



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 94 OF 2014

KENNETH STANLEY NJINDO MATIBA.....PETITIONER (DECEASED)

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

AND

JOHN MBAU MBURU t/a J. M. MBURU

& COMPANY, ADVOCATE.....APPLICANT/PROPOSED INTERESTED PARTY

AND

EDITH WANJIRU MATIBA, SUSAN WANJIKU MATIBA-MWAMTO &

RAYMOND DAVID VICTOR NJINDO MATIBA.....APPLICANTS

RULING

1. There are two applications before this court. The first application to be filed is that of John Mbau Mburu trading as J.M. Mburu and Company Advocates (hereinafter simply referred to as Mr. Mburu). Mr. Mburu acted as the advocate of the deceased Petitioner, Kenneth Stanley Njindo Matiba (hereinafter referred to as the deceased). The second application is that of Edith Wanjiru Matiba, Susan Wanjiku Matiba-Mwamto and Raymond David Victor Njindo Matiba. The applicants in the second application are the personal representatives of the estate of the deceased. They will henceforth be referred to as the personal representatives of the estate of the deceased.

2. Through his notice of motion dated 9th May, 2019 and amended on 2nd July, 2019, Mr. Mburu seeks orders as follows:-

a. Service hereof be dispensed with and this application be heard *ex-parte* in the first instance;

b. John Mbau Mburu, Advocate, t/a of J.M. Mburu & Company, Advocates, who acted for the late petitioner herein, Mr Kenneth Stanley Njindo Matiba, be joined as an interested party to this suit for purposes of pursuing payment of his professional fees;

c. A declaration that the balance of the decretal sum remaining after the respondent recently paid the late petitioner's estate/family the sum of Kshs 200 million behind the applicant's back should not be paid to them pending the hearing and determination of this application;

d. A declaration that payment of the said sum directly and clandestinely to the deceased's estate/family without consultation with the applicant and also planning to by-pass him again in the payment process involving the balance of the decretal sum plus interest while he was and still is on record for the petitioner and further violating his right to first priority in payment of his fees by virtue of an equitable lien that exists in his favour over the decree was and is illegal.

e. A declaration that the applicant's professional fees are payable to him by the respondent by virtue of an admission which was made by the respondent in a letter dated 6th March, 2019;

f. A declaration that the applicant's professional fees are payable by the respondent in priority over any other claim or

person by virtue of an equitable lien that exists in his favour over the decretal sum and that the said fees be paid first from the decree before any further payment to the deceased's estate/family or any other person;

g. A declaration that the sum of Kshs 202, 715,839.50 plus interest and VAT thereon is the fee payable to the interested party by the respondent on account of advocate/client fees pursuant to taxation of the party and party bill of costs herein on 1st February, 2018 and the provisions of Schedule 6 B(b) of the Advocates Remuneration Order 2014 for reasons set out hereunder. ~~The same is payable together with VAT thereon;~~

h. A declaration that the parties hereto to wit the applicant and the respondent having held negotiations to discuss the reference dated 22nd March,2018 which was filed by the respondent after taxation of the party and party bill of costs herein with a view to a possible settlement of the same and almost reaching a settlement only for the respondent to mysteriously abandon the process and proceed to collude with the deceased's family to pay them the decretal sum clandestinely in violation of his lien and attempting to further by-pass him in payment of the balance of the decretal sum plus interest despite being the advocate on record for the deceased and the lien, the respondent is precluded from relying on the reference as an excuse to avoid paying the applicant his fees in full made up as indicated in paragraph 7 hereof or blocking his efforts to recover the same;

i. A declaration that having used and intending to continue using the reference as an excuse to deny the applicant his fees and also to block his efforts to recover the same to enable the respondent to buy time and pay the deceased's estate/family the decretal sum plus interest behind the applicant's back the respondent is precluded from relying on the reference as an excuse to avoid paying the applicant his fees made up as indicated in paragraph 7 hereof;

j. An order that having violated the applicant's lien by paying the said sum of Kshs.200 million in the manner stated above the respondent is bound to pay and should pay an equivalent sum to the applicant forthwith;

k. In the unfortunate event that this Honourable court is inclined to order that the reference proceeds to hearing, an order that the respondent do deposit the aforesaid sum of Kshs.202,715,839.50 plus interest and VAT thereon in court to prevent more prejudice being occasioned to the applicant by reason of further abuse of the process of the court by the respondent pending the hearing and determination of the reference.

