



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**IN NAIROBI**  
**MISC. APP. NO. 174 OF 2017**  
**IN THE MATTER OF THE ADVOCATES ACT CAP 16**

**AND**

**IN THE MATTER OF THE ADVOCATE (REMUNERATION ORDER)**

W G WAMBUGU & CO ADVOCATES.....APPLICANT

VERSUS

EPCO EMMA MUTHONI WAMBAA.....1<sup>ST</sup> RESPONDENT

WINGFRED NGANGA REGERU.....2<sup>ND</sup> RESPONDENT

CATHERINE NYANGUI REGERU.....3<sup>RD</sup> RESPONDENT

ESTHER WANJA REGERU.....4<sup>TH</sup> RESPONDENT

STEPHEN KAGECHE.....5<sup>TH</sup> RESPONDENT

VIRGINIA WANJIRU.....6<sup>TH</sup> RESPONDENT

PAULINE WANJIRU.....7<sup>TH</sup> RESPONDENT

DENNIS WAMBAA REGERU.....8<sup>TH</sup> RESPONDENT

JOSEH KABATI REGERU.....9<sup>TH</sup> RESPONDENT

DANSON MUCHUGIA REGERU.....10<sup>TH</sup> RESPONDENT

PIUS WAIHAKA REGERU.....11<sup>TH</sup> RESPONDENT

**RULING**

1. Stephen Kageche and Pauline Wanjiku, the 5<sup>th</sup> and 7<sup>th</sup> respondent's herein, took out the motion dated 27<sup>th</sup> August 2018, in which they sought for the following orders:

*i. THAT this honourable court be pleased to certify this application as urgent for hearing ex parte in the first instance.*

*ii. THAT pending further orders of this honourable court, there be a stay of execution of the judgment and decree made herein on 17<sup>th</sup> November, 2017.*

*iii. THAT this honourable court be pleased to set aside the exparte judgment and decree made herein on 17<sup>th</sup> November 2017.*

**iv. THAT in the alternative to prayer 3 above, this honourable court be pleased to review, vary and set aside the judgment and decree entered herein on 17<sup>th</sup> November, 2017 as regards the 5<sup>th</sup> and 7<sup>th</sup> respondents/applicants herein.**

**v. THAT in further alternative, this court be pleased to struck out the notice to show cause herein dated 24<sup>th</sup> July, 2018 and to set aside all subsequent proceedings regarding the said NTSC including the order allowing execution made on 16<sup>th</sup> August 2018.**

**vi. THAT costs of this application be provided for.**

2. The motion is supported by the affidavits of Stephen Kageche and Pauline Wanjiku. When served with the motion, W. G. Wambugu & Co. Advocates, the applicant herein, filed the replying affidavit of Wanja G. Wambugu and a notice of preliminary objection to oppose the motion.

3. When the motion came up for interpartes hearing, learned counsels appearing in the matter made oral submissions. I have considered the grounds stated on the face of the motion dated 27.8.2018 and the facts deponed in the affidavits filed in support and against the motion. I have further considered the grounds set out on the face of the notice of preliminary objection.

4. It is the submission of the 5<sup>th</sup> and 7<sup>th</sup> respondents that they were not served with the applicant's motion dated 10<sup>th</sup> April 2017 and that is why they did not respond to the aforesaid motion. Mr. Gacheru, learned advocate for the 5<sup>th</sup> and 7<sup>th</sup> respondents, argued that the applicants' right of a hearing was breached and hence exparte orders were issued thus condemning them unheard. It is for the above reason that the 5<sup>th</sup> and 7<sup>th</sup> respondents have beseeched this court to set aside the orders issued by this court on 17.11.2017.

5. The applicant is of the submission that the 5<sup>th</sup> and 7<sup>th</sup> respondents were served and therefore they do not have any plausible grounds in support of the motion to set aside this court's decision. The applicant attached to her replying affidavit the affidavit of service of Mary Mutuku to show that the 5<sup>th</sup> and 7<sup>th</sup> respondents were served with the motion dated 10.4.2017. For the above reason the applicant argued that this court's decision should not be interfered with. This court was also urged to find that it is *functus officio*.

6. Having considered the rival submissions and the material placed before me, it is clear from the affidavit of service of Mary Mutuku sworn on 23.5.2017 that the motion dated 10.4.2017 was served upon Esther Wanja, the 4<sup>th</sup> respondent herein, on 22<sup>nd</sup> May 2017 at Kinoo shopping centre. In paragraph 6 of the aforesaid affidavit, Mary Mutuku avers that Esther Wanja received the motion plus a hearing notice on behalf of Pauline Wanjiku and Stephen Kageche.

7. The 5<sup>th</sup> and 7<sup>th</sup> respondents have denied authorising the 3<sup>rd</sup> respondent to receive process on their behalf.

8. It is therefore apparent that the motion dated 10.4.2017 and the accompanying hearing notice was not personally served upon the 5<sup>th</sup> and 7<sup>th</sup> respondents. There is no reliable evidence to show that the 3<sup>rd</sup> respondent had authority to accept process on behalf of the 5<sup>th</sup> and 7<sup>th</sup> respondents.

9. With respect, I agree with the submissions of Mr. Gacheru, that the 5<sup>th</sup> and 7<sup>th</sup> respondent's right to a hearing was breached. In the circumstances, this court has the discretion to step in and exercise its inherent power to set aside its decision which affected the 5<sup>th</sup> and 7<sup>th</sup> respondents. It cannot therefore be said that this court is *functus officio*.

10. In the end, I allow the motion dated 27.8.2018 in terms of prayer 4. Consequently, the judgement and decree entered against the 5<sup>th</sup> and 7<sup>th</sup> respondents on 17.11.2017 is set aside. The motion dated 10<sup>th</sup> April 2017 as against the 5<sup>th</sup> and 7<sup>th</sup> respondents is reinstated and the aforementioned respondents are given 14 days from the date of this ruling to file a response. The motion is to be heard afresh as against the 5<sup>th</sup> and 7<sup>th</sup> respondents. Mention on 17.12.2018 for further orders and directions.

11. Costs of the motion to await the outcome of the motion dated

10.4.2018.

**Dated, Signed and Delivered in open court this 30<sup>th</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... For the Appellant

..... For the Respondent