



REPUBLIC OF KENYA



Mwangi & another v James Ngugi t/a Ngugi & Company Advocates (Civil Case E006 of 2023) [2024] KEHC 14792 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL CASE E006 OF 2023
CW GITHUA, J
NOVEMBER 21, 2024**

BETWEEN

ANASTACIA WANJIRU MWANGI 1ST APPLICANT

GLADYS WAIRIMU 2ND APPLICANT

AND

JAMES NGUGI T/A NGUGI & COMPANY ADVOCATES RESPONDENT

JUDGMENT

1. By an Originating Summons dated 5th June 2023, the applicants Anastacia Wanjiku Mwangi and Gladys Wairimu instituted suit against the respondent, James Ngugi who is an Advocate of the High Court of Kenya trading as Ngugi and Company Advocates seeking that the respondent be compelled to release Kshs. 2,142,207 to them which was the decretal amount awarded in Murang'a Civil Appeal No. 34 of 2021.
2. The applicants alleged that the respondent had been paid the money aforesaid on 5th January 2022 on their behalf in his capacity as their advocate and has retained it since then despite several demands to release it to them. The applicants thus prayed that the amount be paid with interest at court rates from 5th January 2022 to date and that costs of the suit be provided for.
3. In the grounds premising the summons and in their supporting affidavit, the applicants contended that as the legal representatives of the Estate of the late Elijah Macharia Ng'ang'a, they instructed the respondent to represent them in Murang'a Civil Appeal No. 34 of 2021, an appeal filed against them by one Daniel Thuo Nguri ; that the appeal was settled by consent in which the appellant's insurers, Fidelity Shield Insurance Company Ltd agreed to pay the applicants damages in the sum of Kshs. 2,142,207. The money was subsequently paid to the respondent on 5th January 2022 for onward transmission to them.



4. It is the applicants case that despite several demands, the respondent had refused to remit the said monies to them; that frustrated by his conduct, they opted to withdraw their instructions from him and instructed the current advocates, Gatoto & Associates Advocates to pursue payment of the money on their behalf.
5. The applicants further averred that the respondent's claim that he was holding the money on behalf of the deceased's beneficiaries had no basis since they were the deceased's only beneficiaries together with the deceased's daughter who was a minor and they had not given the respondent instructions to hold the money as claimed.
6. The respondent contested the summons through a replying affidavit sworn on 16th March 2024 and a Notice of Preliminary Objection dated 29th June 2023. In the Preliminary Objection, the respondent sought dismissal of the applicants Originating Summons (O.S) on grounds that in seeking release of the decretal amount, the applicants were seeking to distribute part of the Estate of the late Elijah Macharia Nganga without a confirmed grant of Letters of Administration; that he had already moved the lower Court at Kandara for orders on distribution and was waiting the outcome of that application.
7. In his replying affidavit, the respondent deposed that the applicants were holders of a limited grant of Letters of Administration whose issuance was limited to the filing of a suit for damages on behalf of the deceased's Estate which suit was filed being SRMC No.183 of 2019; that he had on several occasions advised the applicants to obtain grant of letters of administration and have the decretal sums distributed to the deceased's beneficiaries but instead of following his advice, the applicants have demanded on several occasions release of the entire decretal amount without taking into account fees and costs due to him as their advocate; that he remains a trustee of the decretal amount pending orders on distribution.
8. On 7th March 2024, I gave directions for disposal of the suit and directed that the Preliminary Objection be heard as part of the respondent's opposition to the summons; that the summons would be prosecuted by way of written submissions and parties were given time lines within which to file their respective written submissions.
9. The applicants filed their written submissions dated 2nd April 2024 as directed by the court but the respondent failed to file his submissions despite being given ample time to do so. Instead, he remitted Kshs. 1,100,000 to the applicant's current advocates on 27th April 2024. Mr. Gatoto, learned Counsel for the applicants acknowledged receipt of the said amount on 30th September 2024 when the matter was slated for mention for further directions.
10. I have considered the summons and the affidavits sworn in support and in opposition thereto together with their annexures. I have also considered the preliminary objection filed by the respondent as well as the written submissions filed on behalf of the applicants. Having done so, I find that it is not disputed that the applicants and the respondent enjoyed an Advocate - Client relationship and that in his capacity as the applicant's advocates, the respondent received a total sum of Ksh.2,142,207 on their behalf. It is also not disputed that the money was the decretal amount which was payable to the applicants after HCCA No. 34 of 2021 was settled in their favour by consent of the parties.
11. It is also not contested that the amount claimed was remitted to the respondent on 5th January 2022 for onward transmission to the applicants but by the time the summons was filed, the respondent had failed and or refused to release the monies to the applicants.
12. Having set out the above undisputed facts, let me now deal with the preliminary objection filed by the respondent dated 24th June 2023. I have already stated what was pleaded in the preliminary objection



and before addressing the merits or otherwise of the objection, it is important to first establish whether the objection meets the threshold of a preliminary objection as defined by the law.

13. In the celebrated case of *Mukisa Biscuit Company V West End Distributors Ltd (1969) EA 696*, a preliminary objection was defined thus;

“...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 the contract giving rise to the suit to refer the dispute to arbitration.”

