

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
FAMILY DIVISION
MISC APPLICATION NO. 6 OF 2017

JOSEPH KAMAU WAITHIRA.....
APPLICANT

-VERSUS-

CECILIA MUTINDA RUPIA

PETER MUGO RUBIA.....
RESPONDENTS

RULING

1. The applicant herein moved the court by way of Notice of Motion dated 29th July, 2025. The application is brought under Order 10 rule 11 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act and supported by the supporting affidavit of Joseph Kamau Waithira the Applicant herein. He seeks for orders:

a) Spent.

b) That this court's orders dated 17th July 2025 be set aside and appropriate directions issued.

2. The application was premised on the following grounds:

- a) The Deceased died on 3rd June 2015.
- b) Succession Cause No. 19 of 2016 was filed in Kithimani Resident Magistrate's Court on 26th April 2016 and was transferred by this court to the Chief Magistrate's Court Machakos on 13th March 2018.
- c) The Application for transfer was made based on the Ruling of the Resident Magistrate then at Kithimani to the effect that the court's jurisdiction was Kenya Shillings Eight Million (Kshs.8,000,000/=) only.

- d) This matter has been substantially heard and is nearing conclusion as only one witness out of eight witnesses is remaining.
 - e) This court's orders are unfair and were obtained on the basis of misinterpretation and material non-disclosure.
 - f) The Application to this court was made too late in the day.
3. The application is opposed through the replying affidavit sworn on by Cecilia Mutinda Rupia and Peter Mugo Rupia. The Respondents depone that the Applicant has come before this Court with unclean hands by stating that he filed Succession Cause No. 19 of 2016 in Kithimani and has equally failed to support this allegation with any proof of the substantive pleadings, yet the unequivocal truth is that this matter was initially instituted in Kithimani Law Courts as a Citation Cause before the Principal Magistrate Court being Kithimani PMCC Citation Cause No. 19 of 2016 as per the annexure marked "CP-J" to the replying affidavit.
 4. The Respondents argue that they are strangers to the allegation that prior to the transfer of the Citation Cause from Kithimani to Machakos, there was a Ruling stating that the court at Kithimani lacked jurisdiction yet the Applicant has failed to annex the purported Ruling.
 5. That in addition to the above and contrary to the Applicant's assertion that the court in Kithimani only had a pecuniary jurisdiction of up to Kshs.8,000,000.00. the Respondents state that they are well advised by their advocates on record, which advise they cherish to be true, that the Principal Magistrate's Court in Kithimani was already seized with the requisite jurisdiction to hear and determine the Citation Cause. pursuant to Section of the Magistrates' Courts Act, which law had already commenced on 2nd January 2016. Therefore this court ought not to reach wrong conclusions of law in the face of clear statutory provisions and therefore this Honorable Court vide its

Orders dated 18th July 2025 properly exercised its discretion and deemed it necessary to correct the apparent error on record by setting aside its initial ex parte Ruling dated 13th March 2018 effecting the transfer of Kithimani PMCC' Citation Cause No. 19 of 2016 to Machakos, on account of misleading facts regarding the court's pecuniary jurisdiction.

6. The Respondents also state that they wish to bring to the court's attention that the proceedings asserted by the Applicant are those in Machakos CMC Succession Cause No. 184 of 2018 which suit was erroneously converted from an unlawfully transferred Citation Cause to a substantive intestate Succession Cause.
7. The Respondents further state that they have challenged the defective proceedings on grounds that the said suit is premised on defective pleadings and also offends the rule on sub judice, considering there is a proper existing substantive Succession Cause filed before court with the competent jurisdiction in Kithimani. In the circumstances, neither the Applicant nor any other beneficiaries will be prejudiced on account of this Court's Orders dated 17th July 2015 and 18th July 2025 as there is a proper substantive Succession Cause which the Applicant is well aware of, being Kithimani PMCC Succession Cause No. E056 OF 2020; In the Matter of the Estate of Rubia Macharia alias James Rupia Macharia (Deceased), which matter is actively ongoing, and the Applicant will have his day in court and will have an opportunity to ventilate his case, if any, before the said court.
8. Lastly, the Respondents contend that at all material times relevant to this suit and to the best of their knowledge, even as at the time of filing their application dated 16th July 2025, the Applicant's advocates on record has all along been J.T Nzioki & Co. Advocates and the firm that has now filed the instant application. Mutua Mboya & Nzissi Co. Advocates is not properly on record.

