



**Makhanu & 3 others v Officer Commanding Station Cherangani Police Station
& 5 others; Amagove & another (Interested Parties) (Constitutional Petition
E015 of 2024) [2025] KEHC 15250 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E015 OF 2024**

**RK LIMO, J
OCTOBER 30, 2025**

BETWEEN

**TITUS BARASA MAKHANU 1ST PETITIONER
CALEB SIMIYU MAKHANU 2ND PETITIONER
SAMMY KOLINS MULONGO MAKHANU 3RD PETITIONER
EDWIN MULONG MAKHANU 4TH PETITIONER**

AND

**THE OFFICER COMMANDING STATION CHERANGANI POLICE
STATION 1ST RESPONDENT
SUB-COUNTY CRIMINAL INVESTINGATION OFFICER.CHERANGANY
POLICE STATION 2ND RESPONDENT
THE INSPECTOR GENERAL NATIONAL POLICE SERVICE 3RD
RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT
THE CHIEF MAGISTRATES' COURT AT KITALE 5TH RESPONDENT
THE HON.ATTORNERY GENERAL 6TH RESPONDENT**

AND

**MEBO AMAGOVE INTERESTED PARTY
HENRY MULONGO MAKHANU INTERESTED PARTY**



RULING

1. The petitioners/applicants herein have moved this court through a notice of motion dated 26/9/2024 for the following prayers/reliefs namely;
 - i. That this court be pleased to issue an order declaring that Robert Tuti Aswani trading as R.T Aswani & Co Advocate's is improperly on record for the interested parties herein and should forthwith cease acting for them.
 - ii. That upon prayer (i) above this honourable court be pleased to issue and order striking out and/or expunging all the documents on record filed by R.T. Aswani & Co Advocates on behalf of the interested parties.
 - iii. Costs of this application.
2. The applicants have listed the following grounds as a basis of this application namely;
 - a. That on 30/1/24 Robert Aswani trading as R.T. Aswani & Co Advocates swore and filed an affidavit in the ELC Court at Kitale ELC No.E001/24 (Amuhaya Sagini Nelson –vs- Titus Barasa & 3 others) and lied on oath that on 5/1/24 his process server George Mumali served the petitioners with the suit papers in the Kitale ELC case while aware it was not true.
 - b. That Having filed the affidavit and which has been produced in these proceedings as an annexure, the said advocate stands to be called as a witness particularly now that the petitioners have also filed an application dated 25/9/24 seeking to examine the advocate on oath on the contentious issues in the affidavit.
 - c. That on the basis of his affidavit and the petitioners' application dated 25/9/24 it has become clear that the advocate will be required to appear before this court to be examined or to respond to the petitioners' claim that he lied under oath in collusion with interested parties.
 - d. That R.T Aswani advocates is conflicted and to avoid hardship and prejudice to the court in dealing with him as an advocate and a witness, it is imperative and in the interest of justice to order him to cease acting for the interested parties.
 - e. The applicants hold the view that the interested parties will not be prejudiced if the prayers sought are granted.
3. The 1st petitioner, Titus Barasa Makhanu in a supporting affidavit sworn on 26/9/2024, has reiterated the above grounds. He avers that R.T. Aswani advocate filed an affidavit vide Kitale Land Case E001 of 2024 and lied on oath that a process server named George Mumali served them with suit papers.
4. He claims that Mr Aswani in that affidavit has exposed himself as a potential witness and he is likely to be called to give evidence orally or by way of affidavit particularly in the face of their application dated 25/9/24 seeking to have him cross-examined.
5. The 1st petitioner claims that Mr Aswani will be required to respond to their claims of lying on oath.
6. He claims that the counsel for Interested Parties is conflicted in these proceedings because he cannot proceed both as a witness and counsel representing the interested parties.