l. The said reference be struck out for being frivolous, vexatious and an abuse of the process of the court;

m. Further and/or in the alternative the reference be dismissed for want of prosecution;

n. The costs of this application be provided for.

3. The application is based on the grounds on the face of the application and Mr. Mburu's affidavit sworn on 9th May, 2019. Mr. Mburu's case is that he was instructed by the deceased to institute proceedings against the Respondent, the Attorney General, for among other remedies, the recovery of damages as well as costs and interest as a result of the physical and financial injury arising from his unlawful detention in 1990. He deposed that at the conclusion of the trial, the Court entered judgement for the deceased against the Respondent for Kshs. 504,810,890.02 on 16th August, 2017. The amount, was upon review, enhanced to Kshs. 978,413,040.10 on 29th September, 2017. It was his further averment that the deceased passed away on 15th August, 2018 before the judgement was satisfied by the Respondent.

4. Mr. Mburu's deposed that upon the delivery of the judgment, he proceeded to file the party and party bill of costs which was taxed at Kshs.135, 143, 893.00. His case is therefore that he has an equitable lien over the decretal amount on account of the balance of his fees and disbursements by virtue of the fact that he was at all material times on record for the deceased. He consequently asserted that all monies payable under the decree should be paid through him so as to allow him to deduct his fees and thereafter pay the balance to the deceased's estate.

5. Mr. Mburu averred that on account of the lien, he is supposed to recover his fees first before any other person, including the deceased's estate. He further deposed that the Respondent had through a letter dated 6th March, 2019 admitted that the fees are payable to him.

6. Mr. Mburu averred that upon the invitation by the Respondent, the parties began the process of negotiating a settlement on the fees payable to him. It was agreed that upon receipt of partial payment by the liable Ministry being the Ministry of Interior and Co-ordination of National Government, the Respondent would directly pay him that amount as the issue of the fees payable to him was negotiated to finality between him and the estate of the deceased.

7. Mr. Mburu deposed that the Respondent later abandoned the negotiations without informing him and colluded with the deceased's family in order to by-pass him and pay them the whole decretal sum including his fees in violation of legal and professional requirements. He claimed that after the judgment was delivered, the deceased's family began harassing him over the fees due to him. Further, that the family proceeded to exclude him from the decree by purporting to claim ownership of the entire decree and treat it as their sole property to which he has no claim.

8. Mr. Mburu's stated that he pleaded with the Respondent to respect his lien over the decretal amount but the Respondent nevertheless proceeded to deal directly with the deceased's estate and subsequently abandoned the efforts to settle the issue without informing him. He averred that the Respondent had paid 200 million shillings to the deceased's family without his knowledge or participation.

9. According to Mr. Mburu, the Respondent ought to have reached a settlement with him on the issue of his fees and released the balance to the estate, or pay the entire sum to him so that he could deduct his fees and pay the balance to the estate of the deceased. Further, that the

Respondent ought to have released the initial payment to him to enable him deduct his fees and release the balance to the deceased's estate, or alternatively release the agreed fees to the him and the balance to the estate of the deceased in consultation with him.

10. Mr. Mburu's position is that the Respondent's action of releasing the decretal amount to the deceased's estate directly and behind his back was illegal and amounted to a theft of his fees. Further, that by paying the family without his participation, the Respondent had usurped his role of determining the rightful beneficiaries to benefit from the decretal amount.

