



**Ngoro and Nguro (Suing as the administrators of the Estate of the
Late Christopher Esbon Macharia Mutahi) v Cheruiyot (Civil Appeal
E08 of 2020) [2022] KEHC 11987 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 11987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E08 OF 2020
SN MUTUKU, J
APRIL 26, 2022**

BETWEEN

**RAHAB WAMBUI NGORO AND ISABEL MUTHONI NGURO APPELLANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE
CHRISTOPHER ESBON MACHARIA MUTAHI**

AND

KIPYEGON NIXON CHERUIYOT RESPONDENT

*(Being an appeal from the Ruling of the Learned Hon
Shitubi, Chief Magistrate in Kajiado CMCC 94 of 2018)*

JUDGMENT

The Appeal

1. This Appeal arises from a ruling delivered on November 26, 2020 in the Magistrates Court Civil Suit No. 94 of 2018. The Appellant is aggrieved by the decision of the Honorable Shitubi S.M CM, and has preferred this Appeal on the grounds that: -
 - i. The Learned trial Magistrate misdirected herself in finding that the only issue pending in the matter was payment of further court fees and thus there was no need for change of advocates.
 - ii. The Learned trial Magistrate erred in law in failing to take into account and/or disregarding the grounds tendered by the appellants on the face of the application and the supporting affidavit thus arriving at a wrong decision.
 - iii. That the Learned trial Magistrate misdirected herself by finding that the application lacked merit and should be dismissed with costs.



2. The said ruling resulted from an application dated 18th December, 2019 which application sought leave to have M/S G.M Wanjohi & Co. Advocates act for the plaintiffs in this matter in place of M/S Mugo Githinji & Co. Advocates as well as costs of the application.

Submissions

3. Through their submissions dated December 9, 2021, the appellants claim that despite the matter in the lower court having been concluded through consent of parties, there is still a pending issue in that their advocate on record had only partially released the decretal sum to them. It is the appellants' case that the balance of the decretal amount was retained on the basis that the appellants could not agree with the parents and siblings of the deceased on the signatories of the account into which this amount was to be deposited.
4. The appellants claim that the retention of the balance of the decretal amount by their current advocates was driven by malice and ulterior motive leading to sour relationship between the current advocate and the appellants hence the need to change advocates.
5. It is further argued that the learned magistrate misguided herself in holding that the only pending issue is payment of further court fees and failed to consider the pending issue of distribution of the funds to the minor children.
6. Mugo Githinji & Co. Advocates filed their submissions in which they have identified two issues for determination: firstly, that the trial court erred in making a finding that the only issue pending is the payment of further court fees and therefore there was no need for change of advocates and secondly, that the trial court erred in curtailing the appellants rights to be represented by an advocate of their choice at any stage of the proceedings.
7. It is their submission that the trial magistrate was correct in law in finding that the only issue pending was payment of further court fees as the rest of the issues between the appellants and their advocates could be sorted out between them. They submitted that they had expressed the readiness to release the balance of Kshs. 1,300,000/- to either an account jointly held by the appellants and the co-administrators of the estate of the deceased or to the Court in Muranga Succession Cause No. 524 of 2017 for the reason that the litigation on distribution of the estate of the deceased could proceed.
8. They argued that the proceedings in Kajiado CMCC 94 of 2018 were instituted and conducted on the strength of the Grant of Letters of Administration intestate issued on November 21, 2017 which grant is yet to be confirmed; that the appellants have not been curtailed in the exercise of their right of legal representation as the distribution of funds which form part of the estate of the deceased lay before another forum and not the trial court subject of this appeal.
9. It was further submitted that the issue of professional misconduct raised by the appellants should be disregarded as there is no record of any complaint having been lodged against them. That they advised the 1st appellant that that since there were co-administrators to the estate of the deceased it was necessary that they reach a consent instead of litigating on who would manage the funds which advice was not favorable to the 1st appellant. They submitted that this court can exercise its discretion and issue directions on the release or distribution of the funds as it's the only issue that the appellants have a right on choice of legal representation which must however be exercised within the law.



Determination

10. I have considered the issues raised in this appeal. Being the first appellate court I remind myself of the duty to reconsider the evidence, evaluate it and draw my own conclusions always bearing in mind that I have neither seen nor heard the witnesses and should make due allowance in that respect.
11. To my mind this appeal revolves around one major issue: whether the lower court was correct in curtailing the appellants right to be represented by an advocate of their choice at any stage of the proceedings.
12. My reading of the record of the lower court reveals that the appellants herein filed an application dated December 18, 2019 through the firm of G.M Wanjohi & Co. Advocates seeking leave to act for the appellant instead of M/s Mugo Githinji & Co. Advocates, the then advocates. This application was filed after a consent judgement in CMCC No. 94 of 2018 had been entered in the following terms:

“By consent:

1. Judgment be entered in favour of the plaintiff
 - (a) General damages Kshs. 2,350,000/-
 - (b) Costs – Kshs. 150,000Total – Kshs. 2,500,000/-
 2. There be stay of execution for 30 days.
 3. The matter be marked settled upon payment failing which execution to issue including further court fees.
 4. Mention 3/10/2019 to confirm settlement.”
13. I have considered the submissions of both parties. It is clear to me that after the consent judgment, this matter was settled, the only pending issue, perhaps being payment of further court fees before the file can be closed. It is clear to me that the cause of action in the lower court arose as a result of a fatal accident. There is mention of the a grant of representation that is yet to be confirmed. There is also mention of Murang'a Succession Cause No. 524 of 2017. My considered view is that distribution of the estate of the deceased must be done within the law but in a different forum than the court that dealt with this matter.
 14. I have considered the issue as to whether the lower court was correct in curtailing the appellants right to be represented by an advocate of her choice at any stage of the proceedings. The law is clear under Order 9 of the *Civil Procedure Rules* that a party to a suit is at liberty to be represented by an advocate of his choice. A party is at liberty to change advocates at any stage of the trial. If it is before judgment, all that is required is to file a Notice of Change of Advocate and serve it on all other parties. If it is after judgment, then Order 9 Rule 9 of the *Civil Procedure Rules* is applicable. It provides that:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

 - (a) Upon an application with notice to all the parties; or
 - (b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.



15. I fault the learned magistrate for curtailing the appellant's right to legal representation of their choice. This right in my view can be exercised at any stage of the proceedings. This is why Order 9 Rule 9 of *Civil Procedure Rules* is in place. The legislature anticipated such a scenario hence the provision to protect the outgoing advocate. I see no prejudice in such an application. Perhaps the only issue that may be pending would be payment of costs which can be done after taxation. Or pending issues between client and outgoing advocate like in this case where the outgoing advocate still holds some funds for the client.
16. In view of the foregoing, I hereby find for the appellants and allow this appeal. The ruling of the lower court dated November 26, 2020 is hereby reversed and set aside. The matter shall be placed before another magistrate for determination of the Notice of Motion dated 18th December 2019 given that Hon. S. M. Shitubi, CM is no longer sitting at Kajiado Law Courts. I award no costs to the appellants but instead order that each party bears own costs. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 26TH APRIL 2022.

S. N. MUTUKU

JUDGE