7. In their written submissions dated 19/11/24 the applicants have cited the provisions of Rule 9 of Advocate Practice Rules. They contend that R.T. Aswani filed an affidavit dated 31/1/24 in Kitale ELC No.E001/24 which in their view arose from the same subject matter Land Parcel No.53.
8. They submit that R.T. Aswani Advocate in light of their application dated 25/9/25 might appear in a dual capacity both as an advocate for interested parties and a witness. They rely on the case of Amina Adam & 3 others –vs- Rosamma Alexander & 2 Others (1993) EKLK where the court disapproved a situation where an advocate is forced to appear in a dual capacity as an advocate of a party and a witness in the same case.
9. They further rely on the decision of Ibrahim Musebe & Anor –vs- Republic (2018)KEHC 5285 (KLR) 19/7/2018 (RULING) which also took a similar view.
10. They also rely on Kagunyi –vs- Gathua & Anor (2008) 2 KLR (EP) 521 where the court noted that a party is entitled to an advocate of his choice save where the cause of justice appears likely to be compromised in situations where the advocate is a potential witness in the same case.
11. They contend that allowing R.T. Aswani Advocate to proceed in this case is likely to put this court in an embarrassing situation because Mr Aswani may find himself being a witness as well as an advocate and as such, the cause of justice will be compromised. They rely on the cases of Jacob Muriungi Mwendwa – vs- Mbaya M’mwenda (Civil Case No.11 of 2022) KEHC 2655 (KLR) (20 December 2004) (Ruling).
12. They submit that this court has jurisdiction to order an advocate to recuse himself in such situations and rely on Director of Public Prosecution –vs- Maero Criminal Case No.E011 & E012/22 (2022)KEHC 11431 (KLR) (28 July 2022) (RULING) where the court found that an advocate who was a witness in a criminal case could not act for the accused in the same case.
13. They further rely on HALSBURY’S LAWS OF ENGLAND Vol 3 paragraph 102 where the author opines that an advocate should not accept retainer in a case he has reasons to believe that he will be a witness. They submit that advocates as officers of this court should help in the administration of justice and should discharge their duties dispassionately and independently.
14. They submit that the documents filed by R.T Aswani advocate on behalf of the Interested Parties should be expunged from the record because they were filed by an advocate who should not be acting for the interested parties in their view. They claim that the jurisprudence world over indicates that an advocate who finds himself in a dual capacity as an advocate and a witness at the same time should recuse himself for the interest of administration of justice.
15. Mr Makhani further submitted that their application is unopposed because R.T. Aswani has not opposed it.
16. The 1st and 2nd Interested Parties have opposed this application through a replying affidavit sworn on 12/10/24 by Mebo Amagove.
17. The interested parties aver that this application is premised on disputed facts yet to be determined by this court and that it makes reference to their supplementary affidavit whose presence on record is unopposed or contested.
18. They also fault this application saying that the first petitioner swore it without filing Notice of Change of Advocate.
19. They aver that the 1st petitioner swore an affidavit on behalf of co-petitioners without filing written authority contrary to Order 1 Rule 13(2) of the Civil Procedure Rules.



20. They further aver that the representation of 1st petitioner to co-petitioners poses a serious conflict of interest and faults him for breaching the very rules cited by the applicants (Rule 9 of the Advocates Practice Rules).
21. That the petitioners are acting in person yet M/s Titus Makhanu and Associates Advocates is still on record for them because there is no Notice to Act in person filed under Order 9 Rule 8 Civil Procedure Rules.
22. They submit that this application to that extent is defective and irregular and should therefore be struck out.
23. They aver that the alleged affidavit sworn on 30/1/24 as alluded by the petitioners does not in any way relate to the instant petition but a land matter in Kitale ELC No.E001 of 2024 pending in ELC court.
24. They further aver that the ELC Court found the said affidavit not to be contentious vide a ruling dated 16/2/24 and to that extent it is their view that this application is Res judicata.
25. The Interested Parties further aver that the applicants are accusing them for what they are doing pointing out that the 1st petitioner has also sworn an affidavit in this matter on contentious matter where he also appears as an advocate.
26. They aver that the application is made in bad faith to frustrate the quick disposal of this matter.
27. The Interested Parties have further submitted that the conservatory orders issued herein are based on Kitale CMC Cr. Case No.E4176 of 2023 which is the substratum of the petition herein and faults the petitioners for sneaking in issues pending in the criminal matter thereby breaching Subjudice Rule.
28. They fault the 1st petitioner for acting in person and at the same time acting for co-petitioners by purporting to sign pleadings on their behalf without filing Notice of Change of Advocates as required under Order 9 Rule 5. They rely on the case of Regina Waithira Mwangi Gitau –vs- Boniface Nthenge (2015)eKLR where the court observed that advocates should not enter into the arena of disputes by swearing affidavits on contentious matters and rendering themselves potential witnesses liable for cross-examinations in matters they are handling as an agent. They also rely on the cases of Serve in Love (Sila) Trust –vs- David Kipsang’ Kipyego & 7 others (2017)eKLR and Thaddaeus Bright Ochanda –vs- Alan Sidonyi Kadima & 6 Others (2020)eKLR.
29. They submit that the application herein is flawed because it is supported by affidavits tainted by misconduct which goes to the root of the application and the misconduct in their view is the claim that the 1st petitioner swore on evidentiary facts of the suit. They rely on Simon Isaac Ngugi –vs- Overseas Courier Services (K) Ltd (1998) eKLR & Kisy Investment Ltd & Others –vs- Kenya Finance Corporation Ltd (no citation given).
30. They submit that the Interested Parties have made a choice by appointing R.T Aswani as their advocate which is within their right under Article 50(2) (g) of *the Constitution*.
31. They contend that the petitioners have not demonstrated any conflict of interest to warrant Aswani’s recusal from representing the interested parties. They submit that the application is intended to delay the disposal of the petition herein.
32. They further submit that the affidavit sworn on 30/1/24 was never filed as evidence by interested parties in this petition as it relates to a different matter in Kitale ELC NO.E001/24 and it would be unfair to cross-examine a party on a document he has not filed.