11. Turning to the reference pending before the Judicial Review Division of this Court, Mr. Mburu averred that although the reference was filed and fixed for hearing on 18th April, 2018 it was not listed, and the Respondent did not bother to take steps to prosecute the same for a period exceeding one year but had instead used it as an excuse to avoid payment of his fees. He deposed that the reference was actually dismissed *suo moto* for want of prosecution on 29th July, 2019. He concluded by urging the court to grant the orders sought, otherwise he would be denied the fruits of his labour.

12. In response to the various pleadings filed by the personal representatives of the estate of the deceased, Mr. Mburu filed a replying affidavit sworn on 27th October, 2019 in which he contends that his application dated 9th May, 2019 as amended on 2nd July, 2019 is only between the Respondent and himself and therefore the personal representatives have no *locus standi* in respect of that particular application.

13. The Respondent filed a response dated 18th October, 2019 to Mr. Mburu's application. The Respondent's position is that Mr. Mburu is a stranger to the proceedings and as such should not be joined as a party. This averment is premised on the grounds that the taxed party & party costs are subject to a reference which is yet to be determined; that the only way in which Mr Mburu can recover his costs is by either allowing the reference to be determined or to tax his advocate client bill; and that the decretal amount due would adequately cover the claimed fees. It is further the Respondent's position that the application is frivolous, vexatious, and an abuse of the court process.

14. In response to Mr. Mburu's application, the personal representatives of the estate of the deceased filed grounds of opposition dated 15th July, 2019. Their position is that joining Mr. Mburu to the proceedings would result in a conflict of interest as he will be unable to act in the best interests of the deceased's estate. Further, that he is not a necessary party in the petition or the execution of the decree and his presence as a party will prejudice the interests of the deceased's estate.

15. The personal representatives of the estate of the deceased additionally averred that prayers 4 to 9 of the application have no basis in law whereas prayers 12 and 13 are misplaced, frivolous and vexatious.

16. The personal representatives of the estate of the deceased disclosed that they have not refused to settle Mr. Mburu's professional fees and they have no objection to a reasonable amount being held in escrow as security for his legal fees. They therefore urged the court to dismiss the application.

17. The personal representatives of the estate of the deceased also filed a further replying affidavit sworn on 15th July, 2019 by one of them, Ms. Susan Wanjiku Matiba-Mwanto. She averred that enjoining Mr. Mburu in the matter would result in a conflict of interest as he would be on record for the deceased and also a party in the same suit. This, she deposed, would lead to Mr. Mburu looking after his interests as he had done previously when he refused to take instructions from them leading to their seeking the assistance of another law firm to apply for substitution in the petition.

18. Ms. Mwamto averred that they have not refused to pay the advocate's professional fees. She pointed out that the taxed party and party bill of costs has been challenged by the Respondent through a reference being Miscellaneous Application No. 130 of 2018 and the court cannot rely on the taxed costs to declare the fees payable. It was therefore her assertion that the fees payable remain indeterminate.

19. It was Ms. Mwamto's deposition that although there has been a payment of an instalment of Kshs. 200 million towards settlement of the decree, there is still a substantial balance remaining which is enough to pay Mr. Mburu's fees once the reference has been determined.

20. It is further Ms. Mwamto's statement that Mr. Mburu is not entitled to exercise a right to a lien in respect of the entire decretal sum when his fees can be recovered from part of the decretal sum. Further, that he has delayed the payment by failing to take steps to have the reference resolved.

21. The second application was filed by the personal representatives of the estate of the deceased by way of a chamber summons application dated 10th June, 2019 brought under sections 1A and 3A of the Civil Procedure Act, Cap. 21; Order 1 rule 14 and Order 24 rules 3 & 10 of the Civil Procedure Rules, 2010 ("CPR"); and Article 159 (2) (d) of the Constitution. Through the application they seek that the deceased be substituted with them. The application is supported by the affidavit of Ms. Susan Wanjiku Matiba-Mwanto who is one of the administrators of the estate of the deceased.

22. It is their case that the deceased passed away on 15th August, 2018 shortly after the judgement was delivered and they need to come into the matter in order to pursue the payment of the decretal sum as well as attend to the claim for legal fees and pursue the costs awarded to the deceased.

