



Ejukan & 42 others v Tullow Kenya BV & 2 others; National Environment Management Authority & another (Interested Parties) (Environment and Land Constitutional Petition E001 of 2024) [2024] KEELC 6472 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT LODWAR
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2024
FO NYAGAKA, J
SEPTEMBER 26, 2024**

BETWEEN

JOYCE ENUKAN & 42 OTHERS & 42 OTHERS & 42 OTHERS & 42 OTHERS & 42 OTHERS & 42 OTHERS PETITIONER

AND

TULLOW KENYA BV & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS RESPONDENT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY & ANOTHER
& ANOTHER & ANOTHER & ANOTHER & ANOTHER &
ANOTHER INTERESTED PARTY**

RULING

1. The forty-three (43) herein brought this Petition, dated 28/02/2024, against the Respondents and the Interested Parties, claiming a number of reliefs totaling to sixteen (16), and any other relief that this court may deem fit to grant. Of these Petitioners, the first thirteen (13) were minors suing through their next friend Legal Advice Centre t/a Kituo Cha Sheria. The rest were described as adults. All the Petitioners were said to be residents of Lokichar Basin of Turkana County and had brought the instant Petition on their own behalf and that of other residents numbering over one thousand (1,000) of the Turkana Community who allege to have been affected by the oil exploration in Turkana County of Kenya.
2. It is worthy of note that the Petition was signed jointly and filed by the two legal counsel, namely, Anthony Mulekyo Advocate and John Mwariri Advocate both stating that that were in-house counsel



practicing as such in Legal Advice Center t/a Kituo Cha Sheria. The Legal Advice Centre was described as a legal aid-providing and human rights Non-governmental Organization (NGO) based in Kenya.

3. Since the first thirteen Petitioners were minors, the next friend, Legal Advice Centre, filed a signed written Notice of Appointment of Next Friend pursuant to Order 31 Rule 1 of the [Civil Procedure Rules](#), 2010. It was dated 28/02/2024 and signed by one Dr. Annette Mbogo, the Chief Executive Officer (CEO) of the legal Advice Centre t/a Kituo Cha Sheria.
4. Before the matter would proceed a dispute arose between learned counsel (or their clients for that matter) regarding the representation of the Petitioners. This Court was called upon to determine which of the learned counsel had the legal capacity and authority to represent the respective sets of and individual Petitioners. The learned counsel for the Legal Advice Centre argued that the Kituo Cha Sheria was a Premier League for NGO championing the rights of minorities and marginalized persons for the last sixty (60) years in Kenya and Africa. It does so on a pro bono basis and with distinction, acumen and commitment.
5. He submitted that the Legal Advice Center received instructions sometime last year in July to bring this Petition on behalf of the Petitioners who comprised a marginalized society which included miners, vulnerable groups of persons and marginalized society, all of Turkana area. The preparation exercise took the NGO about six months to prepare and file this Petition in order to hold accountable the first Respondents for various environmental violations articulated in the Petition.
6. He submitted that the first set of 13 Petitioners were minors; this was confirmed by way of affidavits sworn by learned counsel filed records on behalf of the Petitioners. He added that they had complied with the provisions of Order 32 of the [Civil Procedure Rules](#). Further, the Petition brought on behalf of the minors could only be instituted by a guardian acting in their interests which was now a next friend.
7. He argued that where a minor files a suit without such written authority, it was the business of the court to appoint a guardian. He argued further that in the instant case, Page 3 of the Petition. Further, it was not in contest that the Petitioners filed the written authority to act on behalf of the minors: the guardianship had not been challenged in court. He submitted further that he had seen affidavits sworn by parents of the 12 minors in regard to the issue herein. They had deposed that they did not authorize the Kituo Cha Sheria to act for the minors. They submitted that that position or proposition had no place in law. Further, they did not need the consent of the parents to do so. Further, the minors did not require the consent of their parents to instruct the Legal Advice Centre to bring this suit for their own future and the larger society.
8. His further submission was that the competency and fidelity of the Kituo Cha Sheria to represent the minors had not been questioned. Its integrity was not in doubt. Its competence either was not an issue. Further, it was the court's duty to protect the interests of the minors and the best interest of the child. Further, since the petition raised fundamental questions on the violation of the children's rights now and the future, it was important that they be represented by such a competent NGO.
9. He submitted further that the Affidavits were for the 12 children. Further, one affidavit by the 12th Petitioner, one Margaret Nakuree, was missing hence she did not challenge the representation by the Kituo Cha Sheria. Learned counsel also submitted that the 14th Petitioner. Elikanah Lokipet who was present in the online virtual court session had sworn an affidavit on 22nd of April to the effect that he did not instruct the law firm of MOB Advocates to act in his behalf. He was ready to be cross-examined. In regard to the 28th Petitioner he submitted that he too sworn affidavit the same date that he did not instruct the MOB Advocates.



