



**In re Estate of Stanley Ndungu Mwaura (Deceased) (Civil Appeal
193 of 2019) [2025] KEHC 5299 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 5299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 193 OF 2019**

A MSHILA, J

MARCH 14, 2025

IN THE MATTER OF THE ESTATE OF STANLEY NDUNGU MWAURA (DECEASED)

BETWEEN

MARY WANGARI NDUNGU APPELLANT

AND

JAMES MWAURA NJOKI RESPONDENT

RULING

Background

1. The Notice of Motion dated 27th February, 2024 was brought under Section 3 and 3A of the *Civil Procedure Act*, Order 40 Rule 1 of the Civil Procedure Rules, Article 50(1) of *the Constitution* of Kenya and all other enabling provisions of the Law; the Applicant sought for the following orders;
 - a. This Court do grant leave to the firm of W.J.Ithondeka Advocates to come on record on behalf of the Appellant/Applicant herein in place of the firm of Ndungu Mwaura & Co. Advocates;
 - b. This Court be pleased to set aside the Orders of dismissal issued on the 26/07/2023 and reinstate the appeal herein.
 - c. This Hon. Court be pleased to issue an injunction restraining the Respondent, his agents or otherwise howsoever from evicting, harassing or in any way whatsoever interfering with the quiet possession by the Applicant, her family, tenants and agents of the property known as Land Reference Number 13097/3.
 - d. The Court do grant prayer 3 in the interim pending hearing of the application inter-parte.
 - e. The costs of the application be provided for.
2. The Application was supported by the sworn affidavit of Mary Wangari Ndungu.



Applicant's Case

3. The Applicant stated that being dissatisfied with the judgment delivered by Hon. Kachuodho she filed an application for stay of execution which was dismissed by Hon. Judge Kasango; being dissatisfied by this latter Ruling the Applicant instructed her then advocates to file a Notice of Appeal and an application for stay of execution to the Court of Appeal; which to date she was under the mistaken belief was still pending for determination;
4. Upon trying to establish the current status of the High Court Appeal at Kiambu she discovered that a Notice to Show Cause for Dismissal had been issued and on 26th July, 2023 the Appeal was dismissed for want of prosecution; and the record reflects that the advocates were absent; in trying to contact the advocates they were non-responsive;
5. On 19th February, 2024 a Notice was served her to vacate the subject property within ten (10) days; the Respondent herein intends to evict me from the subject property; The current application seeks to firstly reinstate the appeal so that the Applicant's appeal can be heard on merit; it also seeks leave to have a new advocate to come on record; and lastly seeks restraining orders against the Respondent.

Respondent's Case

6. The Respondent in the response stated that the Applicant was represented by the law firm of M/s Ndungu Mwaura & Co Advocates and that the Applicant had never moved the Court to seek leave of the Court for the new advocate to come on record; neither do the written submissions make any attempt to touch on the issue of representation; on that point alone the instant application ought to be struck out for having been filed by a stranger to the proceedings;
7. This Honourable Court issued a Notice to Show Cause for the dismissal of the appeal that had been instituted in 2019 and there being no action for a period of over one (1) year; no explanation whatsoever was forthcoming from of the Applicant as to why the appeal had not been set down for directions or for failure to file a Record of Appeal and with the forgoing in mind this Court correctly proceeded to dismiss the appeal for indolence and inaction by the Applicant;
8. It is not enough for a party to blame the advocate but must show tangible steps taken in following up with the matter; The Applicant was awakened from her slumber by the Respondents Notice to yield up vacant possession of the subject property and it had taken the Applicant seven (7) months to file the current application
9. The Respondent prayed the application be disallowed with costs to the Respondent.

Issues For Determination

10. The court considered the Application and the response and the issues that must first be determined is the issue of representation thus;
 - a. Whether the firm of W.J. Ithondeka & Co. Advocates should be granted leave to come on record on behalf of the Applicant in place of the law firm of M/s Ndungu Mwaura & Co Advocates; then
 - b. Whether to re-instate the Appeal.



Analysis

11. Order 9, Rule 9 of the Civil Procedure Rules provides as follows;

“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.”

12. Further, Order 9, Rule 10 provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

13. The above provision of Order 9 Rule 9 CPR is meant to protect advocates from mischievous clients who will wait until a judgment has been delivered and then proceed to replace their advocate with another advocate or act in person. The provision is therefore an important one and cannot be wished away. This was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

14. The same issue was addressed by the court in the case of Johnson M.S. Njoguri v Samuel Makindu Gachegu [2021] eKLR

“What appears from the above is that the need for leave to change an advocate after judgment is only meant to cater for the interests of the advocate whom the applicant wants to change. Despite the respondent having brought the issue as to service of the instant application upon the firm of Munyasya & Company Advocates, the applicant did not refute these averments or prove that the same was served upon the said firm of advocates.

Though the above is the correct legal position, in my view, the change of advocates by a party to proceeding without notifying the previous advocate cannot in any way prejudice the other party in the proceedings so as to warrant a court to deny the party leave to effect the said change. The respondent did not prove any prejudice which he stands to suffer if the change of the advocates is allowed. I say so bearing in mind that an advocate has a right to raise a client- advocate bill of costs for work done or services rendered if the same has not been paid for.”

15. Apart from not being able to immediately enjoy the fruits of his judgment there is no prejudice the Respondent has not demonstrated the prejudice he stands to suffer if the Applicant is granted leave to change her advocates; In the circumstances this Court will grant the Applicant leave to effect this change;

16. The reinstatement of a suit is at the discretion of the Court and this discretion may be exercised so as to avoid injustice that may arise from inadvertence or an excusable mistake; but it is not enough for



a party to entirely blame their advocate and this woeful explanation given by the Applicant for her inaction is not entirely convincing; she failed to demonstrate to this Court the tangible steps taken in following up with the matter it would appear that she was indeed rudely awakened from her slumber by the Respondents Notice to yield up vacant possession of the subject property; nevertheless, this Court will give the Applicant one last chance and will allow the application for reinstatement of the Appeal conditional to the payment of thrown away costs in the sum of Kshs. 35,000/- payable within thirty (30) days from the date hereof;

Findings And Determination

17. This Court makes the following findings and determinations;
- i. The application is found to be partially meritorious; The dismissal order made on 26/07/2023 be and is hereby set aside conditional to payment of thrown away costs.
 - ii. The Appeal is hereby re-instated provided the Applicant pays thrown away costs of Kshs.35,000/- to the Respondent within Thirty (30) days from the date hereof.
 - iii. Upon compliance leave be and is hereby granted to the firm of W.J. IThondeka & Company to come on record for and on behalf of the Appellant/Applicant herein in place of the firm of M/s Ndungu Mwaura & Co. Advocates;
 - iv. In default the re-instatement order shall lapse.
 - v. Mention on 28/05/2025 before the Deputy Registrar for Compliance and directions.
 - vi. Notice to Issue to Applicant/ Appellants Advocates

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 14TH DAY OF MARCH, 2025.

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

N/A – for the Appellant

Waithera Mwangi – for Respondent

