



REPUBLIC OF KENYA



**In re Estate of Amalemba Zakaria Lugonzo (Deceased) (Succession Cause  
265 of 2011) [2024] KEHC 2987 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2987 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 265 OF 2011**

**G MUTAI, J**

**MARCH 11, 2024**

**IN THE MATTER OF THE ESTATE OF AMALEMBA ZAKARIA LUGONZO(DECEASED)**

**BETWEEN**

**BEATRICE AMALEMBA ..... APPLICANT**

**AND**

**HUMPHREY MUSULI AMALEMBA ..... 1<sup>ST</sup> RESPONDENT**

**FRANK KARURI MWANGI GICHOHI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion application dated 8<sup>th</sup> November 2023. Vide the said application, the Applicant seeks the following orders:-
  - a. That the court declare and order that all the proceedings leading to the confirmation of the grant issued on 5<sup>th</sup> October 2012 were null and void and should be struck off the record;
  - b. That the grant issued herein was obtained by law firms that were not instructed nor aware of this proceedings hence they are a nullity and of no effect in law;
  - c. That the court do issue any appropriate order as it deems proper and the cost be provided for; and
  - d. That the cost of this application be provided for.
2. The application is premised on the grounds stated in the body of the Motion and also on the supporting affidavit of Shitakha Tom Ambwere sworn on 8<sup>th</sup> November 2023.
3. Mr Ambwere stated that on 5<sup>th</sup> October 2023, the court ordered the issuance of summons to the firm of Madzayo Mrima & Jadi Advocates and Odour Okumu Advocates. On 6<sup>th</sup> November 2023, the managing partners of Madzayo, Mrima & Jadi Advocates and Odour Okumu, Ms Jadi and Mr Oduor,



appeared in court and totally denied ever handling or filing this matter. Thus, it is clear that a fake or unknown law firm filed this matter, and therefore, it's a nullity. He thus urged that it is incumbent upon the court to declare the whole proceedings leading to the confirmation of grant on 5th October 2012, a nullity.

4. In response, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 1st February 2024 and stated that the application is premature and an abuse of the court process. He deposed that one Ngina Mutua, who appeared before the court during confirmation, has been summoned by the court but is yet to be afforded an opportunity to testify.
5. He further stated that even if the court finds that the pleadings were drawn by firms not instructed, the pleadings will not be defective if they were drawn by a person who was an advocate. He deposed that the said Ngina Mutua is an advocate of the High Court of Kenya, having been admitted in 2011 and currently working with the Office of Director of Public Prosecution. At the time the pleadings were filed she was qualified person within the meaning, purpose and function of section 9 of the *Advocates Act*. Even if it is assumed that she drew the pleadings without the authorisation of both the firm of Madzayo Mrima & Co. Advocates or Odour Okumu & Co., then she is guilty of professional misconduct whose remedy lies with the Disciplinary Commission or the Law Society of Kenya.
6. The application was canvassed by way of oral submissions. As the matter is part heard I will refer to the testimonies of the witnesses to the extent that these are relevant to my determination.
7. The 1<sup>st</sup> witness for the Objector was Beatrice Kaziliku Amalemba. Beatrice is the widow of the deceased. Beatrice told the court that they were blessed with 6 children, one of whom, Titus Amalemba, is deceased. The deceased used to take care of her as she suffered a stroke in 2008. Further, they had a property in Kiongoni in Lamu, being Plot No.72, Title No. Lamu/Hindi/Magogoni/72.
8. It was her evidence that in 2011, she received a report that there were people cutting trees on their land. She thereupon sent her daughter to confirm and assess the position. She was then told that her firstborn son, Humphrey Musili Amalemba, had sold the land to Frank Mwangi Gichohi. They had not agreed on the same, and neither did she sign any consent in respect of the sale. Further, she did not know when the son obtained the grant, and when she learnt of it, she went to Malindi Court to try to overturn the same, but the court did not rule in her favour.
9. She stated that Humphrey had the title deed to the land. She testified that the second Respondent had never lived on the land and that she wanted her land back.
10. The Objector's second witness was Peris Uside Amalemba. Peris is the daughter to the deceased. She told the court that her brother Humphrey sold their land without their consent and that she learnt of the same in 2014 and placed caution on the land. She was informed of the same by the chief. They reported the case to the police. She stated that they did not appear before either before Madzayo Mrima & Co. Advocates or Odour Okumu Advocates.
11. The court then directed the parties to file their written submissions. Subsequently, the applicant, through her advocates, Ambwere T.S & Associates Advocates, filed written submissions dated 5<sup>th</sup> February 2024.
12. Counsel relied on Sections 34 and 35 of the *Advocates Act* and submitted that the documents filed herein were fraudulent. The orders obtained are, therefore, null and have no legal consequences. It was submitted that counsel cannot legitimise an illegal and unlawful act, nor can the same be legitimised by an affidavit of a beneficiary of that fraud. Counsel urged the court to declare all actions taken in this matter illegal and of no legal effect and to strike out the offending pleadings.



