



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1657 OF 2011

IN THE MATTER OF THE ESTATE OF PETER MWIKYA KAKENYI alias MWIKYA KAKENYI alias PETER KAKENYI alias BRIGADIER PETER KAKENYI alias BRIGADIER P. KAKENYI alias BRIGD. PETER KAKENYI alias BRIG. PETER RAYMOND KAKENYI alias BRIG. P. KAKENYI alias PETER R. KAKENYI alias PETER RAYMOND KAKENYI (DECEASED)

ANGELLINA MUENI MBAABU.....APPLICANT

VERSUS

FLORENCE M. MWANGANGI T/A

F. MWANGANGI & COMPANY ADVOCATES RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated 26th November 2020 by which the Applicant ANGELINA MUENI MBAABU seeks the following orders:-

(i) Spent

(ii) That Honourable Court be pleased to order the Respondent to file Bill of Costs and same be taxed by the Deputy Registrar of the Court.

(iii) That upon grant of prayer (2) above the Court be further pleased to grant an order compelling the Respondent to deposit the Applicant Land Titles together with the Deed Plans being Land Title Nos. 7885/5, 7885/17, 12648/15, 12648/14 in Court pending the hearing and determination of this application inter parties.

(iv) That the Honourable Court be pleased to release Land Titles No. 7885/5 to the Applicant firm of Advocates to facilitate the sale of the said property and on a professional undertaking that they shall settle and/or pay the Respondent her legal fees upon the same being taxed by the Court.

(v) That the Honourable Court be further pleased to make a declaration that the Respondent never had any instructions to act for and/or behalf of the Applicant.

(vi) That the Honourable Court be further pleased to make a declaration that the Respondent purported fee notes dated the 8th day of January, 2018 and Bill of Costs attached to the letter dated 23rd day of November, 2020 are illegal, irregular and not drawn to scale, the same be declared null and void.

(2) The application was premised upon Section 1(a), (b) & 3A of the Civil Procedure Act Cap 21, Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of law and was supported by the Affidavit of even date sworn by the Applicant herein.

(3) The Respondent FLORENCE MWANGANGI T/A MWANGANGI & COMPANY ADVOCATES opposed the application through her Replying Affidavit dated 14th December 2020. The application as canvassed by way of oral submissions. Parties appeared via the online platform on 1st February 2021 to make their submissions.

BACKGROUND

(4) This matter revolves around the estate of one **PETER MWIKYA KAKENYI** (hereinafter referred to as '**the Deceased**') who passed away on **27th April 2011**. Following the passing of the Deceased the Respondent was engaged by the beneficiaries of his estate, to file a Petition for Grant of Letters of Administration Intestate. A Grant was issued in respect of the estate which grant was later rectified and re-issued on **4th June 2015**.

(5) The estate of the Deceased was then distributed and all the beneficiaries including the Applicant herein were registered as owners of the portions of land which had been bequeathed to them as set out in the confirmed Grant. The Applicant **Angelina Mueni Mbaabu** who was a beneficiary to the estate had the following four (4) parcels of land allocated to her:-

(i) **L.R. No. 7885/2**

(ii) **L.R. No. 7885/17**

(iii) **L.R. No. 12648/15**

(iv) **L.R. No. 12648/14**

(6) Through the efforts and provision of legal services by the Respondent the above **four (4)** parcels of land were eventually registered in the name of the Applicant and Title Deeds issued.

(7) The Applicant averred that on **8th January 2018** she received a fee note from the Respondent claiming legal fees amounting to **Kshs. 5,946,587/-** for services rendered in securing registration of deeds of assent for the Applicants **four (4)** Title Deeds. The Applicant avers that she never instructed the Respondent to act for her in this matter. That it was the administrators of the estate who instructed the Respondent and as such the Respondent's fees ought to be paid out of the estate of the Deceased.

(8) The Applicant is aggrieved that the Respondent has failed and/or declined to release her **four (4)** title deeds on account of unpaid legal fees due and owing to the Respondent. That the Respondent has adamantly refused to release the title deed to this **L.R. No. 7885/5** until the Applicant pays the outstanding legal fees for the procurement of all the **four (4)** Title Deeds. That the Respondent is claiming the sum of **Kshs. 1,317,190.55** for registration of **L.R. No. 7885/5**. The Applicant states that she has secured a buyer for **L.R. No. 7885/5** and entered into a Sale Agreement dated **10th November 2020**. However she is unable to complete the sale transaction due to the fact that the Respondent is still holding her Title Deeds. The Applicant is apprehensive that the sale of this parcel of land may fail to materialize to her prejudice unless the Court steps in and grants the orders being sought. Hence the present application.

(9) On her part the Respondent urges the Court to dismiss this application. The Respondent confirms that she is holding onto the **four (4)** Title Deeds belonging to the Applicant. However the Respondent clarifies that she is not disputing the Applicant's ownership of the **four (4)** parcels of land. That her only claim against the Applicant is for legal fees due to her law firm for legal services rendered.

(10) The Respondent contends that the Applicant has not come to Court with clean hands. That the fact of the matter is that she was instructed by the administrators of the estate of the Deceased with the active involvement and participation of all the beneficiaries including the Applicant herein. The Respondent avers that the Applicant is not being honest in her denial that she instructed the Respondent, when the same Applicant has made several attempts to settle the outstanding fees. The Respondent submits that this application is nothing but an abuse of Court's process and a waste of limited judicial time and resources. She urges the Court to dismiss the application with costs.

(11) The Applicant retorts that if any legal fees are outstanding then the Respondent should file her Bill of Costs for Taxation in the normal manner.