33. That there is nexus between Kitale ELC No.E001/24 and this petition and rely on Otieno Mogire – vs- South Nyanza Sugar Co Ltd (2018)eKLR.
34. According to them, the petition herein is a Judicial Review to audit the process that led to Kitale CM’s Court Cr Case No.4176/23 and not to interrogate the merits of the case itself.
35. They formally submit that the applicants have come to a court of Equity with unclean hands because the judge in ELC No.E001/24 cautioned advocate against representing and swearing affidavit on behalf of co-plaintiffs. That the 1st petitioner was disqualified from representing co-plaintiffs in the matter as such.
36. This court has set out both the applicants’ case and the opposition by the by the interested partis. The issues raised in the application for determination by this court can be summed up as follows;
- i. Whether R.T Aswani Advocate is a potential witness in this petition.
 - ii. Whether R.T. Aswani representation of the interested parties is likely to compromise fair administration of justice and should therefore recuse himself.

37.

- (i) Whether R.T. Aswani advocate is a potential witness in this matter.

It is quite clear that the gist of this application is the claims by the petitioners that R.T. Aswani advocate is a potential witness in this case by reason that there is an application dated 25/9/25 pending that is likely to render him a witness to be interrogated on the contents of an affidavit sworn on 30/1/2024 and his involvement in Kitale CM’s Court Cr Case No.4176/23. To that extent, the applicants take the position that it would be improper for R.T Aswani to continue acting for the interested parties in this petition. The applicants’ prayers are hinged on Rule 9 of Advocates (practice) Rules under Advocates Act (Cap 16 Laws of Kenya).

38. The provisions of Rule 9 of the cited 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 of 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.....”

Before I consider the interpretation of the above provisions, I will first consider the evidence or facts presented by the applicants suggesting that R.T. Aswani advocate for interested parties is a potential witness. Mr R.T. Aswani denies vehemently that he is a potential witness pointing out that the subject affidavit was filed in another case at ELC court.

39. It is not disputed that the subject affidavit sworn by R.T Aswani on 30/1/2024 was filed vide Kitale ELC No.E001 of 2024. The applicants have not exhibited the subject affidavit in this application which I find a bit irregular given that the same is the subject of their prayers but that notwithstanding, I find that the subject affidavit is exhibited by Titus Barasa Makhanu in paragraph 39 of his affidavit sworn on 16/7/24 in support of their application for conservatory order and the petition.
40. The gist of the issue raised by the deponent in paragraph 39 is the question of service of suit papers in the ELC case. Mr R.T Aswani in the subject affidavit sworn on 30/1/24 vouches for service of the petitioners herein by a process server known as George Mumali and asked the ELC court not to set aside an order issued in that court on account of lack of proper service.