23. According to Ms. Mwamto, her understanding is that all rights and liabilities of the deceased arising in and from the petition herein vests exclusively in the personal representatives of his estate and therefore they wish to act in their names on behalf of the deceased. It was her further averment that Mr. Mburu, the advocate for the deceased, has failed to act on their instructions and therefore has jeopardized the execution proceedings. She therefore deposed that in order to pursue the payment of the decretal sum plus costs and settle the legal fees the court needs to enjoin them in the suit by substituting them in the place of the deceased.

24. Mr. Mburu opposed the application through a replying affidavit sworn on 5th July, 2019 in which he claimed that the personal representatives of the estate of the deceased have failed to disclose the true nature of the conflict in their application. He reiterated the averments made in support of his application for joinder and added that the personal representatives of the estate of the deceased are attempting to circumvent the payment of his fees by replacing him without following the proper procedure as laid out in Order 9 Rule 9 of the CPR.
25. Responding to the allegation that he failed to act on instructions by the personal representatives and thus delayed the execution proceedings, Mr. Mburu averred that the personal representatives of the deceased have never instituted any proceedings but instead pursued payment of the decretal sum plus interest through the backdoor. Further, that from the time that the reference was filed he informed the personal representatives of the estate of the deceased that he could pursue the decretal sum less party & party fees but they had instead pursued the matter directly with the Respondent to his exclusion. He stressed that the application for substitution by the deceased's legal representatives could only be made through his firm as he is the advocate on record for the deceased.
26. Mr. Mburu also filed a preliminary objection dated 10th July, 2019 in which he averred that in accordance with Order 3 and Order 9 of the CPR he shall remain the advocate for the deceased until the conclusion of the matter as he was the one who filed the petition and prosecuted it until the execution stage. Further, that as per Order 24 Rule 10 of the CPR, there is no need for substitution as the matter is at the execution stage.
27. Mr. Mburu's final take on the application for substitution was that the firm of Mboya Wangong'u & Waiyaki & Company Advocates was in contravention of Order 9 Rule 9 of the CPR by purporting to represent the deceased while he is still on record for the deceased. He urged the court to find that the advocates for the personal representatives of the deceased cannot file any application until there is an application for change of advocate.
28. Mr. Mburu filed submissions dated 27th October, 2019 in support of his application for joinder. His case is that being joined to the suit would allow him to pursue his professional fees by enforcing his lien. He cites several legal sources in order to highlight the meaning of the term 'lien' and the applicability of the same to his case. Mr. Mburu submits that his non-possessory lien is automatic and ensures that he is not denied the fruits of his labour. Further, that a judgement debtor must pay the money through the lawyer on record so that the lawyer may deduct his fees and release the balance to his client.
29. Mr. Mburu relies on the case of **Khan Solicitors (a firm) v Chifuntwe and another [2013] 4 All ER 367** where it was held that the court should intervene in order to protect the solicitor's claim on funds recovered or due to be recovered by a client if the paying party pays the client directly or the judgement debtor colludes with the client to cheat the solicitor of his fees. He observes that in the cited case the solicitor's fees had not been determined but the court determined the same and made an order for the payment of the fees.
30. Mr. Mburu also cites the case of **Gavin Edmondson Solicitors Ltd v Haven Insurance Company Ltd [2018] 3 ALL ER 273** where it was also held that a solicitor should be paid first from the decree before his client or any other person. Further, that the court would intervene and enforce a solicitor's lien where a defendant proceeds to pay the solicitor's clients directly or deals with the debt in a manner which is inconsistent with the solicitor's equitable interest. Where such an illegal payment has been made it is for the court to order the paying party to pay the sum over again to the solicitor.
31. Mr. Mburu stresses that he is the advocate on record for the deceased and relies on Order 9 Rule 1 of the CPR in support of his assertion that once an advocate is appointed it is his duty to perform all acts which pertain to the conduct of the suit until its conclusion, including the settlement of the suit or execution of a decree.
32. The personal representatives of the estate of the deceased filed submissions in respect to Mr. Mburu's application for joinder. They acknowledge that the estate of the deceased is indeed indebted to Mr. Mburu for the services rendered. They nevertheless submit that Mr. Mburu has never taxed and presented a bill of costs for his legal fees and his professional fees have therefore not been determined. Further, that counsel has persisted in obtaining his professional fees based on the party & party costs awarded to the deceased yet the quantum has been disputed by the Respondent and is the subject of a reference in Nairobi High Court Misc. Application 130 of 2018 before the Judicial Review Division. That, as a result of this misguided notion counsel has stalled the execution process and delayed the payment of his fees.
33. Counsel for the personal representatives of the estate of the deceased submit that if Mr Mburu is made an interested party in the matter he would have two roles in the same suit, one of which would be a personal one. It is submitted that Mr. Mburu cannot possibly act in his clients' interest while at the same time pursuing fees from the same clients. Counsel for the personal representatives of the estate of the deceased is therefore of the view that there is a conflict of interest as Mr. Mburu's fiduciary duty to his clients is not compatible with his interests. The decisions in the cases of **Serve in Love African (Sila Trust) v David Kipsang Kipyego & 7 others [2017] eKLR**; **Nils Staffan Wirell v Emily Chepkosgey [2018] eKLR**; and **British American Investments Company (K) Limited v Njomaiha Investments Limited & Another [2014] eKLR** are cited as explaining the meaning of the term "conflict of interest".
34. The personal representatives submit that the estate of the deceased would be at risk of prejudice if Mr. Mburu were to be enjoined as a party as he would only act in his own commercial interest to recover his fees. In the alternative it is proposed that counsel resigns as the advocate of the deceased and pursue his professional fees separately.
35. It is further contended that Mr Mburu is not a necessary party in the petition as his presence is not necessary for the effectual and complete adjudication of the questions in the case as per the requirements of Order 1 Rule 10(2) CPR. It is the submission of counsel for the personal representatives of the deceased that Mr. Mburu's admission to the proceedings would not assist in determining the issue of professional fees and would only hamper the same as well as the determination of the reference by the Attorney General.
36. As to the declarations sought in paragraphs 4 to 9 of Mr. Mburu's application for joinder, counsel for the personal representatives of the estate of the deceased contends that the prayers have no basis in law on the grounds that the applicant is not a party to the petition; that the

