



**Maragia t/a Maragia Ogaro & Co Advocates v Kimani & another; Mwangi & another (Interested Parties) (Succession Cause 855 of 2015) [2023] KEHC 25748 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25748 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 855 OF 2015  
SM MOHOCHI, J  
NOVEMBER 23, 2023**

**BETWEEN**

**ELIJAH MARAGIA T/A MARAGIA OGARO & CO ADVOCATES . APPLICANT**

**AND**

**DAVID MWAURA KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**PETER RIMUI KIBERERE ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GLADYS WAIRIMU MWANGI ..... INTERESTED PARTY**

**JANE WANGARE MWANGI ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. The deceased died on 24<sup>th</sup> November 1985 (38 years ago) and an initial probate and administration number 414 of 1986 evolved and became the instant succession cause, that was eventually confirmed by Justice AK Ndungu on the 28<sup>th</sup> February 2019. For all intents and purpose the distribution ought to have been concluded by June 2020.

On 11<sup>th</sup> November 2022 this instant Application was filed by Advocates that were instructed by one deceased Administrator (Monica Njeri Mwangi) and allegedly by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Under Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* and all enabling provisions of law, The Application seeks inter alia the following relief(s):

- i. That this honourable Court be pleased to stay further dealings to the estate herein as pertains the share of Monica Njeri Mwangi pending the hearing and determination of this application.



- ii. That this honorable Court be pleased to stay the further dealings to the estate herein as pertains the share of Monica Njeri Mwangi pending the determination regarding payment of taxed costs as between the Applicant herein and the said Monica Njeri Mwangi as taxed on the 12<sup>th</sup> Day of April 2022.
  - iii. That costs of the application be in the cause
2. The Application is anchored on the following grounds: -
- i. That, the Applicant was instructed by the said Monica Njeri Mwangi alongside her representative (now the 1 and 2d Respondent) to act for them in the matter herein.
  - ii. That, the cause herein is a consolidation of Nakuru High Court Succession Cause Number 193 of 1992 and Nairobi High Court Succession Cause Number 314 Of 1986 both involving the same estate.
  - iii. That, the Applicant proceeded to file Notice Of Change of Advocates dated 13/8/2015 in Nakuru High Court Succession Cause Number 193 Of 1992.
  - iv. That, the Applicant yet again filed an Appearance and Application in Nairobi High Court Succession Cause Number 314 Of 1986.
  - v. That, the Applicant conscientiously agitated the case for the said
  - vi. Monica Njeri Mwangi and managed to have the matter
  - vii. surreptitiously filed in Nairobi transferred to Nakuru where in the said
  - viii. Cause was consolidated and the new number allocated being Nakuru High Court Succession Cause Number 855 Of 2015.
  - ix. That, even then applicant still agitated the case for the said Monica Njeri Mwangi until she was duly granted her share that she was not about to get.
  - x. That, after the conclusion of the case, and the Court requiring each
  - xi. Party to bear their costs, the Applicant lodged an Advocate Client Bill of Costs dated 17/12/2019 that was effectively served upon the said Monica Njeri Mwangi in the presence of her Nephew the now 2<sup>nd</sup> Respondent on the 23<sup>rd</sup> Day of January 2020.
  - xii. That, the Bill of costs has since been determined but the Applicant learnt that the said Monica Njeri Mwani passed on sometimes in January 2022.
  - xiii. That, the Applicant has learnt that the entire share of the said Monica Njeri Mwangi is set to devolve to other Administrators and or Beneficiaries of the Estate without taking into account Costs payable to her Advocate.
  - xiv. That, it will be fair that the issue of Costs be addressed and the Applicant be paid for his Professional Work before the share of the said Monica Njeri Mwangi devolves to other Parties whereby it will be a complicated exercise to start involving them.
  - xv. That, there was no status report filed as at the time of amending the application herein meaning that the Decree is yet to be implemented taking into account the terms of Judgment and statutory provisions regarding distribution of net estate.



