



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC MISC. APP. NO. 14 OF 2012

**IN THE MATTER OF: A PETITION FOR THE APPOINTMENT OF A GUARDIAN AND
MANAGER FOR ADI MWALIMU**

ADI MWAIM AND HIS ESTATE

**IN THE MATTER OF: ADI MWALIMI ADI MWALIM (A PERSON SUFFERING FROM
MENTAL DISORDER)**

IN THE MATTER OF: THE MENTAL HEALTH ACT CAP. 248

BETWEEN

GAMARI ABDALLA DIFINI.....PETITIONER

=VERSUS=

ADI MWALIMU ADI MWALIMU.....RESPONDENT

AND

BAKARI MOHAMED ABDURAHMAN.....INTERESTED PARTY

RULING

1. Before me is the Application by the Interested Party dated 18th August 2015 seeking for the following reliefs:

(a) There be a stay of Execution of the Judgment and Order of this Court passed on the 22nd May 2015 pending the hearing and determination of this Application interparties.

(b) That the proceedings of this court on 27th October 2014, 19th January 2015 and 18th March 2015 and the consequential Judgment and Order of this Court passed on 22nd May 2015 be set aside and the case be heard De Novo and the Interested Part be allowed to testify in this Petition and bring his witness.

2. The Application is premised on the ground that the Petition was heard in the absence of the Interested Party; that the then advocate of the Interested Party did not inform him of the dates for

- hearing and that the firm of A.B. Olaba whom the Interested Party had instructed to act for him did not inform him that they had ceased to act for him.
3. According to the Interested Party, he did not instruct the firm of Katsoleh & Co. Advocates or an advocate known as Mr. Obaga to act for him and that as a result, the Interested Party was not represented by an advocate of his choice.
 4. In her Replying Affidavit, the Petitioner has deponed that no application for leave was ever filed after the entry of Judgment by the current advocate for the Applicant.
 5. The Interested Party deponed that the suggestion that Mr. Obaga took over the conduct of the case from Mr. Olaba without the consent of the Interested Party is a grave issue and that the two advocates should be examined on oath on those allegations.
 6. I have considered the brief submissions together with the authorities that were filed by the advocates on record.
 7. The first issue for determination is whether the firm of J. K. Mwarandu & co. Advocates is properly on record.
 8. The record shows that when the Interested Party was served with the Petition and other court process, he instructed the firm of Okuthe & Co. Advocates who filed a Notice of Appointment of Advocates on 13th February 2013.
 9. However, on 13th March 2013, the firm of M/S A. B. Olaba Esq, Advocate filed a Notice of Change of Advocates, in which they indicated that they had received instructions from the Interested Party to act for him instead of Okuthe & Co. Advocates.
 10. The firm of A.B.Olaba Esq then filed the "Answer to Petition" on behalf of the Interested Party on 7th October 2013.
 11. On 27th October 2014, the firm of Katsoleh & Co. Advocates filed a Notice of Change of Advocates in which they indicated that the Interested Party had appointed them to act for him instead of the firm of Kiarie Kariuki Advocates.
 12. The said Notice of Change of Advocates was filed after Mr. Olaba informed the court that he had not received instructions from his client, the Interested Party.
 13. Although the Notice of Change of Advocates by the firm of Katsoleh states that they were taking over from the firm of Kiarie Kariuki advocates, it is instructive to note that the said Notice of Change of Advocate was copied to Mr. Olaba.
 14. Indeed, Mr. Olaba has never complained about the said change.
 15. The important thing about the Notice of Change that was filed by the firm of Katsoleh is that the said firm was taking over the matter on behalf of the Interested Party. It is really insignificant that the notice indicated that they were taking over the matter from the firm of Kiarie Kariuki instead of Mr. Olaba.
 16. It is not in dispute that the Petition proceeded for hearing in the presence of an advocate from the firm of Katsoleh & Company Advocates and Judgment was delivered on 22nd May, 2015.
 17. A consent between the firm of J. K. Mwarandu & Company Advocates & Katsoleh & Company Advocates was then filed on 18th August 2015 allowing the firm of J. K. Mwarandu to take over the matter.
 18. Although the said consent was not formally adopted as an order of the court, the same satisfies the provisions of Order 9 Rule 9 of the Civil Procedure Rules which requires that when there is a change of advocates after Judgment has been passed, such a change shall not be effected without an order of the court either upon an application or a consent filed between the outgoing advocate and the proposed incoming advocate.
 19. The fact that the said consent was not adopted as an order of the court does not invalidate the consent.
 20. In any event, as was held by **Aburili J in Jamnades Kaked Vs Lucus Oluoch (2015) eKLR** and by this court in **Abdalla Salim Omar Vs Charo Kazungu Chome & Others, Malindi ELC Case No. 2 of 2011**, *Order 9 Rule 9 was intended to protect the interest of an advocate who had represented a party until after Judgment and there is no prejudice in endorsing a consent filed by the incoming and outgoing advocate.*
 21. Having filed the consent on 18th August 2015, I find and hold that the firm of J.M. Mwarandu & Co. Advocates are properly on record for the Interested Party.
 22. The Interested Party's case is that he never instructed Mr. Obaga, an advocate working in the firm

- of Katsoleh & Co. Advocates to act for him when the Petition came up for hearing.
23. According to the Interested Party, Mr. Olaba advocate never informed him that he was withdrawing from acting for him.
 24. However, the Interested Party has not informed this court the efforts he made to find out the position of the Petition since the year 2012 when it was filed.
 25. Indeed, there is no evidence of the kind of instructions that the Petitioner gave to his previous advocate in respect to the Petition with a view of showing that it is the said advocate who declined to adequately represent him.
 26. Considering that there have been four advocates on record for the Interested Party, I am of the view that the Interested Party's intention is to delay the finalization of this matter by instructing different advocates at every stage.
 27. Having declined to give Mr. Olaba full instructions, I am convinced that the Interested Party must have instructed the firm of Katsoleh & Company Advocates but deliberately failed to attend court when the Petition came up for hearing.
 28. Having not appeared in court even on a single day after he was served with the Petition, and in view of the fact that the two advocates he claims did not either represent him adequately or have his instructions, I find and hold that the Application by the Intended Interested Party dated 18th August 2015 is unmeritorious.
 29. For those reasons, I dismiss the Application dated 18th August 2015 with costs.

Dated and delivered in Malindi this **19th** day of **February**, 2016.

O. A. Angote

Judge