



Mereka & Company Advocates v Mbugua & 3 others (Miscellaneous Application 44 of 2016) [2024] KEHC 4161 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEHC 4161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 44 OF 2016**

G MUTAI, J

MARCH 11, 2024

**IN THE MATTER OF THE ADVOCATES ACT (CAP 16 OF THE LAWS OF KENYA
IN THE MATTER OF TAXATION OF COSTS BETWEEN THE ADVOCATE AND CLIENT**

BETWEEN

MEREKA & COMPANY ADVOCATES APPLICANT

AND

THOMAS NGUGI MBUGUA 1ST RESPONDENT

SUSAN WANJIKU MBUGUA NGUGI 2ND RESPONDENT

VIVIENNE LINDA MBUGUA 3RD RESPONDENT

NGUGI EMANUEL SAWE 4TH RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 18th October 2022 and a Notice of Preliminary Objection dated 5th June 2023. The application seeks the following orders:-
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. The Honourable Court or the Respondents(Beneficiaries) be pleased to refer the matter to the Advocates Complaints Commission for hearing and determination;
 - e. That the Honourable Court be pleased to issue further or other orders as shall meet the ends of justice;



- f. That the costs of this application be borne by the Client /Respondents.
2. The application is premised on the grounds stated in the body of the application and also on the Supporting Affidavit of Mr David Mukii Mereka, an advocate trading in the firm name and style of Mereka & Company Advocates, the Applicant herein, sworn on 18th October 2022.
 3. In his affidavit, Mr Mereka stated that the beneficiaries' Amended Notice of Motion dated 11th November 2019 was heard on 21st September 2022, and Honourable Justice Onyiego reserved the ruling for 11th November 2022. He further stated that on 16th October 2022, he came across an article in page 6 of the Sunday Nation entitled “Wahome’s political mixed bag and ghosts from the legal practice”, which related to a ruling by Hon. Mr. Justice Muchelule (as he then was) that the advocates in that suit withdrew an amount of Kes.183,000,000/- without authority from the court but were saved from prosecution as the matter ought to have been handled by the Law Society of Kenya in the first instance.
 4. He deposed that he perused section 53 of the *Advocates Act*, which establishes the Advocates Complaints Commission and provides for a dispute resolution mechanism, including appeals. He averred that having gone directly to the High Court by way of an application for summary judgment, the Beneficiaries/Respondents locked him and his law firm out of the appeal process and thus denied him his constitutional right to fair hearing and due process. In the circumstances, he urged, it is only fair and just that the court downs its tools and allows the application herein so that the lawful process can take place. He further urged that no party will be prejudiced if the application is allowed.
 5. In response thereto, the 4th, 5th and 6th Beneficiaries/Respondents filed Grounds of Opposition dated 10th November 2022. The said Beneficiaries/Respondents deposed that the Advocate/Applicant had never represented them. That being the case, they urged that there does not exist an Advocate/Client relationship between the said parties. Thus the Advocates Complaints Commission did not have the jurisdiction to determine the issues raised by the Beneficiaries/Respondents in their application dated 11th November 2019. They stated that the Advocate/Applicant filed the succession cause herein with regard to the estate of Grace Wanjiku Ngugi (deceased). In the said cause, their interest in the estate was deliberately ignored. That being so, it is, therefore, just and proper that this court resolve the issues regarding monetary accounts relating to the estate. It was urged that this court has jurisdiction to hear and determine this matter and that the Advocate/Applicant is estopped from removing this matter from this Honourable Court so as to have the same resolved by the Advocates Complaints Commission. They further urged that the Advocate/Applicant should not be allowed to forum shop, as doing so would have the effect of bringing the administration of justice into disrepute. They further urge that the instant case was filed in the year 2019, yet the application for the transfer of the same to the said tribunal was filed in October 2022. By dint of his actions, the Applicant is guilty of inordinate delay, which has not been properly explained.
 6. The Advocate/Applicant filed a Further Affidavit sworn on 14th February 2023 by Mr David Mukii Mereka. In the Further Affidavit counsel reiterated the averments he had made in his supporting affidavit and stated that on 21st September 2022, Messrs. Gikandi & Company Advocates stated that they were holding brief for Messrs. Gathaara & Associates, whereas no documents had been filed by the said firm. He deposed that no documents were filed by the beneficiaries in support of the amended Notice of Motion.
 7. He further stated the claim for Kes.7,632,151/- is misguided and an attempt by the Beneficiaries/ Respondents to illegally enrich themselves to the exclusion of all other beneficiaries. He urged that Ground 1 of the Grounds of Opposition is not correct as the cause of action, in this case, relates to



the taxation of costs between advocate and client. Further, the Amended Notice of Motion is brought under the Probate and Administration Rules.