- xvi. That, the Interested Parties are set to be gifted with the share of the deceased Monica Njeri Mwangi going by the Mediation Settlement Agreement dated 31/08/2022 as signed by the Interested Parties for the second house and the 2<sup>nd</sup> Respondent for the first house.
3. This is a rather odd and curious Application, the Applicant on the 20<sup>th</sup> June 2023, further Amended his summons without the leave of the court long after filing of submissions and close of pleadings, which amendments were disallowed on the 25<sup>th</sup> May 2023 bringing to the fore the question of whether,
- i. An advocate acting in a matter is a necessary and party thereto to file proceedings such as this?
  - ii. Can an advocate acting in a matter assume a sufficient stake in the matter to become a necessary party?
  - iii. Is this an abuse of the process of court?
4. The Application was opposed by an interested party Jane Wangare mwangi arguing that the Application should be directed to the Estate of the deceased person and not the instant estate.
5. However, of importance is the Preliminary objection dated 22<sup>nd</sup> May 2023 that;
- i. This Application is inept and lacks merit hence an abuse of the Court process.
  - ii. The Respondents are not the administrators of the Estate of Monica Njeri Mwangi.

### **Applicants Submissions**

6. The Applicant filed two different submissions one dated 19<sup>th</sup> July 2023 and one dated 29<sup>th</sup> may 2023 where he submits that, the issues that are germane to determine the Application are as follows;
- i. Whether the applicant is entitled to costs from the share of the said beneficiary now that the applicant represented her and that the said applicant managed to be bequeathed from the estate.
  - ii. Whether the deceased Monica Njeri instructed the applicant to represent her in the estate
  - iii. Whether the respondent and the said Monica Njeri Mwangi were served with the bill of costs
  - iv. Whether there was mediation that was conducted in august 2022 and if not, the actual date the mediation took place and the nature of the mediation agreement.
  - v. Whether the respondent have objected to the taxed bill.
  - vi. Whether the preliminary objection is merited vis-à-vis the participation of the 2nd respondents in the mediation process.
7. That, there is no contest or dispute to the fact that the Applicant was instructed by the said Monica Njeri Mwangi to represent her in the cause herein. In any event that averment is cleared by paragraph 4 of the Replying Affidavit to the exception that the amount of Kshs.50,000/= was what was agreed. Besides the above, there is in Court record a duly filed Notice of Appointment of Advocates and several pleadings filed from the Applicant's firm. The *Advocates Act* defines a "Client" under section 2 thereof thus;-

“includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any capacity, has never, express or implied, to retain or employ, and



retains or employs or is about to retain or employ an advocate and any other person liable to pay to an advocate any costs.

8. As to whether the Applicant is entitled to Costs the Applicant posits that; the expression from the Advocates Act "on behalf of"; "express or implied" and "any other person who may be liable to pay to an advocate" squarely places the deponent of the Replying Affidavit as a client. However, the applicant is seeking payment from The Share Of His Deceased Client. the Respondent had stood for her and ought to stand when costs are paid.
9. That there is no gain saying that the applicant is entitled to costs given that he acted for the said Monica Njeri Mwangi from the time of filing the notice of appointment to the date of completion of the succession cause. A brief history of the succession cause herein will be helpful for case of reference and need for court. "having law both the initially the erstwhile Administrators had surreptitiously filed a succession cause in respect to the estate herein in Nairobi vide Nairobi High Court Succession Cause Number 314 of 1986. That Cause proceeded to completion and a Grant of Letters of administration as well as the certificate of confirmation of grant issued. The other Administrator (the deceased Client) had also filed on Succession in Nakuru vide Nakuru High Court Succession Cause Number 193 of 1992. In the Nakuru Succession Cause all the widows were included in the estate but it came to the realization that the erstwhile administration had indeed clandestinely filed the Nairobi Succession Cause which caused the Court, via the Deceased Client to make a Ruling in the Nakuru case. Of copy of the said Ruling is in the Court me but a portion from the one attached reads. applicant and Respondents affidavit as well as annexures it is clear from the record that both are beneficiaries of the deceased estate" it is apparent that an earlier grant was issued in Nairobi succession cause No, 314/86. The applicant alleged. This was done behind her back. The Respondent affidavit has not alleged that the applicant was aware of that application and as a widow she was entitled to co-administration with other beneficiaries" Nothing has been done to amalgamate the succession cause herein.
10. It was after the instruction of the applicant herein that there was aggression and employment of intense efforts to have the file in Nairobi High Court moved to Nakuru the same can be gleaned from the application dated 28/9/2015 with the attendant notice of change advocates dated the same day that the said file was brought to Nakuru and the said file together with the Nakuru Succession Cause number 193/1992 be amalgamated into the instant cause, that is Nakuru High Court Succession Cause Number 855/2015.
11. Therefore, it will be absurd that there can be pronouncement that the Applicant isn't entitled to Costs from the person who was set to be disentitled of anything from the estate. Even more absurd are the erstwhile administrators or beneficiaries, who even after obtaining their due share, they are thirsting for what the Deceased Client was awarded by Court in wholesome without letting a penny slip in form of expenses and liabilities to the Deceased Client's share. The Ruling in this cause and the pleadings speak loudly the level of contest that pertained the Succession Cause herein but in summary:-
  - a. The cause herein 855 of 2015 comprises of two other causes being Nairobi High Court Succession Cause Number 314 of 1986 and Nakuru Succession Cause 193 of 1992.
  - b. The period of engagement lasted more than 4 years. That is from the date of appointment to the date of Decree
  - c. The Deceased Client successfully obtained what she was to lose. She had been disenfranchised.
  - d. Therefore, the Applicant is entitled to Costs, is for anything for the interest of fairness and justice.