14. In the same case, Sir Charles New Bold stated at Page 701;

“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 that has to be ascertained or if what is sought is the exercise of judicial discretion.”

15. In this case, the preliminary objection is premised on grounds that the applicant’s suit was incompetent as it sought distribution of the deceased’s Estate without a confirmed grant. Whereas it is settled law that the Estate of a deceased person can only be distributed through a certificate of confirmation of grant, it has not been pleaded in this suit that what the applicants were seeking was distribution of the deceased’s Estate. What the applicants were seeking was simply release of the monies decreed in their favour being the successful litigants in Civil Appeal No. 34 of 2021 which was paid to the respondent in his capacity as their advocate which he subsequently refused to release to them. Secondly, whether or not there was a court process pending at the Kandara Law Courts pertaining to distribution of the deceased’s Estate, though in my view irrelevant to the current case, was a matter of evidence which required factual investigation.

16. In view of the foregoing, I am satisfied that the preliminary objection (P.O) raised by the respondent does not raise pure points of law relevant to the applicant’s suit and does not therefore qualify to be a preliminary objections as defined in law. The P.O is consequently dismissed.

17. Turning to the merits or otherwise of the suit, I note that the suit is premised on the provisions of Order 52 of the Civil Procedure Rules (CPR) which serves as subsidiary legislation to the *Advocates Act*. Order 52 Rule (4) (1) states as follows;

- (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—
- a. the delivery by the advocate of a cash account;
 - b. the payment or delivery up by the advocate of money or securities;
 - c. the delivery to the Applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the Applicant;
 - d. the payment into or lodging in court of any such money or securities;
 - e. the delivery up of papers and documents to which the client is entitled.



18. As stated earlier, it is not disputed that the applicants and the respondent had an Advocate - Client relationship on 5th January 2022 when the respondent received Kshs. 2,142,207 on their behalf from the appellants insurers in settlement of HCCA No. 334 of 2021 in which the applicants were the respondents. Though not specifically pleaded, It is apparent that the applicants were the successful litigants in the suit filed in the lower court which culminated in the filing of the aforesaid appeal.
19. It is worth noting that the respondent has not only admitted receipt of the monies in question but has also admitted having refused to release it to the applicants despite several demands to that effect. The respondent's claim that he was holding the money as a trustee awaiting orders on distribution of the deceased's Estate is, to say the least, baseless since the money had been decreed to the applicants in their capacity as the successful litigants in the suit filed on behalf of the deceased's Estate. Being his instructing clients, on receipt of the money, the respondent was duty bound to release the same to them less any agreed legal fees to mark the end of the brief they had entrusted to him as their advocate. It was thereafter the applicants responsibility to hold the money in trust for the deceased's Estate.
20. I have gone through the authority cited by learned Counsel for the applicants, namely, Kamau John Kinyanjui V Republic (2010) eKLR, a decision by the Court of Appeal and in my view, it was not applicable to this case since the facts and issues raised in that appeal were markedly different from the facts in this case.
21. From the material placed before me, I have come to the firm conclusion the respondent's claim that he was honestly holding the money awaiting distribution of the deceased's Estate was incredulous and lacked any substance. If this claim was indeed true, one wonders why the respondent proceeded to release a substantial amount of that money namely, Kshs. 1,100,000 to the applicants' current advocates when this suit was pending hearing.
22. In my view, the respondent's claim above was just an excuse to justify his continued unlawful retention of the said monies at the expense of his clients which speaks volumes about his integrity as an advocate and an Officer of this Court. The respondent clearly failed to uphold the values of honesty and integrity which are described in the Law Society's Code of Standards of Professional Practice and Ethical Conduct published in The Kenya Gazette of 26th May 2017, Gazette Notice No. 5212 as the hallmark of the legal profession.
23. I regret to have to state that it is conduct like the one exhibited by the respondent in this case which if not checked and corrected by the relevant organs of the Law Society of Kenya may lead to erosion of public trust and confidence in the legal profession in Kenya.
24. That said, there is evidence from the applicants annexures which prove that the parties had agreed on legal fees due to the respondent.

The undated letter authored by the applicants withdrawing instructions from the respondent and directing him to release the decretal amount to their current advocates made it clear that the money to be released was to be less 30% being the parties agreed legal fees.
25. In the premises and for all the foregoing reasons, I find merit in the applicants suit and it is hereby allowed on the following terms;
 1. . The respondent shall release the decretal sums to the applicants less the Ksh.1,100,000 already paid to their current advocates on record and less 30% of the parties agreed legal fees. This translates to Kshs. 457,338.



- 2). The above amount shall be paid to the applicants' current advocates within 30 days of today's date for onward transmission to the applicants in default of which the amount shall attract interest at court rates from today until payment in full.
- 3) The applicants are awarded costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF NOVEMBER 2024

HON. C.W GITHUA

JUDGE

In the presence of:

Mr. Gatoto for the Applicants

Mr. Orimba holding brief for Mr Ngugi, the respondent

Ms. Susan Waiganjo, Court Assistant