8. Mr Mereka deposed that his firm is not estopped from removing this matter from this Honourable Court. Thus, the issue of forum shopping does not arise. Further, he is not guilty of laches since the matter only came up for a substantive hearing in September 2022. He also averred that he did not file a response to the Amended Notice of Motion dated 11th November 2019 for reasons that he assumed that his Grounds of Opposition dated 22nd August 2022 would be dealt with first.
9. The application was canvassed by way of written submissions. The Advocate/Applicant filed written submissions dated 15th February 2023. Vide the said submissions the Advocate/Applicant identified several issues as coming up for determination. The first issue that he identified was due process. Mr Mereka submitted that the subject matter complained of relates to the disbursement of funds held by his firm on behalf of the Respondents. Thus, this matter should be determined by the Advocates Complaints Commission, whose decision could then be appealed to the Law Society of Kenya and thereafter to the High Court. To support his submission counsel relied on several authorities.
10. Mr Mereka identified representation as the second issue. He submitted that Messrs. Gikandi & Company Advocates claimed they were holding brief for Gathaara & Associates Advocates, whereas the 2nd and 3rd Beneficiaries/Respondents denied instructing the said firm. The said beneficiaries, in their emails of 5th December 2022, stated that they did not receive their share of proceeds, being Kes.15,909,974/- out of Kes. 23,998,525/-, sent to the joint account of Gikandi & Company Advocates and Gathaara & Associates Advocates on 20th June 2012. He urged that with the said information, the said beneficiaries perjured themselves, and thus, the Amended Notice of Motion cannot proceed any further and that the Advocates Complaints Commission should handle this matter in the 1st instance.
11. The said counsel identified the third issue as being that the Amended Notice of Motion is selective. The Applicant submitted that the amount of Kes.7,682,151/- being claimed cannot be due to Gikandi & Company Advocates and Gathaara & Company Associate Advocates, and the beneficiaries are only entitled to a prorated share. Thus the Advocates Complaints Commission and or the Probate and Administration Court has powers to handle this matter.
12. On forum shopping, counsel submitted that he is not forum shopping as he is not seeking to have the matter transferred to a different court of concurrent jurisdiction.
13. The 4th, 5th and 6th Beneficiaries/Respondents, through their advocates Gikandi & Company Advocates, filed written submissions dated 27th March 2023. Counsel submitted that the application herein is a delaying tactic by the Applicant so that he does not account to the beneficiaries in respect of the monies received by them following the sale of some of the estate's assets. The subject matter in this case is the inheritance of the assets left behind by Grace Wanjiku Ngugi (deceased). It was urged that the matter be filed in the Family Court, with the Applicant acting as counsel for some of the beneficiaries of the said estate; thus, this court has jurisdiction to deal with the matter.
14. Counsel submitted that the Advocates Complaints Commission is a specialized tribunal whose core mandate deals with disciplinary matters affecting members of the Law Society of Kenya. However, it was submitted that said Tribunal is not authorised to deal with matters of the nature referred to in this case.
15. In conclusion, counsel urged the court to dismiss the application.



