



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**MISC. APPLICATION NO. 128 OF 2017**

**KAMAU KURIA & COMPANY ADVOCATES.....APPLICANT**

**VERSUS**

**LUCY NYAMBURA KINYANJUI.....1<sup>ST</sup> RESPONDENT**

**CATHERINE WANGARI GITHAGUI.....2<sup>ND</sup> RESPONDENT**

**JOSEPHINE WANJIRU GITHAGUI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The deceased James Githagui Kangau died intestate on 16<sup>th</sup> July 1991. He was married five times and had 21 children. His estate comprised land parcel Dagoretti/Kinoo/582. The 1<sup>st</sup> respondent Lucy Nyambura Kinyanjui, the 2<sup>nd</sup> respondent Catherine Wangari Githagui and Peter Njoroge Githagui petitioned for a grant of letters of administration intestate. The deceased's widow Tabitha Njeri Githagui filed an objection to the grant. A consent was reached in which the petitioners and the objector obtained a joint grant. The objector subsequently developed a mental problem. She was replaced in the grant by the 3<sup>rd</sup> respondent Josephine Wanjiru Githagui who was her daughter. Peter Njoroge Githagui eventually passed on.

2. There is no dispute that the petition had been filed on behalf of the petitioners by the firm of E.N. Nganga & Co. Advocates who represented them to the conclusion of the matter. The objector was represented by the firm of Kamau Kuria & Co. Advocates (the applicants). They substituted the objector with the 3<sup>rd</sup> respondent.

3. The 3<sup>rd</sup> respondent through her advocates (the applicants) filed summons dated 29<sup>th</sup> February 2000 seeking the confirmation of the grant. Her proposal that the estate be shared equally among the beneficiaries was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and others. They had their own proposals. The application was heard through oral evidence. The grant was confirmed by the judgment delivered on 10<sup>th</sup> July 2015. The proposal by the 3<sup>rd</sup> respondent carried the day. It was ordered that costs be in the cause.

4. On 26<sup>th</sup> September 2017 the applicants filed an advocate and client bill of costs seeking to recover Kshs.23,884,419/72 in costs from the three respondents. This was on the basis that they were entitled to recover the costs from the estate whose administrators were the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a notice of preliminary objection on the following grounds –

(a) that the applicant firm of advocates had never been instructed by (and never acted for) the 1<sup>st</sup> and 2<sup>nd</sup> respondents and cannot tax the bill against them;

(b) there was no order awarding costs to the applicants as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents or as against the estate of the deceased;

(c) the applicant could only tax as against the 3<sup>rd</sup> respondent who had instructed them; and

(d) since the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by the firm of E.N. Ng'ang'a & Co. Advocates to whom they are liable in costs, if the bill was taxed against them they would be paying costs to two different firms.

5. The objection had been filed before the taxing officer, but counsel asked that this court determines it before returning the matter to the

officer to tax. This was a substantial issue relating to retainer and therefore became the business of this court (**Mugambi & Co. Advocates – v- John Okal & Another [2013]eKLR**).

6. The applicants and Kiarie Njuguna & Co. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed respective written submissions on the objection. The 3<sup>rd</sup> respondent supported the objection, saying in her replying affidavit that the applicants were instructed to act for her and that there were no instructions for them to act for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

7. The facts of this case are not in dispute. The applicants were instructed by the 3<sup>rd</sup> respondent's mother, and later by her, to act in the objection and subsequently to file and prosecute the application for the confirmation of the grant. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were throughout represented by the firm of E.N. Ng'ang'a & Co. Advocates. The three respondents were joint administrators of the estate of the deceased.

8. I am aware that under **section 83(c)** of the **Law of Succession Act (Cap. 160)** personal representatives had the obligation –

**“(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);**

However, this obligation will normally arise where the administrators have, in the case of legal fees, jointly instructed an advocate. Where, like in this case, they instructed different advocates they will pay the advocates they have instructed, unless they seek, and obtain, an order that the fees be paid out of the estate.

