



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 266 OF 2011

1. **BEN NJOROGE MUCHUNU 1ST PLAINTIFF**
2. **SIMON KIMANI MUCHUNU.....2ND PLAINTIFF**
3. **STEVE NJDUNGU MUCHUNU.....3RD PLAINTIFF**

VERSUS

PHARES MUCHUNU.....RESPONDENT

AND

**MARGARET WANGARE MBURU (on her own and as the next friend of
HARUN MBURU).....1STINTERESTED PARTY/APPLICANT**
PENINAH WANGUI.....2ND INTERESTED PARTY/APPLICANT

RULING

1. By a motion dated 24th September 2015, the Interested Parties sought an order that Munene & Associates and B.W. Mathenge and Company Advocates be ordered to deposit Kshs.3,930,000/= in court and in the alternative furnish a bank statement reflecting the same; and a further order that the application dated 24th July 2015 be struck out for having been filed by a stranger, as the advocate on record for the applicant was Munene & Associates and not, Munene Chege and Company Advocates now on record.

2. The application is based on grounds that all parties to this suit have by a consent dated 10th March 2015 and adopted by the court on the 20th July 2015 settled issues in dispute. It is further stated that by an order issued on the 15th January 2015, all the parties Advocates were restrained from transacting with Kshs. 5,000,000/= deposited in joint account in the names of Munene and Associates and B.W. Mathenge and Company Advocates.

It is alleged that despite the restraining orders, the said monies have been squandered by the two firms of Advocates in total breach of the court orders.

3. Margaret Wangare Mburu, the 1st Interested Party in her affidavit sworn on the 24th September 2015 in support of the application depones that her advocates have failed to supply her with a statement of the account. It is her further deposition that all the parties to this dispute have

agreed on settlement leading to the filing of a consent order dated the 10th March 2015.

4. In response to the application the Defendant, Phares Muchunu Njoroge who on the 3rd November 2015 opted to act in person by a Notice of Intention to act in person filed on even date, and before represented by B.W. Mathenge and Company Advocates filed grounds of opposition that the firm of M/s Gordon Ogola, Kipkoech & Company Advocates are improperly on record. This position was also taken by Munene Chege and Company Advocates for the plaintiffs and sought that the application be struck out.

5. On the 18th November 2015, the firm of Geoffrey Otieno and Company Advocates filed a Notice of Change of Advocates to act for the Defendant in place of B.W Mathenge and Company Advocates.

6. To determine whether the interested parties Advocates were competent to file the application under review dated the 24th September 2015, I have perused the court proceedings.

The Originating Summons hereof was taken out, on behalf of the plaintiffs by Munene and Associates on the 30th September 2011. B.W. Mathenge and Company Advocates appeared for the Defendant – upto the 18th November 2015 when a notice to act in person was filed by the Defendant.

On the 15th February 2013 the Interested Parties filed a Notice of Appointment of new Advocates, Gordon Ogola and Associates. On the 10th July 2014 a Notice of Change of Advocates for the plaintiff was filed by Munene Chege and Company Advocates.

7. On the 30th March 2015, a consent letter dated 10th March 2015 was filed and adopted by the court, to the effect that the plaintiffs are to be paid Kshs.3,000,000/= less their advocates costs and the interested party be paid a sum of Kshs.2,200,000/= which is inclusive of costs of the interested party's advocates fees while Kshs,50,000/= was to be paid to B.W. Mathenge Advocates being fees. Out of the sum of Kshs.5,000,000/= ordered to be deposited in the joint account of the Advocates, a sum of Kshs.1,070,000/= is indicated to have been paid out to the parties leaving a sum of Kshs.3,930,000/= in the account.

8. The application under review and dated 24th September 2015 was filed by Gordon Ogola, Kipkoech and Company Advocates. This firm of Advocates come on record for the applicants on the 15th September 2015.

Order 9 Rule 5 and 6 of the Civil Procedure Rules provides that a party is at liberty to change his advocate without an order of the court but upon filing the said Notice of Change of Advocates, and upon service of the notice upon any other party in the matter.

9. The court upon consideration of the preliminary objection filed by the defendant and the plaintiffs, finds that the firm of Gordon Ogola & Kipkoech and Company Advocate were properly on record at the time of filing of the application dated 24th September 2015. The preliminary objection is therefore without merit and is dismissed. The sequence of change of Advocates by all the parties is stated above. The application dated 24th July 2015 is therefore dismissed with costs.

10. On the substantive prayer in the application dated 24th September 2015,

It is noted that by the consent order dated 10th March 2015 and referred to above, a settlement was reached on the distribution of the monies held in the plaintiffs and defendants advocates' joint names. The said consent letter was adopted as an order of the court and it is in force as it has not been set aside. To safeguard the integrity of the court, it is important that court orders are obeyed unless sufficient cause is shown by the parties upon application why the said orders cannot be

obeyed or enforced.

The consent order as filed provides for payment of the interested party Advocates costs and is included in the sum of Kshs.2,200,000/= while the firm of B.W. Mathenge was to be paid Kshs.50,000/= being balance of its fees. The plaintiffs were to be paid Kshs.3,000,000/= less costs of the Advocates, Munene Chege and Company Advocates.

It is submitted that the defendants Advocate-client bill of Costs is filed and pending taxation.

11. In my view, the pendency of taxation of the plaintiffs Advocates bill of costs cannot bar the other parties from being paid their respective shares as stated in the agreement. It is true that the firm of B.W. Mathenge and Company Advocates is no longer on record for the Defendant and so is the firm of Munene & Associates for the plaintiffs. The Advocates now representing the respective parties are properly on record and any order that the court may issue in respect of the monies held in the joint account of the former Advocates will bind the advocates now on record. It cannot be that the monies subject of dispute in the names of the former Advocates ought to be ordered released to them when they no longer represent the parties.

12. All parties agree that there is no dispute on the distribution of the monies held by the two legal firms save that the plaintiff advocates fees is yet to be certified by the taxing master. Once so certified, the sum shall be deducted from the Kshs.3,000,000/= as stated in the consent order.

It would serve no purpose for the advocates to keep holding the monies payable to their clients, the defendant and the third parties.

The applicant (3rd parties) seeks that the firm of Munene and Associates and B.W. Mathenge and Company Advocates be ordered to deposit Kshs.3,930,000/= in court or furnish a bank statement reflecting the said sum.

13. For transparency purposes, the furnishing of a certified Bank statement will indeed inform and confirm that the said monies have not been misappropriated or squandered by the two firms of Advocates as alleged. The said monies were so held by the Advocates for and on behalf of their respective clients.

14. The court finds that the application is merited in its prayer No. 4.

An order is issued that the firm of Munene Chege and Company Advocates for the plaintiffs and Geoffrey Otieno and Company Advocates for the Defendant do within ten(10) days of this order furnish to this court a certified Bank statement confirming that the said sum of Kshs.3,930,000/= is securely held in the said joint account.

It is further ordered and directed that the Bank to generate and furnish the said firms of Advocates with an up to-date certified bank statement in respect of the monies deposited pursuant to the court order dated the 7th November 2013.

I have perused the court file and I see no details of the account or bank where the sum of Kshs.5,000,000/= was deposited pursuant to the court order issued on the 7th November, 2013. Notwithstanding, this court is satisfied that **Prayer 3 and 4** of the application dated the 24th September 2016 are merited. They are allowed.

15. This case shall be mentioned in this court on the 26th May 2016.

16. Costs of the application shall be costs in the cause.

Dated, signed and delivered in open court this 12th day of May 2016.

JANET MULWA

JUDGE