



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi & 3 others v Omunga & 2 others (Civil Appeal 33 of 2019)  
[2024] KEHC 8971 (KLR) (Appeals) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8971 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPEALS**

**CIVIL APPEAL 33 OF 2019**

**AM MUTETI, J**

**JULY 23, 2024**

**BETWEEN**

**BENSON IRUNGU MWANGI ..... 1<sup>ST</sup> APPELLANT  
ABRAHAM MWANGI ..... 2<sup>ND</sup> APPELLANT  
EUNICE NYAMBURA ..... 3<sup>RD</sup> APPELLANT  
BECH COMPANY LTD ..... 4<sup>TH</sup> APPELLANT**

**AND**

**VINCENT ODUOR OMUNGA ..... 1<sup>ST</sup> RESPONDENT  
EMERENZIANA MUNYIVA MAKAU ODUOR ..... 2<sup>ND</sup> RESPONDENT  
JUDITH ABRAHAMS GUSERWA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Ruling of the learned Hon. E Nyaloti C.M delivered on the 14th December 2018 dismissing the Appellants Notice of Motion dated 23rd July 2018))*

**JUDGMENT**

1. The appeal arises out of a Ruling delivered by the learned Honourable E. A Nyaloti Chief Magistrate dismissing the Appellants Notice of Motion dated 23<sup>rd</sup> July 2018. The application in question was brought under order 7, 8 rule 3(1), 57 and order 51 of the [Civil Procedure Rules 2010](#) Section 3 (a) of the [Civil Procedure Act](#) and all other enabling provisions of the Law. Counsel for the parties agreed to have the matter disposed off by way of written submissions.
2. The record has a set of submissions filed by the Appellants that are undated but that clearly deal with the Ruling delivered by the learned Hon. E. A Nyaloti CM on the 14<sup>th</sup> December 2018. However, the



said submissions at the very top make reference to an appeal against the Ruling made on 27<sup>th</sup> July 2021. There being no other set of submissions by the Appellants I shall treat these as the submissions MR. Wanyama advocate who appeared before me holding brief for Mr. Kangethe was referring to.

3. The 3<sup>rd</sup> respondent on other hand has filed submissions dated 13<sup>th</sup> May 2024 addressing themselves to the Ruling of 14<sup>th</sup> December 2018 by H M Nyaloti CM.
4. The appellant in his memorandum of Appeal faults the learned Honourable Magistrate for holding that  
“the appellants did not merit to be sufficiently presented by a competent advocate of their choice during trial because the advocate on record did not have a duly practicing certificate a fact that came into the appellants’ knowledge after the matter had proceeded without representation”.

That is what the appellants have captured in the second paragraph of their submissions. The accusation against the learned Honourable magistrate is grave for it basically impeaches the ruling by the Hon. Chief Magistrate on account denial of fair trial rights in the proceedings. The right to be represented by counsel of one’s choice is a constitutional right and is one of those rights that cannot be derogated from it. However, that Right to representation by counsel of one’s choice is not to be exercised without considering the duty of the party asserting the right to ensure that when he chooses counsel to represent him or her it is incumbent upon him to ensure that the counsel so appointed, meets the qualifications set out under the *Advocates Act* Cap. 16 of the Laws of Kenya.

5. The duty to do due diligence on the part of the party appointing counsel is one a party cannot run away from.
6. This court has examined the Ruling in question to determine whether indeed it is true the magistrate denied the Appellants the opportunity to be represented by counsel of their own choice. The Ruling at paragraph 15 reads:-

“On the issue of the plaint having been filed by an unqualified person, I am satisfied that Onyancha Nyakundi held a valid practicing certificate as per the confirmation from the Law Society of Kenya. I am satisfied that the Advocate was qualified person within the meaning of Section 9 of the *Advocates Act*”

7. The learned Hon. Magistrate did not stop there but went further to state that Section 9 of the *Advocates Act* is clear and refers to an individual Advocate. The trial magistrate noted that the defendant at the hearing was represented by an Advocate who was qualified within the meaning of Section 9 of the *Advocates Act*. Mr Nyakundi Robert Mongare was found to have held a valid practising certificate when the case was filed.
8. It is the view of this court that, once the learned Honourable Magistrate was satisfied that the counsel who appeared for the party had a valid practising certificate, then the court could not rule otherwise. The fact of one holding a valid practicing certificate is purely a matter of fact and the Law Society of Kenya being the body charged with regulating the legal profession in Kenya is well equipped to tell who is an Advocate within the meaning of the *Act* and who is or is not qualified to practice Law in Kenya.
9. The court acting an information from the Law Society of Kenya in my view did not err as alleged by the appellant or in any event condemn the appellants to be represented by an unqualified person. The position taken by the court is supported by counsel for the Respondents in their submissions. I find no reason to interfere within the finding of the learned Honourable Magistrate in that regard.