16. The preliminary objection, on the other hand, is based on the following grounds: that this honourable court has no jurisdiction to deal with succession matters in a taxation cause; that the advocate is not a personal representative of the estate as envisaged by section 92 and 95 of the Law of Succession Act; that the application infringed the advocates' rights as enshrined under Article 50 of the constitution of Kenya 2010; that Gathaara & Associates Advocates have no instructions to deal with this matter on behalf of their alleged clients; that Gikandi & Company Advocates did not have instructions to file the amended Notice of Motion from his alleged clients; and, that in the circumstances the Notice of Motion dated 11th November 2019 should be dismissed with costs.
17. The preliminary objection was canvassed by way of written submissions.
18. On the first ground, counsel submitted that this being a miscellaneous suit instituted by the advocate for hearing and determination of an advocate/client fees, upon hearing the taxation of the reference arising from the said taxation, the court became functus officio and therefore has no jurisdiction to hear this matter further.
19. Counsel relied on the case of The Owners Of The Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] EKLK and submitted that his court cannot decide on an amount in a taxation cause; it's only the succession cause in which the court ordered the said amount be deposited that can hear the matter. Therefore, the Amended Notice of Motion dated 11th November 2019, brought under a reference, cannot be sustained.
20. On the second ground, counsel relied on Sections 83(h),92 and 95 of the Law of Succession Act and submitted that an advocate is not a personal representative of the beneficiaries or the estate.
21. On the third ground, counsel submitted that the Applicants' application is premature as it ought to have been filed before the Advocates Complaints Commission, that this court's jurisdiction ought to have been appellate, and that by filing the application in the High Court, the Respondents deprived him of the right to a fair hearing as provided for in Article 50(1) of the constitution of Kenya, 2010.
22. On the fourth and fifth grounds, counsel submitted that it is a prerequisite for an advocate filing any documents in court in a contentious matter to obtain instructions from the client orally or in writing, which is not the case in this case. That is why this matter should be referred to the Advocates Complaints Commission. He also argued that this court should down its tools since the advocates are acting without instructions. He urged the court to dismiss the amended application with costs.
23. Counsel further filed supplementary submissions dated 20th November 2023 vide which he reiterated the position in his submissions of 10th July 2023. He submitted that a preliminary objection can be raised at any stage of proceedings, and thus, the argument that his preliminary objection is an abuse of the court process and ought to be dismissed on the basis that the Notice of Motion dated 11th November 2019 is pending ruling before this court cannot stand. He urged the court to find that the preliminary objection has merit, allow the same and dismiss the amended application dated 11th November 2019 with costs.
24. When the matter came up for highlighting submissions on 4th December 2023, Mr Mereka reiterated his position and submitted that the court has no jurisdiction to deal with this matter and that it should be referred to the Advocates Complaints Commission. He urged the court to dismiss the amended application.
25. Mr Kabebe, on the other hand, submitted that the preliminary objection seeks to prosecute the application dated 11 November 2019, whereas parties have been heard in respect of it and that it is pending a ruling. Therefore, counsel cannot purport to argue that application.



26. Mr. Mereka, in response, conceded that the ruling was arrested on his application dated 18th October 2022, and directions given.
27. I have considered the application, the Grounds of Opposition, the preliminary objection and the rival submissions by both counsels. The issues that emerge for determination are:-
- a. Whether this court has jurisdiction to deal with this matter; and
 - b. whether this matter should be referred to the Advocates Complaints Commission.
28. Before I proceed to determine the two issues, I must state that I have perused the court record. It is evident that parties were heard in respect of the amended application dated 11th November 2019 on 21st September 2022 and the ruling set for 11th November 2022. On the 26th October 2022 when the matter came before court the ruling was arrested based on the applicant's application dated 18th October 2022 which is pending before this court.
29. I have also noted that the preliminary objection is in respect of the said amended application, and it's my view that the same cannot be dealt with in these proceedings as it ought to have been raised during the hearing of the said application and or before the matter was set for hearing. It is my view that to deal with the said preliminary objection while the amended application is pending ruling would be un-procedural, against the interest of justice and not the best use of judicial time.
30. If I were to consider the preliminary objection at this stage, it is my view that apart from ground No.1 on the jurisdiction of the court, the rest do not meet the threshold of a preliminary objection as they do not raise pure points of law and would require this court to making an enquiry regarding disputed facts. I am guided by the cases of The Court of Appeal in *Mukisa Biscuit Manufacturing Ltd v West End Distributors* (1969) EA 696 observed that:-

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“ a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

31. In the case of *Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party)* [2022] eKLR the court stated in part thus:-

“With the greatest of respect, this objection calls upon this Court to inquire of the pleadings to ascertain whether or not the Interested Party was a party or not in the trial Court. Equally the Court will have to inquire into evidence to find out if she has an accrued right capable of protection by the Court.”