9. The Respondents maintain that this court's orders dated 17th July 2025 and issued on 18th July 2025 are self explanatory and were made to correct an error apparent on record and thus lawful and proper. The Respondents state that they do not seek, whether by evasion or otherwise, to obstruct or delay the course of justice, rather they wish that, in the interest of fairness and natural justice, this court be well guided and uphold the Civil Procedure Rules and the overriding Objective Principle. The Respondents urged the court to find the application lacks merit and have it dismissed with costs.
10. The application was canvassed through written submissions and both parties complied and filed their respective submissions. The Applicant's submissions are dated 16th October 2025 filed by Mutua Mboya & Nzissi Advocates whilst the Respondent's submissions are dated 27th October 2025 filed by Andrew N. Makundi & Co. Advocates.

Analysis and determination

11. I have perused the pleadings and proceedings on record. I have also **carefully considered the instant application, supporting affidavit**, replying affidavit, the filed written submissions and the ruling being sought to be set aside. The two pertinent issues that stand out for my are;

(i) whether the application dated 29th July 2025 which basically seeks the setting aside of this court's orders dated 17th July 2025 should be allowed; and

(ii) whether the firm of Mutua Mboya & Nzissi Advocates is properly on record for the Applicant.

(i) whether the application dated 29th July 2025 which basically seeks the setting aside of this court's orders dated 17th July 2025 should be allowed

12. On the first issue, on 17th July 2025, this court issued orders cancelling the transfer of Kithimani PMCC Succession Cause No. 19 of 2016 to Machakos Chief Magistrates Court for hearing and determination that had been ordered by Hon. Justice D. K. Kemei on 13th March 2018. The reason for the transfer was that the deceased's estate is valued at Kshs.10,000,000/= which sum was above the pecuniary jurisdiction of Kithimani Principal Magistrate's court which was then Kshs.8,000,000/=. From the ruling dated 13th March 2018, the Judge noted that the Applicant had not indicated whether or not the Respondent had been served with the said application. However, that notwithstanding, he found that he had power on his own motion without any notice being served to parties to transfer the suit. The Applicant had already disclosed that Kithimani court seemed not to have the requisite jurisdiction to try the matter since the value of the estate was estimated to be over Kshs.10 million and that the said court's pecuniary jurisdiction had been disclosed to be Kshs.8 million.
13. The Respondents submit that the Applicant is not a beneficiary to the deceased's estate pursuant to the provisions of Section 66 of the Law of Succession Act which provides:-
- “When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-*
- (a) Surviving spouse or spouses, with or without association of other beneficiaries;*
 - (b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
 - (c) The Public Trustee; and*

(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

14. It is the Respondents’ argument that the Applicant being a stranger to the estate could not have been in a position to know the estimate value of the deceased’s estate and thus he misled the Judge by indicating that the Principal Magistrate's Court in Kithimani had no pecuniary jurisdiction to hear and determine the suit as indicated above whereas the said court was already seized with the requisite jurisdiction to hear and the Citation Cause pursuant to Section 7(1) (c) of the Magistrates' Courts Act 2015, which law had already commenced on 2nd January 2016. For avoidance of doubt, Section 7(1) (c) of the Magistrates' Courts Act expressly provides as follows;

7. Civil jurisdiction of a magistrate’s court

(l) A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-

(a) twenty million shillings, where the court is presided over by a chief magistrate;

(b) fifteen million shillings where the court is presided over by a senior principal magistrate;

(c) ten million shillings, where the court is presided over by a principal magistrate

(d)

(e)

15. I have looked at the Magistrate’s Court Act 2015 which was Published in **Kenya Gazette Vol. CXVII—No. 145 on 24th December 2015, assented to on 15th December 2015 and Commenced on 2nd January 2016.** I have also read the above cited provisions of the Act on the pecuniary jurisdiction of

the Magistrate's Court. The Kithimani PMCC Succession Cause No. 19 of 2016 which was transferred to Machakos Chief Magistrates Court was filed in court on 26th April 2016 a few months after the commencement of the Act herein and therefore it could not have been correct to say that the Kithimani Principal Magistrate lacked the pecuniary jurisdiction to hear the Citation Cause as alleged by the Applicant who is a total stranger to the estate as stated by the Respondents.

16. It is my considered position that the Citation Cause was erroneously transferred to Machakos Chief Magistrate's Court in the first instance and therefore, this court was right to correct that error and have the transfer cancelled and the matter returned to Kithimani Law Courts vide the orders of 17th July 2025. On the above elaboration, I see no reason to set aside the orders of 17th July 2025.
17. Under Rule 22 (1) of the Probate and Administration Rules, a Citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.
18. The above rule is clear that Citation may issue at the instance of any person who would himself be entitled to a grant in the event of the Citee renouncing his/her right thereto.
19. The persons entitled to grant are specifically spelled out under Section 66 of the Law of Succession Act.

