



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**PETITION NO. 852 OF 2016**  
**IN THE MATTER OF ARTICLES 2, 3, 10, 22, 53, 60, 159**  
**AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 27, 28, 31, 39, 40, 43, 48 AND 50 OF THE  
CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**EDWARD THIONG'O WACHIRA.....PETITIONER**

**AND**

**WASHINGTON NDERITU KOMU T/A NDERITU KOMU & CO.ADVOCATES.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT, MILIMANI COMMERCIAL COURTS.....2<sup>ND</sup> RESPONDENT**

**DUNCAN KIRERI WACHIRA.....3<sup>RD</sup> RESPONDENT**

**RULING**

What is before the court is a Notice of Motion application dated 16<sup>th</sup> February 2021 brought by the Petitioner in which the Petitioner (hereinafter referred to only as "the Applicant") has sought the following orders;

1. That the Court be pleased to record the death of the 3<sup>rd</sup> Respondent as 22<sup>nd</sup> October 2019.
2. That the Court be pleased to strike out the affidavits sworn on 18<sup>th</sup> November 2020 by Geoffrey G. Mahinda and purportedly filed on the same day by the deceased 3<sup>rd</sup> Respondent.
3. That the Court be pleased to strike out the written submissions by Gathara Mahinda & Co. Advocates that were purportedly drawn and filed under the instructions of the deceased 3<sup>rd</sup> Respondent on 20<sup>th</sup> November 2020.
4. That costs be provided for.

The application which is supported by the affidavit of the Applicant is based on the following grounds;

- a. The 3<sup>rd</sup> respondent died on 22<sup>nd</sup> October 2019.
- b. The cause of action continues against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

c. It is impossible for the 3<sup>rd</sup> Respondent to have filed and/or authorised the filing of the said affidavit on 18<sup>th</sup> November 2020 or to have instructed the firm of Gathara Mahinda & Co. Advocates to file submissions on his behalf on 20<sup>th</sup> November 2020.

d. The said affidavit and written submissions; are an abuse of the court process, are intended to pollute the proceedings herein with confusion through non-disclosure of material facts and threaten the Petitioner's right to fair administrative action and fair hearing.

e. It is fair and just to grant this application.

The application is opposed through a replying affidavit sworn by Geoffrey Mahinda, Advocate on 7<sup>th</sup> June 2021 in which he has stated as follows;

a. The 3<sup>rd</sup> Respondent died on 22<sup>nd</sup> October 2019.

b. A petition for Grant of Letters of Administration was filed by the 3<sup>rd</sup> Respondent's widow but the same has not been issued following an objection by the Applicant.

c. The Applicant failed to substitute the deceased 3<sup>rd</sup> Respondent in the instant suit within the prescribed statutory period as a result of which the suit against the 3<sup>rd</sup> Respondent abated.

d. The representation of the deceased 3<sup>rd</sup> Respondent by the firm of Gathara Mahinda & Company Advocates does not cease until formally terminated.

e. The impugned affidavit and submissions cover also the response of the 1<sup>st</sup> Respondent who is still a party to the petition and the contents thereof cannot be separated or treated in isolation as the issues are intertwined and arise from the same matter.

#### The submissions:

The application was argued by way of written submissions. The Applicant filed his submissions on 14<sup>th</sup> May 2021. The Applicant submitted that Geoffrey Gathara Mahinda, Advocate does not have instructions to act for the 3<sup>rd</sup> Respondent herein who is deceased. The Applicant cited Republic v Makuyu Land Disputes Tribunal Committee & another Ex-Parte Joseph Kimani Peter [2014] eKLR where the court stated as follows:

**“An advocate cannot purport to step into the shoes of a litigant and apply for orders against the opposite party. The advocate is not a party to the matter but simply an agent of the client who is the party to the case. Where an advocate purports to act for a deceased client without substitution having been made, he becomes an agent without instructions.”**

The Applicant argued that the deceased 3<sup>rd</sup> Respondent could not have instructed Geoffrey Gathara Mahinda, Advocate to respond to the Petitioner's Supplementary Affidavit dated 26<sup>th</sup> August 2020.

In his submissions in reply filed on 9<sup>th</sup> June 2021, Geoffrey Gathara Mahinda Advocate of Gathara Mahinda & Company Advocates on record for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents argued that, based on Order 9 Rule 5 of the Civil Procedure Rules, his firm's representation of the 3<sup>rd</sup> Respondent can only be terminated if a Notice of Change of Advocates or Notice of Intention to act in person is filed and not by the death of the 3<sup>rd</sup> Respondent.

The said advocate argued that an application to substitute the deceased 3<sup>rd</sup> Respondent with his legal representative was not made within one year from the date of his death as required under Order 24 Rule 4 of the Civil Procedure Rules. He submitted that the suit by the Applicant against the 3<sup>rd</sup> Respondent has abated. He urged the court to mark the Applicant's claim against the deceased 3<sup>rd</sup> Defendant as having abated.

On whether the impugned affidavit and submissions should remain on record, the advocate submitted that they should as they contain the response of the 1<sup>st</sup> Respondent who is still a party to the suit. He submitted that the same do not contain anything frivolous or scandalous and that the Applicant has not pointed out in what manner he is aggrieved with the contents of the said documents.