10. Regarding the 15th to 21st Petitioners, he admitted that they had since moved grounds and sworn affidavits of instructions to the new counsel. That it was the right to be represented by advocates of their own choice. As for Petitioners 22, 23 and 24 he argued that there having been no affidavits to show that they had shifted ground, there was no contest about the Centre representing them.
11. He confirmed that Petitioners 26 and 27 had since sworn affidavits to the effect that they had instructed firm of MOB Advocates. Regarding Petitioner 28 he had sworn two affidavits, the first one on 22/04/2024 in which he deponed that he had instructed Kituo Cha Sheria and the other one on 09/07/2024 that he had since instructed the firm of MOB Advocates. That would require the court to determine the representation.
12. In regard to Petitioners 29 to 33 they had since withdrawn instructions and instructed the firm of MOB Advocates to represent them. Petitioners 35, 37, 38, 40 also had since instructed the said law firm. As for Petitioners 34, 39 and 42 they had not sworn any affidavit denying instructions. As for Petitioner 43 he had sworn an Affidavit on 22/04/2024 confirming the instructions to Kituo Cha Sheria but on 09/07/2024 sworn one withdrawing the same and appointing the firm of MOB Advocates. In regard to Petitioners 25, 36 and 41 they had filed and served on all parties a Notice of Withdrawal from the Petition hence their representation was not in contest.
13. The submissions by learned counsel for the Petitioners were supported those of Mr. Mwariri Advocate who added that the mischief behind filing notices of change was brought out by the affidavit sworn on 05/07/2024 by one Annette Mbogo who deposed that it had not been shown that Kituo Cha Sheria had not acted in the best interest of the minors. He invited the court to look at the issue of representation more broadly, especially at paragraphs 42 and 43 of the Petition. In them issues of environmental damage were first raised by the County Government of Turkana and the First Interested Party never seemed to care about the issues of environmental damage and the only interest by the Kituo Cha Sheria was the acting in the best interest of the minors. Further, the minors donated the authority to Kituo but they had not donated the same to the firm of MOB Advocates.
14. Further, at the time of donation of the authority to Kituo there was a meeting in which their parents were present. That fact had not been denied. Further, there was no subsequent meeting to reconfirm the change of instructions. If the firm of MOB Advocates came on record for the minors there would be no authority of the next friend. The Court would have to appoint another next friend for the minors. A mere representation of the minors would not entitle the lawyers to act as next friend for the minors.
15. He urged the Court to look at the vulnerability of the minors and their protection and find that Kituo Cha Sheria was the best person to represent them because their parents had confirmed that they were poor and marginalized hence could not be able to meet the costs of litigation. Lastly, Kituo Cha Sheria had employed enormous resources, experts and invested in time and expense on behalf of the minors and their parents who had no means to do so.
16. There had been no application filed in the court to challenge the ability Kituo to be the next friend. He argued that the interests of the minors superseded that of the immediate guardians. Insofar as this litigation was concerned, since the guardians were unable to meet the enormous costs and the public interest lay in favor of the Kituo Cha Sheria representing the minors.
17. On their part, learned counsel for the firm of MOB Advocates which intended to come on record for the parties has argued that the issue of representation by a learned counsel is a paramount right to fair hearing and access to justice. In terms of Order 9 of the [Civil Procedure Rules](#) a party had the right to change his Advocates at any time except where a judgment was in place. He submitted that Order 32 of the [Civil Procedure Rules](#) provides on how suits by minors may be instituted and defended. Specifically,



sub-rule 2 of Order 32 provides that before any one's name may be used as the next friend there should be a signed written authority to do so.

