



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 89 OF 2017**

**JEFFERSON MWENDWA MUTHAMA.....1<sup>ST</sup> PLAINTIFF**

**AYUB JOEL WANAMI WEFWAFWA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR OF SURVEY.....3<sup>RD</sup> DEFENDANT**

**YASIN ABDURAHMAN.....4<sup>TH</sup> DEFENDANT**

**ISMAIL YAKUB.....5<sup>TH</sup> DEFENDANT**

**STEPHEN MWANGI GICHURA.....6<sup>TH</sup> DEFENDANT**

**MUSA EBRAHIM NDAUSI.....7<sup>TH</sup> DEFENDANT**

**PAUL MUTUI MSAKU.....8<sup>TH</sup> DEFENDANT**

**THOMAS OJWANG.....9<sup>TH</sup> DEFENDANT**

**BENSON MWAURA MUGO.....10<sup>TH</sup> DEFENDANT**

**HAWA BULLE MOHAMMED.....11<sup>TH</sup> DEFENDANT**

**DANIEL MBARATHI KANGETHE.....12<sup>TH</sup> DEFENDANT**

**DENNIS ODHIAMBO MUNDA.....13<sup>TH</sup> DEFENDANT**

**JAPHETH KAMISI MUTHOKA.....14<sup>TH</sup> DEFENDANT**

**BONCRODITATOR MUTUA WAMBUA.....15<sup>TH</sup> DEFENDANT**

**JOSEPH BLASIO OMONDI.....16<sup>TH</sup> DEFENDANT**

**JOHN MAKAU.....17<sup>TH</sup> DEFENDANT**

**LUCY NDUNGU.....18<sup>TH</sup> DEFENDANT**

**FREDRICK MUSYIMI MBUVI.....19<sup>TH</sup> DEFENDANT**

GIDEON AMALLA.....20<sup>TH</sup> DEFENDANT

MBUKONI HOLDINGS LIMITED.....21<sup>ST</sup> DEFENDANT

THOMAS MAINGI WAMBUA.....22<sup>ND</sup> DEFENDANT

RUTH NZULA MAINGI.....23<sup>RD</sup> DEFENDANT

### RULING

1. In the Notice of Motion dated 6<sup>th</sup> March, 2018, the Plaintiffs are seeking for the following orders:

***a. This Honourable Court do order that the firm of Odero-Olonde & Co. Advocates, appearing for the 4<sup>th</sup>-20<sup>th</sup> Defendants cease to appear, or continuing to appear for the 4<sup>th</sup>-20<sup>th</sup> Defendants in this suit or any other proceedings therefrom.***

***b. The firm of Odero-Olonde & Co. advocates be restrained by an injunction, whether by themselves, their partners, servants or agents, from representing the 4<sup>th</sup> -20<sup>th</sup> Defendants in this action or any other proceedings therefrom.***

***c. This Honourable Court do issue such or consequential orders as it may deem fit.***

2. The Application is premised on the grounds that the firm of Odero-Olonde Advocates acted for the Plaintiffs in the verification and witnessing of the Agreements of Sale dated 8<sup>th</sup> February, 2005 and 21<sup>st</sup> January, 2005; that the said firm drew, witnessed and attested the transfer documents and that it is reasonable to expect that an advocate from the said firm will be called as a witness to testify in the suit.

3. In his reply, the 4<sup>th</sup>-20<sup>th</sup> Defendants' counsel deponed that the suit is seeking to restrain the issuance of Title Deeds to the 4<sup>th</sup> to 20<sup>th</sup> Defendants on the grounds that the measurements in the Deed Plans are incorrect; that the dispute at hand does not touch on the Sale Agreements that he drew between the Plaintiffs and the 21<sup>st</sup> Defendant and that he was not involved in the demarcation and survey of the land.

4. The Defendants' counsel deponed that the mere fact that he drew and witnessed Agreements between the Plaintiffs and the 21<sup>st</sup> Defendant does not bar him from representing the 4<sup>th</sup> to 20<sup>th</sup> Defendants on matters that fall outside the terms and conditions of the Agreements and that there is no evidence or suggestion that he obtained any privileged information in regard to the dispute at hand.

5. In the Further Affidavit, the 1<sup>st</sup> Plaintiff deponed that he is challenging the registration of the Transfers and Deed Plans; that the challenged Transfers and Deed Plans were presented for registration by the Defendants' advocate's firm and that the suit imputes fraud on the registration of the documents, which registration was done by the Defendants' advocate's firm.

6. The Plaintiffs' advocate submitted that the Agreements for Sale were drawn by the 4<sup>th</sup>-20<sup>th</sup> Defendants' advocate; that the Plaintiffs are challenging the process that led to the registration of the transfers and the Deed Plans and that the said Deed Plans had been recalled and cancelled by the Director of Surveys.

7. Counsel submitted that even after the Deed Plans were recalled, the 4<sup>th</sup> - 20<sup>th</sup> Defendants' advocate participated in the registration of the said Deed Plans.

8. In his submissions, the 4<sup>th</sup>-20<sup>th</sup> Defendants' counsel submitted that he was only involved in the drafting of the Agreements and not the survey work and that having acted for common clients, he should be allowed to act for the Defendants.

