



**Kihoro & another v Muguku & another; Mbari Ya Kireru Self Help Group
(Through Officials Miichael KANYARI – Chairman Charles Thiongo
– Secretary Nancy Wangeshi – Treasurer) (Interested Party) (Succession
Cause 870 of 2012) [2024] KEHC 3694 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 870 OF 2012**

SM MOHOCHI, J

APRIL 18, 2024

BETWEEN

MWANGI KIHORO 1ST APPLICANT

HELLEN MUTHONI KIRERU 2ND APPLICANT

AND

MARY WANJIRU MUGUKU 1ST RESPONDENT

SIMON MAINA MUGUKU 2ND RESPONDENT

AND

**MBARI YA KIRERU SELF HELP GROUP (THROUGH OFFICIALS MIICHAEL
KANYARI – CHAIRMAN CHARLES THIONGO – SECRETARY NANCY
WANGESHI – TREASURER) INTERESTED PARTY**

RULING

1. Before Court for determination is the Application dated 16th March, 2023 filed by the firm of M/s Frank Mwangi, advocates for the 1st and 2nd Applicants, brought under Order 34, Rule 3 and Order 25, Rule 4 of the *Civil Procedure Rules* seeking the following;
 - i. Spent
 - ii. That pending the hearing and determination of this Application inter-partes this Honourable Court be pleased to issue a temporary stay of its ruling delivered on the 16th of February, 2023 pending taxation of Misc. No. HCF 17 of 2023.



- iii. That the Honourable Court be pleased to stay this suit and all proceedings in this matter pending taxation of the advocate client bill of costs in Misc. App. No. 17 of 2023 which is pending in the High Court Deputy Registrar.
- iv. That costs of this application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Francis Mwangi Njuguna, an advocate who deponed that the 1st and 2nd Applicants instructed him to institute the suit on their behalf but have since failed to settle legal costs despite demands issued. That he filed an advocate client bill of costs in Misc. App. No. HCF 17 of 2023 that is pending taxation.
3. That the Court on 16th February, 2023 ordered the amounts held in a joint account by the advocates be transferred to the Interested Party. He stated that if the funds are transferred, he will suffer since the Applicants have no other retrievable asset that can be attached to cover his costs. That it would be in the interest of justice to grant the prayers sought.
4. The Interested Party opposed the Application vide Replying Affidavit sworn by Micheal Kanyari on 30th March, 2023. He deponed that the Application has no basis in law since the amount ordered for release belongs to the Interested Party and there exists no advocate client relationship between the group and the Applicant. That the bill of costs dated 1st March 2023 is between Mwangi Kihoro and Helina Muthoni Kireru in their individual capacities.
5. He stated that the funds cannot be held as lien and the Application is misconceived. Further that the Applicant has been withdrawing money from account No. 0180XXXX at Family Bank without the knowledge of the Interested Party. That the Application is a delay tactic and diversion.

Applicant's Submissions

6. The Applicant through submissions filed on 10th July, 2023 submitted that Applicants are members of self-help group with no other retrievable assets that can be attached to recover the legal fees. That the advocate is protecting his interests by charging the amount held in the bank account. That he stands to suffer irreparable loss should the orders sought not issue. He relied in the case of *Ann Njeri Mwangi V Njomaiha Investments Ltd* (2014) eKLR.

Interested Party's Submissions

7. It was submitted vide submissions dated and filed on the 19th of October, 2023 that the Application has been brought to forestall implementation of the Court orders issued to the 3 firms and that the implementation period has since lapsed. That there are huge sums of money missing and the Applicant wants to conceal the truth.
8. It was also submitted that there has been no demonstration that the 1st and 2nd Applicants in their personal capacity have interests in the funds held in the joint account as to entitle the Applicant advocate to the funds. That in the application the Applicant is asking Court to determine that their clients have interest in the funds a matter that was never before this Court which is akin to asking Court to determine a case within another case without pleadings.

Submissions by the 1st and 2nd Applicants and Submissions by the 1st and 2nd Respondents

9. The Parties in their respective submissions both dated, signed and filed on 24th October, 2023 submitted on similar issues in verbatim that, they disagreed in totality with the mediation agreement dated 12th September, 2022. That since then, from the 6 members that were appointed in the settlement



agreement, nothing has been done and the management of the group is done by Micheal Kanyari and Charles Thiongo and they together with a third member purported to be a treasurer illegally operate the account.

10. That they have all agreed (the 1st and 2nd Applicants and the 1st and 2nd Respondents) to withdraw from the Settlement Agreement and have agreed that the money in the custody of the advocates be set aside as payment of the advocates fees and payment in the ongoing case.
11. That they (the 1st and 2nd Applicants and the 1st and 2nd Respondents) have disagreed with the submissions by the purported officials dated 19th October, 2023 on the grounds that, firstly the last time members were given dividends was more than 20 years ago, secondly, the money deposited belongs to a few members and not the whole group and finally that the said officials continue to occupy the office illegally for there has been no genuine annual general meeting done for the last 20 years.