12. That the Respondents contend that the Fee was agreed and they exhibit an Agreement dated 14/11/2019. It is the Applicant's view that the said Agreement does not relate at all with the Applicants Fees. The said Agreement was just a Sale Agreement whose objects are contained in the Clauses of the said Agreement and there is no mention therein regarding payment of fees. Furthermore, no agreement on agreeable fees has been attached. The Advocate's Act is explicit on the issue of advocate s fees at Clause 4 thereof and it states: -

“ An advocate shall not agree or accept remuneration at less than provided by this order”

13. On the issue of awareness of the bill of costs and this taxation the Applicant submits that, having deposed that no Advocate is permitted to accept a Fee that is less than what is provided under the Act and placing all circumstances as captioned above regarding the blow of the cause, the Applicant prepared the Advocates Client Bill of costs vide Nakuru High Court Miscellaneous Civil Application Number 559 of 2019. The Applicant set the record straight as follows:-

- i. Contrary to the assertion that the Respondents were unaware of the said Bill, there is an Affidavit of Service alluded to under paragraph II of the Applicant's Supporting Affidavit. The 2nd Respondent herein alongside the Deceased Client were duly served. The Respondent signed the Taxation Notice and the Bill whereas the deceased Clients thump printed the same.
- ii. It is noteworthy to also inform the Court that the Respondent who are decrying lack of knowledge of the Bill of Costs have to date done nothing (from 16th Day of November 2022) to either set aside and put their contestation therein or make appropriate reference to challenge amount awarded us costs. Therefore, it is just on an exercise of mere denial, the denial that the Respondent were not aware of the Bill of Costs.

14. The Applicant urge this Court to totally disregard the contestation therein in and direct that the Certificate of Costs contains the amount the Applicant is entitled to receive from the share of his Deceased Client.

### **Respondents Submissions**

15. It is submitted that this Court has to take into consideration whether;

- a. The person named as the client was the Client in the parent file.
- b. The instructing party and the paying party were the same.
- c. The Bill of costs was served on the correct parties.
- d. The Advocate acting without authority.
- e. The nature of the Client Advocate relationship.
- f. Can the Applicant Tax the Beneficiary in an Estate in a personal capacity instead of the Estate?

16. It is the Respondent's Submission that, there isn't and has never existed a client Advocate relationship between the Applicant and the Respondents herein, and at no point did the Respondents issue instructions to the Applicant to act for them in any matter mentioned herein or on record.

17. That there does not exist the Estate of Monica Njeri Mwangi and the Respondents have never been either Administrators or Beneficiaries in the Estate of Stephen Mwangi Gituka. That the Respondents herein are strangers in this matter and are being unjustly ambushed by the Applicant.



