



In re Estate of John Kyuvi Mutiso (Deceased) (Succession Appeal E007 of 2022) [2023] KEHC 20210 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
SUCCESSION APPEAL E007 OF 2022**

TM MATHEKA, J

JULY 13, 2023

IN THE MATTER OF THE ESTATE OF JOHN KYUVI MUTISO (DECEASED)

BETWEEN

BARNABUS MASUNGA KYUVI 1ST PETITIONER

SAMMY KITHUKA KYUVI 2ND PETITIONER

AND

GEOFFREY MUTISYA 1ST PROTESTOR

ROSE MBITHE MUTINDA 2ND PROTESTOR

RULING

1. I gather from the ruling dated 15/12/2022, that the issue in Makueni CM. Succession Cause No. E017/2022 In the Matter of the Estate of John Kyuvi Mutiso (deceased), was, who, between the children of the deceased, and the protestor who claimed to have bought the said parcel of land from the deceased, was entitled to inherit the entire estate comprising of land parcel Nzau/ (Mumbuni/424.
2. The learned trial magistrate heard the protest and determined it to the effect that the grant issued to the petitioner be confirmed and the entire estate of the deceased be distributed to the protestor and be registered in his sole name.
3. Those orders provoked this application dated 22/12/2022 in which the applicants (petitioners) seek a temporary order of injunction against the respondents from transferring, selling, alienating, subdividing, entering, cutting or clearing any vegetation and/or carrying out any further developments on plot Nzau/ mumbuni/424 pending the hearing of the appeal; and stay of execution of the judgment and decree issued in this Succession Cause E017 of 2020 pending the hearing of the appeal.
4. Together with the application the applicants filed a memorandum of Appeal.



5. The application is brought under Order 42(6), Order 51 Rule 1,2,3 and 6 of the *Civil Procedure Rules*, sections 1A, 3A of the [Civil Procedure Act](#), and the Probate & Administration Rules.
6. It is supported by joint the affidavit of Barnabas Masunga Kyuvi and Sammy Kithuka Kyuvi. The main ground is that the respondents did not establish that they were the sole beneficiaries of the estate of the Deceased; and that the court left out the other beneficiaries of the estate.
7. On 19/01/2023 the respondents filed a Preliminary Objection to the application on the basis that the application had been filed by an advocate who was not properly on record and grounds of opposition to the effect that the intended appeal did not raise any triable issues; that the applicants had not complied with the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
8. Parties filed written submissions through their respective counsels. P. Wasolo & Co. Advocates for petitioners/applicants and O.N Makau & Mulei Advocates for the respondents.
9. I have carefully considered the submissions, the grounds of opposition and affidavits on record. To determine the Preliminary Objection, it is important to examine the issue whether the advocates who filed the application are properly on record – and the impact of that finding on the application.
10. It is submitted that a Preliminary Objection is as defined in *Mukhisa Biscuits Manufacturing Company Ltd –vs- West Biscuits Distributors (1969)*, [Oraro –vs- Mbaja](#) (2005) IKLR 141 summarized it thus;

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”
11. Further, in [Sohanlal Durgadass Rajput & Anor –vs- Divisional Integrated Development Programmers Co. Ltd](#) ELC No. 50 (MKS) [2021] eKLR a Preliminary Objection must be premised on undisputed facts and raise a pure point of law. That was the same holding in [Hannah Wanjiru Mburu –vs Simon Nyutu Mararo and 3 Others](#) ELC 65/2020 (Thika) [2021] eKLR.
12. It is further submitted for the respondent that Order 9 Rule 9 of the Civil Procedure Rules provides for change of the advocate on record thus;

Change to be effected by order of court or consent of parties.