When a party appears in court in response to a Citation to accept or refuse letters of administration, he/she has two options. One is to refuse and therefore the Citor may seize the opportunity to file a Succession Cause in respect of the named deceased person. The second option is to file a Succession Cause and the file in respect of the citation is closed.

20. In the case of **Josiah Muli Wambua (Deceased), Nairobi Succession Cause No. 2557 of 2012 [2014] eKLR**, W. Musyoka, J stated the following at paragraph 9 of his ruling: -

“In intestacy, citation issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf. The citor should not be a person who has himself already applied for the grant, for the citor should only apply for grant after the citee fails to so apply”.

21. In **Re the Estate of Josiah Muli Wambua - Deceased [2014] eKLR**, court held that:-

“Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf.”

22. A cursory perusal of the proceedings reveals that what was initially filed in Kithimani PMCC and transferred to Machakos Chief Magistrate’s Court was a Citation Cause No. 19 of 2016 relating to the estate of JAMES RUPIA MACHARIA (Deceased). I have not come across a mention on what happened to the Citation Cause thereafter and the Applicant has not at all informed this court what happened to the said Citation. There is no indication that the Respondents were served with the Citation.
23. As far as the law is concerned, there is a Succession Cause No. E056 of 2020 which has been filed in respect of the estate of Rubia Macharia alias James Rupia Macharia alias James Rubia Machara (Deceased) by Cecilia Mutinda Rupia and Peter Mugo Rupia (the deceased’s widow and son respectively) and which is actively ongoing and was last in court on 13th November 2025.
24. It is therefore irregular for this application to be brought in this file.

(ii) whether the firm of Mutua Mboya & Nzissi Advocates is properly on record for the Applicant.

25. On the second issue whether the firm of Mutua Mboya & Nzissi Advocates is properly on record for the Applicant. This issue was raised at paragraph 10 of the Respondents' replying affidavit. I must point out that have thoroughly perused the file record as well as the CTS on this matter. The Applicant's advocates on record are J. T. Nzioki & Co. Advocates. I have not seen either a Notice of Appointment of Advocates or a Notice of Change of Advocates filed by the firm of Mutua Mboya & Nzissi Advocates who seem to have filed the instant application and submissions. The said firm of Mutua Mboya & Nzissi Advocates has neither filed a response nor submitted on this issue.
26. I find that Order 9 Rule 5 & 7 of the Civil Procedure Rules, a party is at liberty to change its advocates, the former advocate shall be considered as the advocate on record unless a notice of change of advocate is filed.
27. The Present application was filed by the Mutua Mboya & Nzissa Advocates without filing any notice of change of advocates and in total ignorance that the firm on record for the respondent/applicant is J.T. Nzioka & Co. Advocates.
28. See **Adblu East Africa Ltd & 2 Others v Jean Farhat & 2 Others [2020] eKLR** and **John Kipkoech Lelei v Stephen Kipchirchir Meli & 3 Others [2022] eKLR**, where the court dismissed pleadings filed by an advocate not properly on record.
29. In the case of **Lalji Bhimji Shangani Builders & Contractors -vs- City Council of Nairobi [2012] eKLR** the Court held as follows:
- "A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure*

the court may well be entitled to conclude that failure to comply therewith was deliberate.”

30. As per the provision of Order 9 Rule 5 & 7 of the Civil Procedure Rules, the correct procedure that was to be followed in the present case, was that counsel coming on record ought to have filed a notice of change to come on record, then file and serve the notice of change of Advocates before filing the application or applying to set aside the orders of the Court.

31. In my opinion, I stand guided by Order 9 rule 5 of the Civil Procedure Rules, 2010 which provides for change of advocates as follows:

“A Party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in court in which such cause or matter is proceedings and served in accordance with rule 5, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

32. What I gather from the above provision is that unless and until a notice of change of advocate is filed and duly served, an advocate on record for a party remains the advocate for that party subject to removal from record at the instance of another party under rule 12 of the same Order or withdrawal of the advocate under rule 13 of the same Order.

33. In addition, Order 9 rule 7 of the Civil Procedure Rules states that:-

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

34. Although the Respondent has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 5 & 7 of the Civil Procedure Rules is mandatory and thus cannot be termed as a mere technicality.
35. Having found that this procedure was not followed by M/s Mutua Mboya & Nzissi Advocates, the said firm is not properly on record, and has no legal standing to move the court on behalf of the Applicant herein.
36. In view of the foregoing, I find the application to be misplaced, incompetent and bad in law.
37. The upshot is that the application dated 29th July 2025 is dismissed with costs to the Respondents.
38. This miscellaneous file is ordered closed.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 27TH JANUARY 2026

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 27TH JANUARY 2026

In the presence of:-