#### Determination:

I have considered the Applicant's application together with the supporting affidavit. I have also considered the response thereto by the advocates on record for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. Finally, I have considered the submissions by both parties. The following is my view on the application. The Applicant filed this petition on 22<sup>nd</sup> July 2016 against the Respondents. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents instructed the firm of Gathara Mahinda & Company Advocates to act for them in the petition. The said firm of advocates filed a Notice of Appointment of Advocates on 16<sup>th</sup> August 2016. The 3<sup>rd</sup> Respondent died on 22<sup>nd</sup> October 2019. On 26<sup>th</sup> August 2020 after the death of the deceased, the Applicant filed a supplementary affidavit in support of the petition in which he raised a number of issues touching on the conduct of Geoffrey Gathara Mahinda Advocate. Geoffrey Gathara Mahinda Advocate filed an affidavit sworn on 18<sup>th</sup> November 2020 on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in response to the said supplementary affidavit. The firm of Gathara Mahinda & Company Advocates also filed written submissions on 20<sup>th</sup> November, 2020 in opposition to the petition again on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. What I have been called upon to determine in the present application is whether the firm of Gathara Mahinda & Company Advocates could competently act on behalf of the 3<sup>rd</sup> Respondent after his death and if not whether the said affidavit and written submissions that were filed by the said firm on

behalf of among others the deceased 3<sup>rd</sup> Respondent were proper. The final issue for determination is whether the said affidavit and written submissions should be struck out.

I am in agreement with the Applicant that the instructions that had been given by the 3<sup>rd</sup> Respondent to the firm of Gathara Mahinda & Company Advocates ceased on his death on 22<sup>nd</sup> October 2019. The said instructions could only be revived by the 3<sup>rd</sup> Respondent's legal representative. It is common ground that no grant of letters of administration in respect of the estate of the deceased 3<sup>rd</sup> Respondent has been issued and as such the estate of the deceased does not have an administrator who could give further instructions in the matter to the firm of Gathara Mahinda & Company Advocates. It follows therefore that although the said firm of advocates remained on record having acted for the deceased 3<sup>rd</sup> Respondent while he was alive, the firm had no instructions to take any further action in the matter on behalf of the 3<sup>rd</sup> Respondent. The firm of Gathara Mahinda & Company Advocates could not therefore purport to file an affidavit or submissions in this suit on behalf of the deceased 3<sup>rd</sup> Respondent after his death. I am in agreement therefore that the affidavit sworn by Geoffrey Gathara Mahinda Advocate on 18<sup>th</sup> November 2020 and filed in court by the firm of Gathara Mahinda & Company Advocates and the submissions that were filed by the firm of Gathara Mahinda & Company Advocates on 20<sup>th</sup> November 2020 were irregular to the extent that the same were purportedly filed also on the instructions of the 3<sup>rd</sup> Respondent who was deceased.

On whether the court should strike out the said affidavit and submissions on account of the said irregularity, I do not think so. As I stated earlier in the ruling, the firm of Gathara Mahinda & Company Advocates are on record for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. Although the 3<sup>rd</sup> Respondent is deceased and the suit as against him has a bated pursuant to Order 24 Rule 4(1) and (3) of the Civil Procedure Rules, the 1<sup>st</sup> Respondent is a live and is still a party to the suit. The said affidavit and submissions were filed by the firm of Gathara Mahinda & Company Advocates on behalf of not only the deceased 3<sup>rd</sup> Respondent but also the 1<sup>st</sup> Respondent. I have also noted that the affidavit of Geoffrey Gathara Mahinda Advocate to a large extent responded to the issues that were raised by the Applicant against the said advocate personally. I have also noted that the suit as against the 3<sup>rd</sup> Respondent has since abated and as such the Applicant would not be entitled to any relief against the 3<sup>rd</sup> Respondent or his estate. Due to the foregoing, I am of the view that the Applicant would not be prejudiced in any way by the said affidavit and submissions. There is also nothing scandalous or oppressive in the said documents. The court would simply ignore the portions of the said affidavit purportedly deposed on the instructions of the 3<sup>rd</sup> Respondent after his death. The court will also treat the submissions as having been filed on behalf of the 1<sup>st</sup> Respondent only.

Article 159(2)(d) of the Constitution enjoins the court to administer justice without undue regard to procedural technicalities. The parties had agreed to argue the petition by way of affidavit evidence and written submissions.

The parties have filed affidavits and written submissions. What is remaining is for the court to give the parties a date for judgment in case they do not wish to highlight the submissions. Striking out the said affidavit and submissions will mean that the 1<sup>st</sup> Respondent would be given more time to file fresh affidavit and written submissions. There is no doubt that that would lead to a delay in the disposal of this petition that has been pending in court since 2016. Since the Applicant will not suffer any injustice if the said affidavit and written submissions are not struck out, I will ignore the irregularities in the same for the sake of just and expeditious resolution of this matter.

Conclusion:

The upshot of the foregoing is that the Applicant's application dated 16<sup>th</sup> February 2021 is not for granting. The application is dismissed with costs to be in the cause.

**DELIVERED AND DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021**

**S.OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Petitioner present in person

Mr. Mahinda for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Ms. Ndundu h/b for Ms. Nyawira for the 2<sup>nd</sup> Respondent

Ms. Betsy-Court Assistant