41. That in my considered view was what was in dispute and pending before ELC court. The subject affidavit was sworn by R.T Aswani for purposes of what was pending before ELC court. The question as to whether the averments contained in the subject affidavit are correct or misleading as alleged by the applicants herein were issues to be canvassed at the right forum or at the court seized with jurisdiction to interrogate the same. The right forum is the ELC court established under Article 162(2) (b) of *the Constitution*. Under Article 165 (5) (b), this court lacks jurisdiction to exercise supervisory powers over issues either pending before that court or issues determined by the same court. Asking this court to interrogate a deponent of an affidavit sworn in ELC court on whether there was proper service or not is tantamount to asking this court to exercise some supervisory powers over matters properly pending in ELC court. This court pursuant to the cited constitutional provision lacks the jurisdiction to do so.
42. The above finding answers the question on whether R.T ASwani is a potential witness in this court on account of contentious contents of an affidavit sworn on 30/1/2024 relating to service of suit papers of a case pending in ELC court. The applicants can move the ELC court if they are desirous of clarifying issues properly pending in that court.
43. Secondly, as correctly pointed out by R.T Aswani Advocates, he has not filed an affidavit in the instant petition that may require him to appear in this court for purposes of cross-examination. The petitioners have not pointed any affidavit sworn in this petition by R.T Aswani that they feel requires interrogation vide cross-examination.
44. Thirdly, this court has looked at the application dated 25/9/25 upon which the applicants contend is likely to make R.T. Aswani a potential witness. In prayer 1, among the persons named R.T Aswani is not named. Prayer 2 of the said application relates to affidavit sworn by R.T. Awani on 30/1/24 which was filed in the ELC court and given my findings above that issue is now moot.
45. It is therefore apparent flowing from the above that the likelihood of R.T. Aswani being called as a witness in this case is remote and uncertain. In such circumstances, this court finds that the provisions of Rule 9 of The Advocates (Practice) Rules cannot apply to prevent the interested parties from being represented by counsel of choice which is a constitutional right.
46. This court further finds that the provisions of Rule 9 only kicks in when a determination is made it ‘becomes apparent that the concerned advocate will be required as a witness to give evidence’ over the same matter he is acting as agent or advocate. It is quite obvious reading the provisions of the cited Rule that in the first instance, the advocate is given a discretion to choose to opt out if “he has reason to believe that he may be required as a witness”. The operative word is “may’ and not shall which indicates that it is permissive. The advocate is granted discretion to decide on his own believe or conscience as an officer of court. This is contrasted to situation where a court makes a finding that indeed the concerned advocate will be required to give evidence as a witness. In that case, as seen from the Rule, the word used is “shall” which means that the provision imposes a mandatory duty to the advocate to recuse himself. There is no option. But in the first instance the word used is ‘may’ showing that there is no legal obligation attached to the requirement.
47. In either case, this court finds that based on the evidence placed before me, there is no nexus between the affidavit sworn by R.T. Aswani on 30/1/24 in ELC matter with the issues raised in this petition. No evidence has been laid to demonstrate how that affidavit is a subject to any issue for determination herein.
48. The subject of the petition filed herein is the process leading to Kitale CM’s Court Cr Case No.E4176 of 2023. The issues pending in Kitale ELC court are better addressed in that court because it is the court that is well seized with the requisite jurisdiction to determine them.



49. Before I pen off this court wishes to advise advocates in this case and other cases to always avoid swearing affidavits over contentious matters because doing so places them in the firing line and puts them in a potential conflict when they are put to task to explain or clarify the contentious issues. As held in *Kagunyi –vs- Gathua (2008)2KLR* and indeed many decisions cited by the applicants, advocates are officers of court and at all times should maintain objectivity and professionalism. Swearing affidavits on behalf of clients on contentious matters compromises their representation when courts are forced to order them to cease acting pursuant to Rule 9 with a view to taking a witness stand for cross-examination. That is my view is undesirable and untidy. It is something that can and should be avoided.
50. This court finds that the 1st petitioner may find himself in a similar situation where it gets a bit cloudy as to when he is acting in person and when he is acting on behalf of co-petitioners as an advocate. The interested parties have pointed out that the 1st petitioner in this matter has filed the affidavits and documents on behalf of the co-petitioners without proper notices indicating that he is duly appointed under Order 9 Rule 7 of Civil Procedure Rules. That the co-petitioners have also not filed Notice to Act in Person as provided under Order 9 Rule 8 of Civil Procedure Rules. These concerns are legitimate and indeed shows that the 1st petitioner is in a glass house so to speak and should therefore not be throwing stones at the interested parties' counsel.
51. This court finds that it is proper and in the spirit of Section 1A & 1B of the *Civil Procedure Act* to concentrate on the substantive issues at hand so that this matter can be brought to an end. Towards that goal and objective, this court finds that in the interest of justice the parties do avoid applications that only serve to delay disposal of this petition. I direct parties to concentrate on the main petition and the petitioners in particular because they moved this court under certificate of urgency and should proceed as such and not appear like after getting conservatory orders they would want to delay the case as much as they can. That is my view does not serve the interest of justice and shall be discouraged going forward.

Having made the above observations in obiter this court finds no merit in the application dated 26/9/24 for the reasons aforesaid. The application is dismissed with costs. This court upon delivery of this ruling will invite the parties to take directions on the pending application dated 25/9/24 for purposes of expediency.

**DELIVERED, DATED and SIGNED at KITALE this30TH DAY OF
OCTOBER....., 2025.**

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Ruling delivered in open court

In the presence of

Titus Makhanu 1st Petitioner acting for 2nd – 4th Petitioners

Mukamo holding brief for Aswani for Interested Parties

Duke/Chemosop – Court assistants