13. On the other hand, the 2<sup>nd</sup> Respondent, through his advocates Matata & Mwabonje Advocates LLP, filed written submissions dated 6<sup>th</sup> February 2024.
14. Counsel submitted that it is not in dispute that Ngina Mutua is an Advocate of the High Court of Kenya and that the applicant should have waited for her to give her evidence. Further, the pleadings remain valid as they were drawn and filed by a qualified person under Section 9 of the [Advocates Act](#). If counsel was not instructed by the two firms, then the remedy lies with the Advocates Complaints Commission established under Section 53 (1) of the [Advocates Act](#) and the Advocates Disciplinary Tribunal established under Section 57 of the [Advocates Act](#) and not in striking the pleadings. Counsel urged the court to dismiss the application with costs.
15. I have considered the application, the response therein, the oral evidence of the applicant witnesses and the rival submissions by both counsels. The issue that emerges for determination is whether the pleadings/proceedings leading to the obtaining of the grant issued on 5<sup>th</sup> October 2012 are a nullity and of no effect in law.
16. The pleadings in this matter leading to the issuance of the subject grant were purportedly drawn and filed by Madzayo Mrima & Co. Advocates and the summons for confirmation by Odour Okumu & Co. Advocates on behalf of the 1<sup>st</sup> Respondent. The grant was then confirmed on 22<sup>nd</sup> July 2013, and a Certificate of Confirmation of the grant was issued on 31<sup>st</sup> July 2013. The applicant herein then filed the Summons for revocation of the grant on 9<sup>th</sup> March 2023. Subsequently, the firm of Matata & Mwabonje Advocates LLP entered an appearance for the 2<sup>nd</sup> Respondent.
17. When the issue of pleadings/proceedings having been made by firms that were never instructed arose, counsel argued that the matter was filed by one Ngina Mutua an advocate of the High Court of Kenya currently working at the Office of Director of Public Prosecution. The court then issued witness summons to the said firms and counsel to come and shed light on the same. Ms. Mutua hasn't come to court to date.
18. The fact that the counsel who drew those pleadings is a qualified person under the [Advocates Act](#) and that the said law firms are in existence and run by advocates is not in dispute. Is the validity of the pleadings affected by the fact that an advocate used the name of a firm she had no nexus with to file the same? I do not think so.
19. I am guided by the decision of the court in the case of [Sogoy Enterprise versus Jane Wathuo & 6 others; Mohamed Ali & Another \(Interested Parties/Respondents\)](#) [2022] eKLR stated:-

“The fact that Maragia & Co Advocates exists and is run by advocates is not in dispute. It is also not disputed that there are pleadings in the court record filed by the said firm. I am not convinced that the disowning of pleadings by the said advocate qualifies the pleadings as being prepared by a person who is not an advocate and, therefore, in contravention of the [Advocates Act](#). It may call for an inquiry but does not outrightly cause the pleadings to be illegal. In any event, subsequently, the firm of Ochang' & Ajigo took over the conduct of the matter, and Mr. Ochang' appeared in court for the Plaintiff on more than one occasion and is still on record as appearing for the Plaintiff; he is yet to file the application to cease acting.”
20. The Applicant has a remedy against the advocate who drew the impugned documents and is at liberty to pursue her.
21. It is therefore my view, and I find and hold, that the application has no merit and is hereby dismissed.
22. This being a family matter I make no orders as to costs.



23. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 11<sup>TH</sup> DAY OF MARCH 2024**

**GREGORY MUTAI**

**JUDGE**

**In the presence of:-**

Ms Mboya holding brief for Mr Mwabonje for the Respondent;

No appearance for the Applicant; and

Arthur – Court Assistant.