9. Rule 9 of the Advocates (Practice) Rules provides as follows:

***“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.”***

10. From the above Rule, it is apparent that an advocate may be barred from appearing or continuing to appear for a litigant on a particular matter if his presence in the matter could endanger confidentiality of advocate/client fiduciary relationship, or where the advocate could be called as a witness in the matter, either by one of the parties or by the court on its own motion.

11. For the court to determine if indeed there is a likelihood of breach of advocate/client confidentiality if an advocate continues acting for one of the parties, or if the advocate is a potential witness in a matter, the court has to look at the matter in a wholistic manner. Indeed, it is only after examining the pleadings that the court is able to determine the likelihood of an advocate appearing in a matter as a witness, or even as a potential party in the suit.

12. In the Complaint dated 27<sup>th</sup> June, 2016, the Plaintiffs have averred that they purchased a portion of L.R. No. 12751/261 from Mbukoni Holdings Limited, who also entered into a separate Agreement with the 4<sup>th</sup> -20<sup>th</sup> Defendants in respect to the sub-divisions of L.R. No. 12751/261.

13. After the said purchase, a Demarcation Plan was prepared showing the size of the parcels of land that was due to each purchaser. The Demarcation Plan showed that Plot Nos. 1-12, 15, 16 and 20 would measure 0.10 Ha; Plots Nos. 13, 14 and 17 would measure 0.045 Ha; and Plot No. 18 and 19 would measure 0.073 Ha. According to the Plaintiffs, they were allocated Plots Nos. 19 and 17 respectively.

14. The Plaintiffs' complaint is that when the Deed Plans for the sub-plots were issued by the 3<sup>rd</sup> Defendant, they did not tally with the Demarcation Plan; that the surveyor who had undertaken the survey and drawn the Deed Plans had requested for the return of the Deed Plans for cancellation and that on 18<sup>th</sup> January, 2016, the 3<sup>rd</sup> Defendant (*the Director of Surveys*) notified the Surveyor and the Chief Land Registrar that the Deed Plans had been cancelled.

15. According to the averments in the Complaint, the Director of Surveys further notified the Chief Land Registrar to cancel any Deed Plans that had been presented for registration. However, it is the Plaintiffs' case that the same Deeds were presented to the Chief Land Registrar who registered them and issued to the 4<sup>th</sup> -20<sup>th</sup> Defendants' Certificates of Titles.

16. The Plaintiffs are seeking for a declaration that the presentation of the Deed Plans for registration was irregular, the Deed Plans having been cancelled; a declaration that the issuance of the Certificates of Titles to some of the Defendants was fraudulent and an order for cancellation of the Certificates of Titles that were issued to the Defendants.

17. In their Defence, the Defendants who were issued with the impugned Certificates of Titles have averred that due process was followed and that the Certificates of Titles were issued following authentication of the Deed Plans by the Director of Surveys.

18. Those Defences were drawn by the firm of Odera-Olonde & Company Advocates, which is the same firm that is on record for 4<sup>th</sup>-20<sup>th</sup> Defendants. Indeed, the firm of Odera-Olonde & Company Advocates has not disputed the fact that it was the one that presented the transfer documents, together with the questioned Deed Plans to the Chief Land Registrar for registration.

19. From one of the letters of the Defendants' advocates dated 25<sup>th</sup> March, 2015 addressed to the Director of surveys, it would appear that the firm of Odera-Olonde Advocates were aware of the complaints raised by the Plaintiffs on the actual measurements of the land viz-a-viz the Deed Plans that were to be presented for registration.

20. In the said letter, the said advocate protested to the Director of Surveys and stated that the registration of the said Deed Plans should proceed and that the same should not be cancelled as stipulated in the Surveyor's letter which he quoted in his letter. He copied the said letter to the 1<sup>st</sup> Plaintiff.

21. Considering that it is Mr. D.O. Olonde advocate who signed the letter of 25<sup>th</sup> March, 2015 addressed to the Director of Surveys, and in view of the fact that he is the one, or his firm, that was involved in registering the said Deed Plans and Transfers, he is a potential witness in this matter.

22. I say so because the Plaintiffs are seeking to have the Certificates of Titles that were issued on the basis of the Deed Plans that he presented for registration cancelled. Having presented the documents for registration, despite the protestation by the Plaintiffs and the Surveyor's letter dated 26<sup>th</sup> February, 2015 recalling the Deed Plans, the current advocate for the 4<sup>th</sup> -20<sup>th</sup> Defendants is likely to be called upon to explain the circumstances under which he presented the said Deed Plans and Transfer documents for registration.

23. Consequently, the circumstances of this case demand that the 4<sup>th</sup> -20<sup>th</sup> Defendants' counsel, being a potential witness in this matter, should cease acting for the Defendants. Indeed, the 4<sup>th</sup>-20<sup>th</sup> Defendants should be represented by an advocate who was not working in the said firm as at the time the said Deed Plans were presented for registration, or who is currently working in the said firm.

24. For those reasons, I allow the Application dated 6<sup>th</sup> March, 2018 in terms of prayer Nos. 1 and 2. Each party will bear his own costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27<sup>TH</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

**JUDGE**