ANALYSIS AND DETERMINATION

(12) I have carefully considered the material placed before this Court, the Affidavits on record, the submissions of both parties as well as the relevant law. The two issues arising for determination are:-

(i) **Whether the Applicant owes the Plaintiff any legal fees.**

(ii) **Whether the Applicant is entitled to the orders sought in this application.**

(i) **Does the Applicant owe the Respondent legal fees?**

(13) It is not disputed that the Respondent acted for the estate of the Deceased in pursuing a confirmed Grant of Letters of Administration. The Confirmed Grant was issued and later confirmed on **4th June 2015**. Annexure '**M1**' to the Respondent's Replying Affidavit dated **14th December 2020** is a copy of the Certificate of Confirmation of Grant. The said Certificate indicates a bequest of various parcels of land to **Angelina Mueni Mbaabu** (the Applicant herein).

(14) The key question to be answered to enable the Court determine if the Applicant owes the Respondent any legal fees is who instructed the Respondent to act for the estate and beneficiaries and whose obligation is it to pay the Respondent's legal fees.

(15) The Applicant contends that she did **not** instruct the Respondent to act for her at all. The Applicant states that the Respondent was instructed by the administrators of the estate and should therefore claim her legal fees from said administrators.

(16) The Respondent whilst conceding that she was indeed instructed by the administrators of the estate asserts that this was done with the full involvement and concurrence of **all** the beneficiaries to the estate. That the law firm held several meetings with the administrators together with all the beneficiaries. The Respondent avers that it was agreed that each beneficiary pay their respective legal fees and that indeed several beneficiaries have cleared their portion of the legal fees and have collected their Title Documents.

(17) It would appear that the Applicant has been somewhat economical with the truth. The Respondent has averred that the Applicant made a payment for deposits on disbursements amounting to **Kshs. 186,240/-** vide a Bankers cheque **No. 044256** dated **13th September 2016** (Annexure **'M4'** to the Replying Affidavit). The Applicant has not denied having made this payment to the Respondent.

(18) The Respondent further stated that the Applicant supplied their offices with copies of her National Identity Card No. **4440179**, PIN Certificate **No. A002650250K** and her pass-port photos to facilitate the registration of her Title Deeds (Annexures **'M5a-c'**). It is very unlikely that the Applicant would be making payments to and providing her documents to a lawyer whom she had not instructed. If the Applicant had not instructed the Respondent to act for her as she claims then why was she engaging with the Respondent for provision of legal services?

(19) Finally it is pertinent to note that vide a letter dated **20th March 2019** (Annexure **'M 3(a)'**) the Applicant wrote to the Respondent suggesting the utilization of the purchase price of Plot No. **7885/17** to offset the debt owed to the Respondent. The said letter reads inter alia as follows:-

"2. The sum of Kshs. 2,000,000.00 shall be paid to yourself being the deposit payment of the debt of Kshs. 6,000,000.00 owed to you for my titles that are currently in your custody

4. Upon the purchaser paying the 30% deposit of the purchase price being (Kshs. 18,000,000.00) you shall proceed to deduct your outstanding payment of Kshs. 4,000,000.00 and thereafter release to me my land titles. The balance of Kshs. 14,000,000.00 shall be deposited by RTGS to my personal account as provided above ..." [own emphasis]

(20) This letter is a clear admission by the Applicant that she owes the Respondent for outstanding legal fees. The Applicant makes proposals on payment of this outstanding debt. In the face of this letter it is deceitful and duplicitous of the Applicant to aver in this Court that she did not instruct the Applicant to act for her and does not owe the Applicant any outstanding legal fees. I find that the Applicant is not an honest litigant. The Applicant was speaking from two sides of her mouth. On the one hand she insists that she did not instruct the Respondent and owes her no legal fees. On the other hand she asks that the Respondent be ordered to file her Bill of Costs for taxation. The fact that the Applicant was making proposals to pay the Respondents outstanding legal fees clearly proves that the Applicant had in fact instructed the Respondent to act for her.

(21) Having benefitted from the legal services provided by the Respondent the Applicant is now seeking to evade payment of legal fees due to the Respondent. I find and hold that the Applicant being one of the beneficiaries to the estate of the Deceased instructed the Respondent to act in the matter of Confirmation of Grant and the transfer and registration of titles to the beneficiaries. As such the Applicant has an obligation to pay the legal fees owed to the Respondent for this service.

(ii) Are the prayers sought by the Applicant merited

(22) The Respondent has conceded that she is in custody of the Applicants **four (4)** Title Deeds awaiting the settlement of her legal fees. The Respondent has claimed a lien over said Title Deeds and asserts the same can only be released to the Applicant upon payment of the outstanding legal fees. It is clear that there is no agreement between the parties regarding the amount of legal fees due to the Respondent.

(23) In cases of disagreement between parties regarding the legal fees payable the remedy is to have the Bill of Costs filed for taxation. I note that the Applicant stated that she has a ready buyer for Plot **No. 7885/5**. In order not to prejudice the Applicant in regard to this sale transaction I am inclined to grant prayer (iv) of this application.

CONCLUSION

(24) Finally this Court makes orders as follows:-

- (1) Prayers (iii) (v) and (vi) of the Notice of Motion dated **26th November 2020** are dismissed.
- (2) I direct that the Respondent herein do file a Bill of Costs to be taxed by the Deputy Registrar of the High Court.
- (3) I direct that the Respondent release to the Applicant's Advocate the Title Deed in respect of Title No. **7885/5** to facilitate the sale of the said property **SUBJECT** to a professional undertaking that the Respondent's legal fees as taxed by the Court will be paid in full.
- (4) Each party to pay its own costs.

Dated in **Nairobi** this **26th** day of **February, 2021**.

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MAUREEN A. ODERO

JUDGE