Analysis and Determination

12. The Court has considered the Application the Affidavits and the parties' respective submissions.
13. The Applicant was instructed by the 1st and 2nd Applicants to represent them until the Advocates filed an application seeking to cease acting dated 9th November, 2023. In a similar turn of events the advocates to the 2nd and 3rd Respondents filed an application to cease action dated 18th January, 2023. Both Applications were triggered letters dated 14th November, 2022 and 15th November, 2022 where the parties sought to bar third party interferences including that of advocates. Vide a Ruling of this Court dated 16th February, 2023 both Applications were allowed on the condition that the money held by the 3 firms of advocates be released to the Interested Parties.
14. The Applicant advocate, moved Court through the instant Application and sought stay of the said Ruling and stay of proceedings pending the taxing of the advocate client bill of costs dated 1st March, 2023 to stay the release of the funds as the Applicant advocate contends that his then clients have failed to pay his legal fees and without any form retrievable assets, he seeks to be paid by the interests of the 1st and 2nd Applicants in the funds.
15. The Interested Party has vehemently objected to such citing the said parties have no interest in the funds and the funds belong to the group an unavailable to the advocate as he was contracted on a personal capacity. They have also accused the advocate of withdrawing funds from the Family Bank account. Interestingly the 1st and 2nd Applicants together with the 1st and 2nd Respondents have stated that they have interests in the funds and have not received dividends for the last 20 years. As such, they have agreed to their interests in the funds being used to pay legal fees in Misc No. HCF 17 of 2023 and the ongoing case.
16. In the Case of *Re Global Tours & Travel Limited (Nairobi) H.C.* Winding up Cause No. 43 of 2000 quoted with approval in Meru Civil Appeal 40 of 2018 [*Kenya Wildlife Service -versus- Mutembei*](#) (2019) eKLR that: -

“The Court stated; As I understand the law whether or not I grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of Judicial Discretion to be exercised in the interest of justice. The sole question is whether it is in the interest to order a stay of proceedings, and if it is on what terms it should be granted.

In deciding whether to order a stay, a Court should essentially weigh the pros and cons of granting or not granting the order, and in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the



intended appeal in the sense of not whether it will probably succeed or not or whether it is an arguable one. The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.... “...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent...”

17. Therefore, the test from the above authorities is one that sets out the following parameters for a Courts exercise in discretion, in deciding whether or not to grant a stay of proceedings as sought in this application: -
 - a. Whether the Applicant has established that he/she has a prima facie arguable case; and
 - b. Whether the Applicant has established sufficient cause to the satisfaction of the Court, that it is in the interest of justice to grant the orders sought.
18. On the 20th April 2017 Justice A.K. Ndungu while admitting the interested party into the proceedings directed that a mutually agreed agent be appointed to collect by the parties including the interested parties to manage and collect rent from title Nakuru Municipality LR/No 12250/297, 12250/116 and 12250/63.
19. The said rent was to be deposited in a joint account to be opened by the three (3) law firms on record in a reputed commercial bank.
20. When the advocates filed three simultaneous Applications seeking leave to cease from acting for their respective clients none of them disclosed the fact that they controlled a bank account No. 0180XXXX held at the Family Bank Nakuru, by virtue of their appointment herein.
21. When the firm M/s Frank Mwangi & Company Advocates sought leave to cease from acting for its clients for want of instructions and it is necessary and in the cause of justice it never indicated there existed and advocate client fee dispute in fact in the Affidavit of Francis Mwangi njuguna Advocate dated 9th November 2022.
22. He deponed that they did received instruction from the applicants and we filed their notice of appointment on 19th October 2015 and have actively prosecuted this suit but despite various requests being made to the applicants, they have failed and/or neglected to furnish proper and further instructions and it is impossible for the firm of M/s Frank Mwangi & Company Advocates to proceed with this matter in the absence of further instructions and therefore only necessary they be granted leave to cease acting for the Applicants. That the application has been made in good faith and he believed that no party will be prejudiced in any way by reason of the present application being granted.
23. This Court further observes from the Application exhibit FMN2 it is apparent that the Taxation initiative with the filing of Misc. No HCF 17 of 2023 was in response to the Ruling of the Court dated 17th February 2023. I do find the arguments of lien on a trust account to be an after thought
24. The failure by the three law firms to account to the Court, even if they do contend they have a lien on the bank account No 0180XXXX held at the Family Bank Nakuru, affirms the position by the interested parties that funds therein, have been misappropriated. The failure to account of trust account by advocates is unacceptable in emotional and long drawn succession cause such as this.
25. The Applicants’ submissions surrendering any trust funds account in payment of legal fees is unlawful to the extent that those funds either belong to the estate of the deceased or to the interested party and



in both scenarios the Applicants would not have the sweeping legal authority to do this unless they involve all beneficiaries in the succession.

26. The Applicants attempt to summersault away from the mediation agreement is misplaced in this instant motion and has no bearing to the same.
27. Regardless of which orders were feasible, due regard must be given to time, in order to avoid delaying this matter any further. In the case of *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 others* (2009) eKLR, the Court of Appeal stated that:

“Judicial time is the only resource the Courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”
28. Court must consider the overriding objective, and balance the interests of the parties to the suit, since the Court is enjoined to always place the parties on equal footing. Since the overriding objective aims, inter alia, to facilitate the just, expeditious, proportionate, and affordable resolution of the disputes, the balancing of the parties’ interest is paramount in an application for stay of proceedings pending taxation. The succession cause is now twelve years old since filing and proudly constitutes a case backlog that this Court and the judiciary shall prioritize.
29. It is my finding that the stay orders sought are not merited. Thus, the prayer for the stay of proceedings is rejected the Succession Cause shall proceed to conclusion even if there is an ongoing taxation.
30. The Notice of Motion Application dated 16th March 2023 is dismissed.
31. All parties are accordingly directed to comply with the Courts directives dated 16th February, 2023 and account for All funds held in bank account No 018000075169 held at the Family Bank Nakuru. Within the next 14 days from the date hereof
32. The costs shall be in the cause.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU THIS 18TH DAY OF APRIL, 2024.

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MOHOCHI S.M
(JUDGE)