applicant has misdirected his claim for fees to the Respondent rather than his clients; that the applicant seeks to rely on a conditional admission founded on the successful completion of the reference; that the applicant has failed to tax his own professional fees and characterizes indeterminate party & party costs as his professional fees; that the personal representatives of the deceased and Respondent have not breached the law by undertaking negotiations on the settlement of the decretal sum; and that the court does not have the power to declare an end to the reference and thus the amount of party & party costs remain unquantified.

37. It is the position of the personal representatives of the estate of the deceased that they have not refused to pay the advocate his fees and are only waiting for Mr. Mburu to prosecute the reference so that the amount payable to him can be determined.

38. Dismissing Mr. Mburu's assertion that the engagement between the personal representatives of the estate of the deceased and the Respondent was irregular, counsel submitted that Section 21(3) of the Government Proceedings Act entitles the Respondent to either make the payment through the advocate or directly to the client. The decision in the case **Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board & 4 others Ex parte** is quoted as establishing the legal principle that the right to lien can only be claimed where the advocate is in possession of the funds, which is not the case herein.

39. Counsel for the personal representatives of the estate of the deceased urges that prayers 12 and 13 of the application for joinder cannot be granted as they relate to the reference filed by the Respondent on 18th April, 2018, and such prayers can only be made through a response to the reference and not through an application in this petition.

40. Submitting on prayer 11 of Mr. Mburu's application, the personal representatives of the estate of the deceased stresses that they have never refused or neglected to make arrangements to facilitate the settlement of the professional fees of the deceased's counsel and are indeed willing to do so. According to them, the fees can only be settled after the reference is finalised or once Mr. Mburu taxes his bill of costs against his client in the petition. They therefore blamed him for delaying the settlement of the matter.