18. He submitted that in terms of Order 19 an Affidavit would suffice. He submitted that they had filed Affidavits by parents of the minors in respect of Petitioners 1 to 13 to the effect of representation. As for the 14th Petitioner, he had maintained that there was no affidavit he had sworn to dispute instructions to Kituo Cha Sheria. That was why he was present in court. Regarding the rest of the Petitioners there were affidavits sworn and filed in that behalf. He submitted that it was their desire that they be duly represented as shown by the affidavits. He argued that only the 28th and 43rd Petitioners had brought up the argument which was peculiar situation because they had deponed to Affidavits which this Court would have to decide on. For this, he argued that the court considers the post date and arrive at the finding of the latter represents their true position on instructions.
19. In regard to the best interests of the minors he argued that whereas Kituo was a reputable NGO which championed rights such as those sought in the Petition the circumstances of the instant petition was different. When the instructions were given to the said NGO, Kituo Cha Sheria, present but the clients whom MOB Advocates now represented had sworn Affidavits that they did not instruct the NGO to sue in their name. Further, the parents of the Petitioner stated they never instructed the NGO to sue in their name.
20. They argued that Article 23 of the Constitution allowed anyone to institute proceedings on their behalf. Under Article 22(1) everybody institute a petition while Article 22(2) one can do so on behalf of another, which means that the person on whose behalf they act had no ability to do so. He stated further that it was true that the minors in this petition may not have resources to ventilate their case regarding their rights but the work of Kituo Cha Sheria was done by advocates. The prejudice that may arise in regard to the minors was that instructions were given pursuant to a meeting where people were sensitized about their rights, and there was apprehension that their best interest would be ventilated in court as per their instructions since the
21. His argument was that the rights of the children ought to be maintained and no person other than their parents could have their best interest. That was why the right is given under the Children Act. Further, the ages of the children were between 7 and 10. After the meeting on instructions took place there is none other as a follow up. Lastly, he stated that the best interests the determination the court was to make was that the rule of law prevails and not that of an organization that should be taken into account. The Court had the duty to promote the rule of law hence should permit the law firm of MOB Advocates to come on record for the Petitioners.
22. Counsel for the Legal Advice Center responded to the submissions by arguing that Article 22 of the Constitution was that a person could act on behalf of another who cannot, for instance, the minors herein who were vulnerable could be represented by a person acting in public interest. He repeated a meeting was held in which the people came up with the representation. That Kituo Cha Sheria would act in the best interest of the minors and the Petitioners. The Petition was filed. The consent of the minors and the petition would be voidable. That for Learned counsel to argue that the parents were the ones whose action should be looked at meant placing the rights of the parents over and above that of the children, to the effect that it is the parents rather who have rights and not the children. In regard to Order 32 about next friend he submitted that Kituo had since signed an authority to that effect. Further that the parents were hijacking minors' Petition and then leave the children to their own devices. As for Kituo Cha Sheria it had no interest in the petition, except that of the minors.
23. This court has considered the application, the law and the submissions by learned counsel. It is of the view that only one issue lies in before it for determination. The issue is whether the firm of MOB



Advocates has made out a case for taking over the representation of the Petitioners they seek to come on record for in respect of which instructions are in dispute.

24. From the onset this court indicates that there is a distinction between legal representation or agency, as provided for under Order 9 of the *Civil Procedure Rules* and a person or individual acting as a next friend for a minor as provided for under Order 32. In regard to a party being represented by an Advocate of his own choice, there has to be capacity to instruct that learned counsel or party to act. Therefore, from the beginning this Court needs makes a distinction that is clear. In so doing it would narrow down to the real question in controversy at this stage about the representation of some petitioners in this matter.

25. Order 9 of the *Civil Procedure Rules*, 2010 provides for situations where parties in a matter decide to appoint persons to act on their behalf. It is to be done through Recognized Agents or Advocates. For purposes of narrowing down the issues in the instant application, since the issue herein pits two sides of learned counsel regarding representation where there are adults and minors as petitioners, on the issue of representation this Court limits itself to the provisions of Order 9 Rule 1 then provides that;

“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the by time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:”

26. I begin this analysis by quoting O’Kubasu JA (as he then was) in *William Audi Odode & another v John Yier & another* Court of Appeal Civil Application No NAI 360 of 2004, where he held as follows:

“...[I]t is not the business of the courts to tell litigants which advocate should or 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 a matter, the parties must be allowed to choose their own counsel.”

27. The right to legal representation is not to be gain-said. It is a constitutional right afforded to parties whether in matters of a criminal or civil nature. While the right may be looked at from a contractual perspective wherein parties of legal capacity have unfettered discretion to enter into lawful contracts with others of similar capacities, provision of legal services goes beyond simple contractual relations. The steps to acquire and obtain the services found an important tenet and desire: a party’s right to win a matter or an argument in regard to a relief based on skills and expertise in the specific area - the legal field. It is a service based on total trust, as in any other profession such as medical, engineering or even teaching or security whose result of the provision of the same may determine the life or death of the recipient of the service.