## Analysis and Determination

18. I have carefully considered the Notice of Preliminary Objection as well as the written submissions filed by both parties. The only question for determination is whether the Preliminary Objection has met the legal threshold required in law.
19. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) as follows: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
20. Therefore, Preliminary Objection may only be raised on a pure point of law. *In Re Estate Of Joseph Mutiso Kitbome* it was held that the issue of locus standi is a pure point of law that can be properly raised in a Succession Cause.
21. The main objection raised by the Respondent is that the Applicant has no locus standi in this matter. *Locus Standi* is a Latin term, which literally means ‘place of standing’ and refers to the right of a particular party to bring an action a suit. *Black’s Law Dictionary 10<sup>th</sup> Edition at Paragraph 1084* defines the term ‘Locus Standi as follows: -

The right to bring an action or to be heard in a given forum.”
22. It is trite law that pleadings filed in court by persons with no locus standi are void *ab initio* and the court would have no jurisdiction in such actions. In *Ibrahim v Hassan & Charles Kimenyi Macharia*, [2019] eKLR the Court observed as follows: -

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite *locus standi* to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards *locus standi* are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues”. (own emphasis)
23. The Applicant as the ‘Advocate’ of the Deceased Administrator in a settled estate- He is neither a beneficiary, an interested party, a creditor nor a dependant of the Deceased and has no legal claim to the estate.
24. The Applicant as the ‘Advocate’ of the Deceased Administrator can only be deemed a beneficiary of the estate if he is found to be a dependant within the meaning ascribed by section 29 of the *Law of Succession Act*. The Applicant has not claimed that he was ‘dependant’ on the Deceased prior to his death neither has he tendered any evidence to prove his dependency on the Deceased. He should ideally move against the estate of the Deceased Administrator and not this instant estate.



25. *In Re Estate Of Alfred Mutune Munyao (Deceased)* [2019] eKLR, the Court held as follows:

- “9. A perusal of the pleadings indicates that the applicant has not been listed as a beneficiary of the estate of the deceased and his claim cannot be tried in a succession cause. Section 29 of the *Law of Succession Act* is to the effect that a brother of the deceased will only be considered a dependant if maintained by the deceased prior to his death and hence is entitled to the estate of the deceased. In the absence of evidence of maintenance, I am unable to find that the applicant is a beneficiary of the estate of the deceased. Merely stating that the deceased was his brother is not enough for the applicant to lay claim to the estate of the deceased without any proof that he was being maintained by the deceased as a dependant.
12. Looking at the applicant’s pleadings there is no evidence to link him to the estate of the deceased or anything to prove that he was a dependant of the deceased. He has not explained his interest in the properties of the deceased and as such he should not prevent the respondents from administering the estate of the deceased. The chief’s introductory letter dated 29.4.2014 has listed the respondents as dependants of the deceased. The applicant is not indicated as a dependant and as such he had the burden of establishing the same. The applicant has not satisfied me that he is a dependant of the deceased. However should he have any claim to ownership of the properties of the deceased then he is at liberty to proceed to lodge it at the Environment and Land Court. Entertaining the applicant in the proceeding herein will serve no useful purpose other than to convolute the matter. The applicant has not satisfied this court that he merits the orders he is seeking as he lacks locus standi.” (own emphasis)
26. The Applicant has not established his legal interest in the estate of the Deceased. He is neither a beneficiary, an interested party, a creditor nor a dependant of the Deceased and has not shown any proprietary interest in the Estate.
27. That the Interested Parties herein were enjoined unilaterally and without leave of the Court.
28. This court equally finds the Application to constitute an abuse of the process of the Court as an advocate acting in a matter is not a necessary party thereto and that he cannot assume a sufficient stake in the matter to become a necessary party. That a succession court and its jurisdiction is distinguishable from the court envisioned under the special jurisdiction under the the *Advocates Act* and the *Advocates remuneration Order*.
29. For the above reasons, I find that the Applicant has no locus standi in this matter. Accordingly, the Application dated 11<sup>th</sup> November 2022 is not tenable and is hereby struck-out.
30. If the Applicant-Advocate wishes to enforce his bill of costs as taxed then should do it strictly within the special jurisdiction provided for under the *Advocates Act* and the *Advocates remuneration Order* as against the estate of and personal representatives of their deceased client Administrators.
31. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**



**S. Mohochi**  
**JUDGE**

