBEGA.....1<sup>ST</sup> PLAINTIFF  
KENNEDY OMOLLO ONYANGO.....2<sup>ND</sup> PLAINTIFF  
SAMWEL OTIENO OBUYA.....3<sup>RD</sup> PLAINTIFF  
PHILIP OTIENDE ADUNDO.....4<sup>TH</sup> PLAINTIFF  
SIMON OMONDI AKINA.....5<sup>TH</sup> PLAINTIFF  
PAULINE AKWACH.....6<sup>TH</sup> PLAINTIFF

**VERSUS**

VICTORIA COMFORT INN LIMITED.....1<sup>ST</sup> DEFENDANT  
KENYA AFRICAN NATIONAL UNION.....2<sup>ND</sup> DEFENDANT  
HON. NICK SALAT.....3<sup>RD</sup> DEFENDANT  
HON. GIDEON MOI.....4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT

**RULING**

M/s Owendo Kibet and Khalid advocates have come to court on behalf of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants seeking orders that the honourable court be pleased to strike out all pleadings including the statement of defence filed on behalf of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants by the firm of Olel Onyango Ingutia & co. advocates.

Moreover, that the court be pleased to grant leave to the 2<sup>nd</sup> and 4<sup>th</sup> Defendants to file and serve a statement of defence, Witness statement, Bundle of documents and any other pleadings herein.

The application is supported by the affidavit of Gideon Kipsieki Tome Moi the national Chairman of the 2<sup>nd</sup> Defendant and the Elected Senator of Baringo County. He states that he was not served with summons to enter appearance in this matter and consequently he is not aware of the existence of the suit nor sale of the suit property. That the position taken by the law firm of Olel, Ingutia & Co. Advocates does not reflect the position of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants. This court should safeguard their constitution right to fair trial.

That the 2<sup>nd</sup> Applicant's Constitution provides that all its properties were to be transferred from trusteeship of branch officials to the 2<sup>nd</sup> Applicant's Foundation which was to be formed. Unfortunately, the 2<sup>nd</sup> Applicant being a political party could not form and register a foundation hence the process halted and as a result the status quo prevailed. The effect was that the local branch officials remained as the trustees to the 2<sup>nd</sup> Applicant's property including the suit property herein where the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs were the legitimate trustees.

That should this honourable court not intervene, the 2<sup>nd</sup> Applicant's right to equal protection of the law and its right to hold property shall be greatly infringed as the suit property will pass to the 1<sup>st</sup> defendant through a flawed and fraudulent process.

Francis Rayola Olel filed a replying affidavit stating that the Instructions acted upon by the firm were given by the 3<sup>rd</sup> defendant who is the Secretary General of the 2<sup>nd</sup> Defendant. That the 3<sup>rd</sup> Defendant was within his power to appointed the firm of Olel Onyango Ingutia & Co. advocates to defend the suit.

That their firm has handled all dispute revolving around the suit property from 2012 to date and the 2<sup>nd</sup> and 4<sup>th</sup> Defendants cannot wish away their representation and/or turn their back on us based on their own convenience. That as can be gleaned from the joint Replying Affidavit filed in court on 7<sup>th</sup> April 2017, on 12<sup>th</sup> March 2013 the National Execution Committee of the party did meet (in a meeting chaired by the 4<sup>th</sup> Defendant) and the issue of sale of the suit property was discussed and minuted thereof signed by both 3<sup>rd</sup> and 4<sup>th</sup> defendants.

After the Determination of Political Part tribunal claim No. 3 of 2014 as directed by the tribunal the local branch official did meet with the National Official and it was expressly official and it was expressly agreed that the branch official hold the property in trust for the part and that the suit property will be sold to settle party liabilities and the Branch officials were property will sold to settle party liabilities and the branch officials were to get Kshs.10,000,000/= as reimbursements for expense used to.

Due process was followed to sell this property and there were several bidders before the party settled upon the 1<sup>st</sup> Defendant.

That our firm did not manufacture documents to support the case of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant all such documents were obtained from the 2<sup>nd</sup> defendant's office with express authority of the 3<sup>rd</sup> defendant in his official capacity as the principal officer of the party.

That while it is within the individual rights of the 2<sup>nd</sup> and 4<sup>th</sup> defendants to change advocates, their aim to distort facts of this case cannot go unchallenged.

That the 2<sup>nd</sup> and 4<sup>th</sup> Defendant attempt to change facts and pleadings is driven by selfish agenda to deny the 1<sup>st</sup> Defendant full benefit of this property.

That it would be prudent for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant should hold internal/in house meeting and resolve their dispute in avertedly instead of embarrassing themselves with divergent opinion in court.

I have considered the application and the replying affidavit and do find that there is no evidence that the 4<sup>th</sup> Defendant was served with the summons to enter appearance and that he instructed the firm of Olel Onyango Ingutia & co. advocates to enter appearance and file defence and therefore the defence filed on behalf of the 4<sup>th</sup> defendant by the firm of Olel Onyango Ingutia & co. advocates is hereby struck out.

However, there is evidence that Hon. Nick Salat, the Secretary General of the 2<sup>nd</sup> Defendant gave instructions to the firm of Olel Onyango Ingutia & co. advocates to file appearance and defence on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

There is no demonstration that the applicant herein holds the property of the party or that he is the sole trustee of the property of the party and therefore the application has no basis on behalf of the 2<sup>nd</sup> Defendant.

The upshot of the above is that the defence is struck out only as it touches on the 4<sup>th</sup> Defendant as he has a right to instruct an advocate of his choice.

The 4<sup>th</sup> Defendant to file and serve defence within the next 3 days. The Plaintiffs are at liberty to file reply to defence within 4 days. Hearing resumes on 4/5/2021. Costs in the cause.

**DATED AT KISUMU THIS 22<sup>ND</sup> DAY OF APRIL, 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 2020.**

**ANTONY OMBWAYO**

**JUDGE**