9. The applicant referred the court to the decision in **Christine Wangari Gachigi & 3 Others – Elizabeth Wambui and 9 Others [2014]eKLR** in which the court reiterated the general principle that the estate must bear the expenses incident to the proper performance of the duties of the personal representative as personal representative. The court also pointed out the provisions of the **section 92(1)** of the **Act** which provides as follows:-

**“(1) Any person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defects or circumstances whatsoever affecting the validity of the grant.”**

10. In the case cited, the applicant was one of the administrators to whom a grant of letters of administration was issued and who had filed and defended various suits in her capacity as the administrator of the estate and for the sole purpose of protecting and collecting the deceased's estate for distribution. She sought a declaration that the costs in all suits on behalf of or in relation to the estate be borne by the estate and an order that the litigation costs she had incurred in her capacity as the administrator be indemnified. The court ordered the costs she had incurred be indemnified by the estate of the deceased. On costs in succession causes the court observed as follows:-

**“29. With regard to the succession causes, it is the court that is determining the cause that has jurisdiction to determine the question of costs. Generally the costs of the administrator are again recovered from the estate, but that remains the unfettered jurisdiction of the court. In this case, Kimaru J. held in his judgment delivered in this cause that each party will bear their costs of the suit .....**”

11. In the instant case, the 3<sup>rd</sup> respondent has not applied that whatever costs that she incurred in the joint administration of the estate, and in applying for the confirmation of the grant, be indemnified by the estate. In the judgment delivered by Justice W. Musyoka on 10<sup>th</sup> July 2015 there was no order that costs be borne by the estate of the deceased. The applicants did not request the court that heard the matter to have their costs to be borne by the estate of the deceased.

12. **Section 2** of the **Advocates Act (Cap. 16)** defines a “**client**” to include –

**“any person who, as a principal or on behalf of another, or a trustee or personal representative, or in any other capacity, has power, expressed or implied, to retain or employ, and retains or employs or is about to retain or employ, an advocate and any person who is or may be liable to pay an advocate any costs.”**

The basic principle is that under a contract of retainer only the client is liable to pay fees to an advocate whom he has retained, hired or employed. The 3<sup>rd</sup> respondent retained the applicants to act for her in the successions proceedings. The contract was directly between her and the applicants. She was under the contract obliged to pay the applicants' fees, unless there was a court order to the contrary.

13. The applicants sought to rely on **section 50** of the **Advocates Act** to say that this was one of the circumstances under which the estate, and not the instructing client, was liable to pay. They also relied on the case of **Roy Dean –v- Allin and Watts (A Firm) [2001]EWCA Civ. 758** to argue that the assumption of responsibility by an adviser (in that case a solicitor) may extend beyond the client to those whom the client intended to benefit; this leads to an implied retainer such as in this case where they assumed responsibility to ensure the due administration of the estate. Lastly, they argued that the holders of the grant must act jointly when administering the estate (**Republic –v- Disciplinary Tribunal of the Law Society of Kenya exparte John Wacira Wambugu & 2 Others [2016]eKLR**), and that “costs in the cause” means that costs of an action are usually awarded to the successful litigant.

14. It was the argument by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that **section 50** was not available to assist the applicants who had not obtained an order of the court that they be paid by the estate of the deceased. **Section 50(1)** provides as follows:-

**“(1) Where a person other than the person who is the party chargeable with a bill of costs is liable to pay the bill either to the advocate or to the party chargeable with the bill, or where a person is interested in any property in the hands or under the control of a trustee, executor or administrator, out of which property the trustee, executor or administrator has paid or is liable to pay the bill, that person or his administrators, executors or assignees may apply to the Court for an order for the taxation of the bill as if he were the party chargeable therewith, and the Court, having regard to the extent and nature of the interest of the person, may make any order thereon which it would have been competent to make if the application had been made by that party:**

**Provided that no order for taxation of a bill shall be made under this section in any case where—**

**(i) the bill has previously been taxed; or**

**(ii) the application is made more than six months after the date on which the bill was rendered to the party chargeable therewith or three months after the date on which the bill was paid, or the date when the party making the application became entitled to do so, whichever is the earliest.**

**(2) If an applicant under subsection (1) pays or has paid any money to the advocate in respect of a bill of costs payable out of property in the hands or under the control, of a trustee, executor or administrator he shall have the same right to be paid that money by the trustee, executor or administrator chargeable with the bill as the advocate had.**

**(3) The Court may, if it orders taxation of the bill under this section, order the advocate to deliver to the applicant a copy of the bill upon payment of the costs of that copy.”**

My understanding of this section is that, if the 3<sup>rd</sup> respondent sought that the applicants’ fees be borne by the estate she had to apply to the court for an order in that regard. Similarly, the applicants ought to have obtained an order in the succession cause that their costs be borne by the estate.

15. There is no dispute that joint grant holders must act together in the administration of the estate. However, there was no order in this cause that the costs of the application do follow the event, or that they be borne by either the estate or the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

16. In conclusion, I find merit in the preliminary objection. The applicants’ costs must be borne by the 3<sup>rd</sup> respondent, and not either by the estate or the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The objection is sustained with costs.

**DATED and DELIVERED at NAIROBI this 27<sup>TH</sup> NOVEMBER 2019.**

**A.O. MUCHELULE**

**JUDGE**