32. On to the issues coming for determination. I will deal with the first two issues together as they are intertwined. The Advocate/Applicant seeks in his application to have this matter referred to the Advocates Complaints Commission on the basis that this court has no jurisdiction to deal with this matter.
33. Section 53 of the *Advocates Act* establishes the Advocates Complaint Commission. It provides;
1. There is hereby established a Complaints Commission (in this Part referred to as "the Commission") which shall consist of such commissioner or commissioners as shall be appointed by the President for the purpose of enquiring into complaints against any advocate, firm of advocates, or any member or employees thereof.
 2. If a single commissioner is appointed under subsection (1) he shall be a person who is qualified to be appointed as a Judge of the High Court under Chapter Ten of the *constitution*, and if more than one commissioner is appointed then one commissioner shall be so qualified.
 3. The Commission may require any person, whom it considers necessary for the purpose of carrying out its duties under this section, to assist it in so doing.
(3A) Any person who, without lawful excuse, fails or refuses to assist the Commission when required to do so under subsection (3) shall be guilty of an offence.
 4. It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof; and—
 - a. if it appears to the Commission that there is no substance in the complaint it shall reject the same forthwith; or
 - b. if it appears to the Commission whether before or after investigation that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under Part XI; or
 - c. if it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence it shall forthwith notify the person or firm against whom the complaint has been made of the particulars of the complaint and call upon such person or firm to answer the complaint within such reasonable period as shall be specified by the Commission in such notification; or
 - d. upon the expiration of the period specified under paragraph (c), the Commission shall proceed to investigate the matter for which purpose it shall have power to summon witnesses, to require the production of such documents as it may deem necessary, to examine witnesses on oath and generally take all such steps as it may consider proper and necessary for the purpose of its inquiry and shall, after hearing any submissions made to it by or on behalf of the complainant and the person or firm against whom the complaint has been made, make such an order or award in accordance with this section as it shall in the circumstances of the case consider just and proper; or
 - e. if it appears to the Commission that there is substance in a complaint but that the circumstances of the case do not disclose a disciplinary offence with which the Disciplinary Committee can properly deal and that the Commission itself should not deal with the matter but that the proper remedy for the complainant is to refer the



matter to the courts for appropriate redress the Commission shall forthwith so advise the complainant.

5. In all cases which do not appear to the Commission to be of serious or aggravated nature, the Commission shall endeavour to promote reconciliation and encourage and facilitate an amicable settlement between the parties to the complaint.
 6. If the Commission considers that the complainant has suffered loss or damage by reason of the advocate's conduct, the Commission may, by order, award such complainant compensation or reimbursement not exceeding one hundred thousand shillings.
 - (6A) An order made under subsection (6) shall be registered with the Court and shall thereupon be enforceable in the same manner as an order of the Court to the like effect.
 - (6B) Where the matter before the Commission relates to surrender of funds or property by an advocate to a client, the Commission may order the surrender of all refunds or property which the advocate does not dispute:

Provided that this subsection shall not apply where the complainant has filed a civil suit against the advocate in respect of the same funds or property.
 - (6C) An advocate against whom an order is made under this section and who has not appealed against such order under section 62 may apply to the Disciplinary Committee for a review of the Order.
 - (6D) The Commission may, in hearing a complaint against an advocate, order such advocate to produce to the Commission a detailed fee note for purposes of taxation of the bill of costs:

Provided that where the advocate fails to produce such fee note within 14 days from the date of such order, the Commission may assess the advocate's fee in such sum as it deems fit.
 - (6E) The Commission may investigate the accounts of an advocate against whom a complaint has been made and for that purpose may order such advocate to produce all relevant books and documents to the Commission or to an accountant engaged before the Commission in that behalf.
 7. The Commission may issue a warrant for the levy of the amount of any sum ordered to be paid by virtue of this section on the immovable and movable property of the person or firm by whom the compensation is ordered to be paid by distress and sale under warrant, and such warrant shall be enforced as if it was a warrant issued by the Court.
 8. Any party aggrieved by a decision or order of the Commission under this section may appeal to the High Court and the determination of any such appeal shall be final.
 9. The Commission shall publish a quarterly report as to the complaints dealt with by it in that quarter and the report shall be made in such manner and be in such form as shall be prescribed by rules made under subsection (3) of section 54.
34. The jurisdiction of the High Court is provided for under Article 165(3), (4), (5) and (6) of the [constitution](#) which provides:-
- (3) Subject to clause (5), the High Court shall have—



- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - c. any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters—
- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
35. In dealing with the issue of jurisdiction Nyarangi, JA in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR stated,

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



36. Further, the Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated,

“A Court’s jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

37. The basis of the application herein is the Notice of Motion application dated 11th November 2019, which seeks the release of money held by counsel/applicant through his firm (Mereka & Company Advocates). I have considered the provisions of Section 53 of the *Advocates Act*. Having done so, it is my view that the same is not a complaint, nor does it amount to a complaint against the advocate as implied by the Applicant herein.

38. That being the case I find and hold that this court has jurisdiction to deal with this matter.

39. The upshot of the foregoing is that it is my finding that both the application dated 18th October 2022 and the preliminary objection dated 5th June 2023 lack merit and are hereby dismissed.

40. This matter arises out of succession proceedings. Parties shall bear own costs.

41. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF MARCH 2024

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Mereka for the Advocates/Applicant;

Mr Kinyanjui for the 4th, 5th and 6th Beneficiaries/Respondents; and

Arthur – Court Assistant.