28. In regard to criminal cases, in *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecutions & another (Interested Parties)* [2021] eKLR the learned judge, Mrima J held:

“This discussion has, hence, brought to the fore several findings and conclusions on the right to legal representation in Kenya. They include, that: -

- (i) Legal representation is a qualified constitutional right;
- (ii) Any eligible person is at liberty to apply for legal representation under the Aid Act;



(iii) A Court before whom an unrepresented accused person is arraigned is under a constitutional duty to promptly inform the accused person of the right to choose and be represented by an Advocate;”

29. In regard to legal representation in civil matters, *David M Mereka t/a Mereka & Co Advocates v County Government of Nairobi* [2021] eKLR the learned Judge, Moeli J held:

“The removal of an advocate from representing a client is not to be taken lightly as the litigant who appointed such advocate enjoys the constitutional right to be represented by an advocate of his choice and the right to a fair hearing.”

30. In *Jopa Vilas LLC v Overseas Private Investment Corp & 2 others* [2014] eKLR the Court of Appeal in emphasizing the gravity of the matter quoted a passage from the judgment in *Delphis Bank Limited v Channan Singh Chatthe and 6 others* (*supra*) before stating as follows:

“The Supreme Court of Samoa in *Apia Quality Meats Limited v Westfield Holdings Limited* [2007] 3 LRC 172 held on the subject of removal of an Advocate from proceedings that such an application had to be considered under the relevant legal principles on the courts exercise of inherent jurisdiction to control the conduct of the proceedings and those who appeared before it as counsel. The factors to be considered were such factors as conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct. It was further held that removal of an Advocate from acting for a party in proceedings was an extraordinary and drastic remedy to be contemplated only in the most extraordinary circumstances, requiring misconduct so serious that removal was the only way of safeguarding the future integrity of the proceedings.”

31. Thus, in this matter the issue of legal representation regarding the 14th to 43rd Petitioners who are adults is simple: each has a right to choose their Advocates to represent them. As for the minors, it goes beyond an Advocate representing them: the person who signs a written authority to act as a next friend is the one to instruct the lawyer(s) to represent them. As for the representation of 25th, 36th and 41st the issue is moot because they have since withdrawn from the Petition. Since they have served all the parties as provided for under Order 25(1) of the *Civil Procedure Rules*, their Petition is hereby marked as withdrawn.

32. In regard to Petitioners 14th, 28th, 22nd, 23rd, 24th, 34th, 39th, 42nd, since they are adults of sound mind who have elected to retain the Legal Advice Centre t/a Kituo Cha Shria, this Court should not interfere with their constitutional right to choose advocates of their choice. They are free to proceed with their duly appointed legal counsel. By the same token, in regard to the 15th - 21st, 26th, 27th, 29th - 33rd, 35th, 37th, 38th, 40th since they are adults of sound mind who have elected to be represented by the law firm of MOB Advocates, this Court shall not fetter their constitutional right to choose advocates of their choice. They are free to proceed with their new duly appointed legal counsel.

33. Since the 28th and 43rd have sworn two conflicting affidavits about representation, and while they have not indicated in their latter affidavits that their depositions are contradictory to the former or a withdrawal of the same, this Court finds that the post-date depositions would be taken to be the current position regarding instructions. Therefore, it is my finding that they be represented by the law firm of MOB Advocates.

34. This Court therefore orders that the adult Petitioners who have since instructed the law firm of MOB Advocates can and have a right to be represented by the said law firm. For avoidance of doubt the law



firm of MOB Advocates is permitted to file and serve a Notice of Change of Advocates on behalf of the 14th, 28th, 22nd, 23rd, 24th, 34th, 39th, 42nd, 15th – 21st, 26th, 27th, 29th -33rd, 35th, 37th, 38th, 40th, 28th and 43rd Petitioners. The rest of the adult Petitioners remain represented by the Legal Advice Centre.