41. Mr. Mburu filed submissions dated 11th July, 2019 in support of his preliminary objection dated 24th June, 2019. His case is that based on the provisions of Order 24 Rule 10 of the CPR the substitution is not necessary. Further, that Order 9 Rule 9 of the CPR provides that once judgment has been passed a party cannot change advocates or act in person without an order of the court. On the strength of the cited provisions he submitted that it is only his firm which has the power to file an application for substitution. Further, that the execution proceedings to enforce the decree can only be instituted by the advocates on record for the deceased.

42. The personal representatives of the estate of the deceased filed submissions dated 15th July, 2019 in regard to their application to be substituted for the deceased. Their position is that upon being granted the letters of administration, all rights and liabilities of the deceased arising in and from the petition herein vests exclusively in them as the personal representatives of his estate. As such they wish to act in their name on behalf of the deceased.

43. The personal representatives of the estate of the deceased submit that their instructions to Mr. Mburu to apply for them to be substituted for the deceased were not acted upon and they have therefore not been able to take any action in the matter.

44. The decision in the case of **David Mburu Gathaiya v Municipal Council Nakuru [2007] eKLR** was cited in support of the proposition that as the personal representatives of the deceased, they can only execute the decree once they are made parties to the proceedings. Reference is made to the case of **Registered Trustees of Ruiru Sports Club & 3 others v Isaac Karuri Nyongo & 15 others [2014] eKLR** in support their submission that they should be substituted for the deceased as they have been duly appointed as his legal representatives. Additionally, they rely on the case of **Agnes Wanjiku Wang'ondu v Uchumi Supermarket Ltd, Nairobi HCCA No. 137 of 2002** where the court held that personal representatives can be enjoined in the suit.

45. The personal representatives of the estate of the deceased also filed submissions dated 17th July, 2019 in response Mr. Mburu's written submissions in respect of the preliminary objection dated 24th June, 2019. They submit that Mr. Mburu's preliminary objection is without merit and should be dismissed. It is their assertion that on account of Order 24 of the CPR, they are not a party to the suit until the court causes them to be made a party. It is their position that Mr Mburu is not their advocate unless they appoint him and he therefore remains *functus officio* and all that remains is the payment his fees.

46. The personal representatives further contend that Order 9 Rule 9 of the CPR is not relevant to this matter as it only applies to a situation where a client wishes to change an advocate which is not the position in this case. Additionally, that the preliminary objection is premised on the misconception that their application is about who represents them or the deceased, yet the correct position is that the application is about substitution of a deceased party so that the incoming party can process the balance of the cause.

47. I have carefully considered the substance of the applications, the responses thereto, the preliminary objection and the submissions of the parties and in my view the issues for the determination of this court are:

- a) Whether Mr. Mburu should be enjoined in these proceedings as an Interested Party;
- b) Whether Mr. Mburu has lien over the decretal amount in respect of unpaid professional fees, and if so, what are the appropriate orders to be issued by the court?
- c) Whether the personal representatives of the estate of the deceased should be substituted for the deceased in the petition; and
- d) Which party should meet the costs of the applications?

48. I propose to first deal with the prayers for substitution of the deceased with the personal representatives of the estate of the deceased in

the petition and the joinder of Mr. Mburu as an Interested Party in the petition before considering the other prayers sought by Mr. Mburu in his application. There is consensus between the parties that Mr. Mburu is owed his professional fees for the legal services rendered to the deceased prior to his demise. There is a dispute as to the amount owed, with the personal representatives of the estate of the deceased and the Respondent claiming that the amount is yet to be determined. Mr. Mburu on the other hand says the amount is known. That in my view should not be a matter of concern in this ruling as I shall shortly demonstrate.