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 by 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.
13. Counsel for the respondent cited a line of authorities demonstrating that courts have frowned upon the situation when a party to a suit will after judgment either opt to act in person or instruct new counsel – with the intent of avoiding paying counsel’s fees or denying counsel the costs; courts have also indicated that proceedings, filed by an advocate who is not properly on record are incompetent and go to the jurisdiction of the court. These include; *Serah Wanjiru Kung’i v Peter Munyua Kimani* [2021] eKLR, *John Michuki Gitau v Mary Njeri Githinji* ELCA no E006 of 2022 where the court cited other cases e.g. *Jackline Wakesho v Aroma Café* [2014] eKLR



14. In response it is submitted for the applicant that the Preliminary Objection was filed on 19/01/2023, yet the counsel on record and the previous advocate on record had filed a consent on 18/01/2023 allowing the current advocate to come on record. Citing *IEBC -vs- Jane Cheperenger & 2 Others* [2015] eKLR, counsel argued that the Preliminary Objection was unnecessary because the true Preliminary Objection ‘serves two purposes of merit ... as a shield for the origination of the objection against profligate deployment of time and other resources the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. The Supreme Court went on to state that ‘it is distinctly improper for a party to resort to the Preliminary Objection as a sword for running a case otherwise destined to be resolved judicially, and on merit.’”
15. Counsel submits that the purpose of Order 9 rule 9 of the Civil Procedure Rules – is to protect advocates from mischievous clients who may want to change advocates for ulterior motives – this court is urged to adopt the consent filed on 18/01/2023 as an order of the court and allow the firm of P. Wasolo Advocates to come on record on behalf of the applicant and to allow the order of temporary injunction sought in the application with respect to Nzau/Mumbuni/424 pending the hearing of the appeal in that the respondent has not demonstrated what prejudice they will suffer if the consent is adopted.
16. I have considered the record before me and it is not in doubt that P. Wasolo & Co. Advocates filed this appeal yet it is the firm of Mwangangi & Associates who handled the matter in the subordinate court. No notice of appearance/change of appearance of advocates was filed together with the appeal.
17. I have carefully considered all the authorities used by both parties and what speaks to the issues in this case is the Court of Appeal in *Tobias M. Wafubwa -vs- Ben Butali* [2017] eKLR. The court pointed out that the application of Rule 9 is an issue that has

“...incessantly recurred and vexed the courts and in determining the issue of whether or not compliance is mandatory the courts have reached varied conclusions dependent on the circumstances and facts. Needless to say that, in each case, the purpose of these rules, their application and the mischief that sought to be addressed requires to be taken into account”.
18. The Court of Appeal agreed with Sitati J. in *Stanley Mugambi -vs- Anthony Mugambi* [2005] eKLR - that the purpose of Rule 9A (the precursor to Rule 9) was to prevent parties from throwing out their advocates after judgment with the aim of denying them the fruits of their costs. The Judge proceeded to dismiss the application. The Court of Appeal also acknowledged similar holdings by Emukule J. in *Kenya Pipeline Co. Ltd -vs- Lucy Njoki Nakuru* (2014) eKLR and Makhandia J. (as he then was), in *Martin Mutisya Kii & Anor -vs- Benson Mwenda Kasyali*, Machakos High Court Misc. Appl. 107/2013.
19. Clearly therefore the position is that the action by P. Wasolo & Advocates is not fatal to the case for the appellant/applicant. This is an appeal. The authorities cited acknowledge that an appeal is a different ball game because the matter in the subordinate court was finalized. In addition, in this case there is no contestation between the former advocate and the advocate on record.
20. In the circumstances of this case, the Preliminary Objection is untenable.
21. So, are the prayers for a temporary injunction warranted?
22. The matter before the subordinate court was the distribution of the estate of John Kyuvi Mutiso (deceased). I have considered the decision of the subordinate court, In my view the appeal raises triable issues – for instance whether the learned trial magistrate in making the final orders satisfied herself as to the requirements of section 71 of the *Law of Succession Act*.



23. This I point out in the interest of justice.
24. In the circumstances:
 - a. The Preliminary Objection is not sustainable and is dismissed.
 - b. There be a stay of execution of the certificate of confirmation of grant made on 15/12/2022 in Succession Cause E017/2022 pending the hearing and determination of the appeal.
 - c. The Record of Appeal be filed and served within 60 days hereof. In default the stay will lapse
 - d. No orders as to costs.
 - e. Mention before the Deputy Registrar for compliance.

DATED, SIGNED AND DELIVERED THIS 13TH JULY 2023

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MUMBUA T MATHEKA

JUDGE

Court Assistant: Munyao

Wasolo & company Advocates: for the applicants: Wasolo

O.N Makau & Mulei Advocates; or the respondents : Kithuka