10. The record shows that on the 13<sup>th</sup> June 2017 when the matter came up in court Mr. Nyakundi Advocate for defendants sought an adjournment and when the court ordered him to pay air ticket for the witnesses who had travelled from Nigeria counsel quickly changed his mind and proceeded with the hearing. He fully participated and cross examined PW 1 (the 2<sup>nd</sup> Respondent) at length. The appellants cannot therefore be heard to argue that they were denied an opportunity to present their case. The appellants to succeed in this appeal ought to have shown that the representation that they got at the time of the hearing in the trial court was not procured by them of their own free will and through exercise of due diligence on their part they could not established the status of Mr. Nyakundi Advocate. No doubt Mr. Nyakundi was in any event qualified to practice law as per the records of the LSK.
11. It is this court's finding that the learned Honourable Magistrate did not in anyway impose counsel upon the Appellants. The appellants have similarly not demonstrated before this court that they never instructed Mr. Nyakundi Advocate thus this court finds and holds that Mr. Nyakundi was the Appellants counsel of choice thus their right to representation was not limited by the magistrate.
12. The second limp of submission by the appellants is that their counsel withdrew from proceedings without notice to them thus they were not given time to instruct another counsel. This court has keenly perused the record and noted that at page 147 of the record Mr. Maina Mbugua Advocate participated in the examination in chief of PW 3 Ms Judith Geserwa an Advocate of this court. When counsel was called upon to cross examine the witnesses he indicated to the court that the was withdrawing from the proceedings.
13. The court was magnanimous enough to give time to the defendants to consult. The record shows that the defendants chose not to cross examine.
14. After Mr. Mbugua Advocate indicated that he was withdrawing from acting for the defendant there is no indication that the defendants sought an adjournment to instruct counsel. The matter proceeded further with one James Joseph Mungura Mbuga testifying. The witness is indicated to have been cross examined by Mwangi whom I suppose was 2<sup>nd</sup> defendant (Respondent).
15. The plaintiffs closed their case and defence hearing was then fixed for Hearing. on 22<sup>nd</sup> May 2018. The application giving rise to this appeal 16. was filed immediately thereafter.
16. This court has looked closely into the history of this matter and is clear that the appellants are simply out to scuttle any further progress in this matter. The court entirely agrees with the learned Honourable magistrate that this application was brought solely to delay the conclusion of this matter. Infact the appellants have succeeded partly in their scheme since 2018.
17. The court is minded to hold that this application was brought as an afterthought by the appellants when they realised that since the plaintiffs had closed their case it was their turn to tender their defence. It is this realization that triggered the application by the appellants to delay the matter before the trial court by seeking to recall witnesses and instruct new counsel.
18. The appeal is a classic case of a means by which the appellants are using the legal system in a way that does not serve the underlying legal action. It is an abuse of process. The fact that even after counsel's withdrawal the Appellants proceeded with the last witness is a clear indication that they had faith in the process but they hatched a scheme to delay the day of judgment.
19. In *Peter Ngingi Kigira vs. Fredrick Ng'ang'a Kigira* [2022] eKLR the court held that the right to be heard does not mean a party will be heard on his own terms. If the court were too allow such to happen then this courts would become captive of innovative litigants who would invent all manner of



applications to delay their date with fate. Courts must remain vigilant and stop such litigants at the earliest opportunity.

20. In *Satay Bhama Gandhi vs Director of Public Prosecutions & 3 Others* [2018] eKLR in addressing the question of abuse of process the court held:

“The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly honestly to the detriment of the other party”.

21. In the instant case it is my considered view that the application by the appellants before the trial magistrate and by extension this appeal amounts to a dishonest invocation of the powers of a court to re-open a matter not on account of any manifest injustice suffered or likely to be suffered but purely to delay the determination of a matter at an advanced stage.

In the end this court is not satisfied that there is any merit in this appeal and I accordingly dismiss the same with costs to the 3<sup>rd</sup> Respondent.

The lower court file is to be remitted to the lower court for final hearing and determination. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY, 2024.**

**A.M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Wanyama for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> for the Appellants

Mugo holding brief for Mrs Wambugu Advocate for the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Respondents