49. The application by Mr. Mburu to join this case as an Interested Party is unique. It is clear that he has no interest in the outcome of the case, which is already known anyway. His interest is in the fees he claims the deceased owes him for the work done in the matter. The personal representatives of the estate of the deceased are opposed to the application for joinder. They argue that enjoining Mr. Mburu will delay the execution process and that there will be a conflict of interest. They have not, however, offered a solution as to how Mr. Mburu is going to be paid his fees. I do not see how the joinder of Mr. Mburu would delay the execution of the matter. He has an identifiable interest in the petition as far as his fee is concerned. He is therefore correct that he should be made a party to this case so that he can protect his interest.

50. The personal representatives of the estate of the deceased appear to fall into the same trap with Mr. Mburu who holds the erroneous position that he still acts for the deceased in the matter. They are all wrong. The principal-agent relationship that existed between the deceased and Mr. Mburu was terminated by the death of the deceased. Order 9 Rule 9 CPR does not therefore apply in the circumstances of this case. The personal representatives of the estate of the deceased did not appoint Mr. Mburu to act in the petition. Their decision to appoint another advocate to act for them cannot therefore be termed as a change of advocates.

51. Mr. Mburu refers to Order 24 Rule 10 of the CPR and submits that since the matter is already at the execution stage then Rule 3(1) of the same Order which requires the legal representative of a deceased plaintiff to be made a party to the case does not apply. That is a self-defeating argument. How then does he expect to be paid his fees? It is only the administrator of the estate of a deceased person who has the authority to collect and settle debts belonging to the estate of a deceased person. Without the legal representatives being brought on board nothing will move. In my view, rules 3, 4 and 7 of Order 24 of the CPR simply serve to ensure that a party in a case who survives the opponent does not proceed against the deceased party and obtain judgement without the legal representative of the deceased party being made a party in the matter. Indeed, I do not see how one can proceed to execute a judgement against a deceased person without making the legal representative of the estate of the deceased a party to the case.

52. In view of what I have stated above, it follows that Mr. Mburu's application to be made a party to these proceedings in order to secure his interests has merit and is allowed. The application by the personal representatives of the deceased is also merited and it succeeds.

53. Mr. Mburu in his application for joinder asked for several other orders. Some of those prayers are not allowable for the simple reason that they seek to terminate a matter before another Judge. The reference filed at the Judicial Review Division of this Court shall be determined in that Division and there is no way I can dismiss that reference in this ruling as requested by Mr. Mburu. All the prayers relating to his professional fees can also not be determined in this ruling. Mr. Mburu, as a lawyer, knows the process of establishing the fees payable to an advocate by a client. He should follow the right procedure in order to establish what is owed to him.

54. What therefore remains is the issue of securing Mr. Mburu's lien for his fees. The most recent decision on an advocate's lien was made by the Supreme Court of England in the case of **Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited [2018] UKSC 21** where it was stated that:-

“In the ordinary course of traditional litigation, with solicitors acting on both sides, the amount due under a judgment, award or settlement agreement would be paid by the defendant's solicitor to the claimant's solicitor Or the claimant's solicitor might recover the sum due to his client by processes of execution. In either case the equitable lien would entitle the solicitor not merely to hold on to the money received, but to deduct his charges from it before accounting to his client for the balance. But equity would also enforce the security where the defendant (or his agent or insurer) paid the debt direct to the claimant, if the payer had either colluded with the claimant to cheat the solicitor out of his charges, or dealt with the debt inconsistently with the solicitor's equitable interest in it, after having notice of that interest. In an appropriate case the court would require the payer to pay the solicitor's charges again, direct to the solicitor, leaving the payer to such remedy as he might have against the claimant. This form of remedy, or intervention as it is sometimes called, arose naturally from the application of equitable principles, in which equitable interests may be enforced *in personam* against anyone whose conscience is affected by having notice of them, either to prevent him dealing inconsistently with them, or by holding him to account if he does.”

55. The Court went ahead and explained the applicability of the principle as follows:-

“It recognises that the equity depends upon the solicitor having a claim for his charges against the client, that there must be something in the nature of a fund against which equity can recognise that his claim extends (which is usually a debt owed by the defendant to the solicitor's client which owes its existence, at least in part, to the solicitor's services to the client) and that for equity to intervene there must be something sufficiently affecting the conscience of the payer, either in the form of collusion to cheat the solicitor or notice (or, I would add knowledge) of the solicitor's claim against, or interest in, the fund. The outcome of the case also recognised that the solicitor's claim is limited to the unpaid amount of his charges. Implicit in that is the recognition that the solicitor's interest in the fund is a security interest, in the nature of an equitable charge.”