35. Having decided the above, I now turn to the representation of the minors. I have stated that for their representation, since they cannot give authority directly to learned counsel to represent them, they can only do so through their duly authorized legal person, and that is the next friend - the one who has signed a written authority for his name to be used as such. I have distilled the difference between offering oneself to act as a next friend and acting as an attorney for a minor.
36. Offering one to act as a next friend cannot be done through an Affidavit whether sworn under Order 19 (or any other law), as submitted by learned counsel Mr. Onyango of the law firm of MOB Advocates. If it were so, Order 32 (1) and (2) would have expressly provided as such. The two provisions stipulate;
- “(1) Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.
- (2) Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed.”
37. The provision is clear that there has to be a written authority signed by the person acting as a next friend. If the minor is to be represented by an advocate then that written authority shall be given to the Advocate. The authority is not in the form of an Affidavit. One of the basic reasons for that to be in the form the Rules Committee required it to be is that it is not a fact in contention. It is a legal issue reflected in a document which is basically part of the pleadings of the minor. Thus, the court does not agree with the learned counsel that what the parents of the minors did as Affidavits to show that they had instructed the firm were written authorities of next friends.
38. A self-defeating argument which the learned counsel seeking to come on record for the minors made was that in the meeting that sensitized the parties about the filing of the Petition there were no instructions for the Legal Advice Centre to act as a next friend. But they acknowledge that there was a meeting, and that in it the Centre was authorized to file the Petition for the 43 Petitioners three of whom have withdrawn their Petition. One question that raises curiosity is: since the parents were present and gave the names of the children (minors) who too were said to be present for the Petition to be filed, how can they deny the authority filed in that behalf? This court finds that the parents are not being honest in their depositions. And that being the case, this Court highly doubts the motive of the parents as that of the best interest of the minors.
39. In the first place the parents admit through the documents filed earlier in the Petition (and from both learned counsel's submissions) that they are poor, marginalized and do not have enough resources to bring the Petition and even meet the costs of the Petition.
40. Furthermore, apart from instructing the firm of MOB Advocates to represent them, they do not show to the court that they have invested in independent legal expertise to help in safeguarding the best interest of the minors. This is unlike the Legal Advice Centre which has heavily invested in the institution of the Petition in which they have no self-interest.
41. One issue that disturbs this Court is how possible it is, without there being a hidden agenda or plot, for persons who are poor, marginalized and have no resources can turn away from a gift of expensive legal services given to help them litigate on their rights which have or are alleged to have been violated and



prosecute ably complex environmental issues against a multinational corporation which and immense resources which it can deploy to defend its case. Worse is the fact that the said poor and marginalized purport to have what it takes to litigate on complex issues of other persons who are minors whose future is at stake in the alleged environmental damage.

42. The MOB Advocates argue that the parents are the ones who are best placed to protect the interests of the minors herein, and that the best interest of the child demands that the be given the right to act as their next friend. With due respect the Advocates either misunderstood the term (principle) “best interest of the child” or they deliberately skewed their argument to suit what their clients desire. Stephen Parker (1994), “The Best Interests of the Child: Principles and Problems; The Best Interest of the Child; Reconciling Culture and Human Rights”, International Journal of Law, Policy and the Family, Vol. 8, Issue 1, p. 27 states that the best interest of the child applies in the realm of family disputes such as custody, guardianship, maintenance, adoption of the child.
43. The principle has its legal background in the 1924 *Geneva Declaration of the Rights of the Child* and the 1959 *UN Declaration of the Rights of the Child*. It is a right-based approach. Article 3(3) of the *Convention on the Rights of the Child* which provides:
- “State parties shall ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”
44. There is more in the legal field that this Court may not discuss herein regarding the principle of the best interest of the child, in this case minors. Suffice it so say that the instant matter does not relate to custody of the minors and their physical protection but the litigation of over their rights, violated or threatened, which ought to be protected. In such circumstances the best interest of the minors over rights which they themselves cannot be able to understand and finance can only be better protected by an independent person or body who or which is willing to freely expend its resources for the children and their future to assure and secure it. This the NGO has shown.
45. Doing the best I can, I find that the Legal Aid Centre t/a Kituo Cha Sheria has demonstrated that it has the legal authority to act as the next friend of the minors. The NGO shall continue to represent them. The MOB Advocates law firm does not, in the first place, have written authority to be a next friend. Again, the parents have not demonstrated that they have the best interest of the minors at heart. In any event they have not followed the procedure of removal of the next friend as provided for under Order 32 of the *Civil Procedure Rules*. I thus dismiss the application by MOB Advocates to represent the minors.
46. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THE 26TH DAY OF SEPTEMBER, 2024

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Mulekyo for the Petitioners

Nyokabi for proposed Amicii

Kuimi for Onganyo for MOB Advocates



Biko for the Respondents