56. Earlier, the Court of Appeal of England had in the case of **Khans Solicitors (A Firm) v Chifuntwe [2014] 1 WLR 1185; [2013] 4 All ER 367** expressed the law as follows:-

“It has always been accepted that an attorney has a lien for his own fees on money which comes into his hands on a client's account...In our judgement, the law is today that the court will intervene to protect a solicitor's claim on funds recovered or

due to be recovered by a client or former client if (a) the paying party is colluding with the client to cheat the solicitor of his fees, or (b) the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees. The form of protection may be preventive but may in a proper case take the form of dual payment.”

57. It is not disputed that Mr. Mburu is owed fees by the estate of the deceased for services rendered to the deceased in respect of this petition. There is also evidence placed before the court showing that the Respondent knew that Mr. Mburu was owed fees by the estate of the deceased. The Respondent nevertheless went ahead and paid Kshs.200 million to the personal representatives of the estate of the deceased. The Respondent is lucky because the decree has not been satisfied in full since the Respondent having known of Mr. Mburu's claim for his fees would have been required to again pay the amount irrespective of the fact that the full decretal amount had been paid to the estate of the deceased.

58. A client cannot evade the responsibility of meeting his advocate's fees. Where the client is represented on the understanding that the fees will be paid upon the success of the claim, the court has a duty to assist the advocate to recover the fees from the client. The decision by the Respondent to pay the personal representatives of the estate of the deceased directly was ill-advised in view of the law as espoused in the cited authorities. It is immaterial that the law, as alleged by the Respondent, allowed him to pay the decretal amount directly to the personal representatives of the estate of the deceased. The moment he had notice from Mr. Mburu that the estate of the deceased owed him money, he was under a duty to preserve the advocate's fees.

59. The Respondent and the personal representatives of the deceased have not hinted in their pleadings as to what they think is payable to Mr. Mburu. Mr. Mburu has averred at paragraph 21 of his supplementary affidavit sworn on 8th November, 2019 that his fees together with interest is Kshs. 252,392,618.48. This figure may be discomfiting but there is no alternative figure put forward by the other side.

60. As already stated, the amount due to Mr. Mburu cannot be determined in this matter. One of the prayers in his application is for an order directing the Respondent to deposit Kshs. 202,715,839.50 plus interest in court. Mr. Mburu has averred that the total amount due including interest is Kshs. 252,392,618.48. Although the fees payable to Mr. Mburu has not been determined, it will not prejudice any of the parties if the amount he has indicated is due to him is preserved. Depositing the money in court will ensure that the same will be available for disbursement once the issue of the amount owing to Mr. Mburu is finally settled. Whatever will remain will be released to the personal representatives of the estate of the deceased.

61. In summary therefore, I allow Mr. Mburu's application dated 9th May, 2019 and amended on 2nd July, 2019 by making him an Interested Party in this petition. An order is also issued directing the Respondent to deposit in court on priority to any other payment the sum of Kshs. 252,392,618.48. The money deposited in court will be used to pay Mr. Mburu's fees once the issue of the exact amount due to him is addressed. Upon the deposit of the said amount, the Respondent is at liberty to disburse the balance of the decretal amount as per the instructions of the personal representatives of the estate of the deceased. For avoidance of doubt, no other prayer is allowed in Mr. Mburu's application.

62. As for the application dated 10th June, 2019 filed by the personal representatives of the estate of the deceased, I allow the same so that they are substituted for the deceased in the petition.

63. Considering that both applications have succeeded, I direct the parties to meet their own costs in respect of the applications.

Dated, signed and delivered at Nairobi this 6th day of January, 2020.

W. Korir,

Judge of the High Court