



REPUBLIC OF KENYA



**Gatuthu & 2 others v Mwariri & 3 others (Civil Appeal (Application)
E372 of 2020) [2023] KECA 1260 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1260 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E372 OF 2020
PM GACHOKA, JA
OCTOBER 13, 2023**

BETWEEN

**JOSEPH KARANJA GATUTHU 1ST APPELLANT
PETER NJUGUNA GATUTHU 2ND APPELLANT
SAMUEL NJUGUNA GATUTHU 3RD APPELLANT**

AND

**JOTHAM NJAMBI MWARIRI 1ST RESPONDENT
HANNAH NJERI GATUTHU 2ND RESPONDENT
MONICAH GATUTHU 3RD RESPONDENT
GATUTHU NJUGUNA ESTATES LIMITED 4TH RESPONDENT**

*(An application to cease acting dated 16th May 2023
pursuant to Rule 1, 23(2) of the Court of Appeal Rules, 2022)*

RULING

1. Before me is a notice of motion dated May 16, 2023 brought under rule 1, 23(2) of the [Court of Appeal Rules, 2022](#). The firm on record for the appellant, Njuguna & Partners Advocates seeks leave to cease acting for the appellant. In support of the application, Abel Githiri Kimani in an affidavit sworn on May 10, 2023 states that:
 - a. Sometime in 2020, the firm was retained by the Appellants with instructions to Appeal the judgment of the Honourable Lady Justice L. Gacheru dated June 25, 2020 in the Environment and Land Court of Kenya at Thika ELC Case No. 378 of 2017.



- b. The firm filed the Record of Appeal on October 9, 2020. Since then, the firm has been responsible for the general conduct of the matter on behalf of the Appellants.
 - c. The Appellants have refused and/or to give proper and sufficient instructions to the firm to date to enable it effectively prosecute this matter.
 - d. The firm as on numerous occasions tried to contact the Appellants to request instructions, but he has failed to do so to enable us to prosecute the suit effectively.
 - e. The firm is thus constrained to conduct this matter further in the circumstances.
 - f. The firm is now incapacitated in as far as prosecuting this suit and it is thus only just and fair that the firm be granted leave to cease from acting for the Appellants.
2. It is noteworthy that there is an affidavit sworn by a process server, Isaack Kabera Chege sworn on 24.5.23 confirming service on the appellants through their last email addresses. In light of the above, I am satisfied that the respondents had notice of the application but elected not to contest it. Lack of contest notwithstanding, I am enjoined in law to consider the application on its own merits which I hereby do.
 3. The applicants have filed submissions dated September 14, 2023. Their position is that the appellants have failed, refused and/ or adequately neglected to adequately instruct the firm to enable it effectively prosecute the matter. They throw their weight behind rule 23(2) of the *Court of Appeal Rules* and the case of *Mauricio Marino & another vs. Daniel Benhard and 3 others* (2021) eKLR.
 4. I have considered the application and the and submissions. The approach I take in disposing of the matter is the same as that taken by this court in *Kenya Tea Agency & Another vs Samuel W'njuguna & 115 others* [2021] eKLR (Nambuye JA) in which the learned Judge expressed herself therein as follows:

“The Rule is permissive. All that an advocate needs to do under the above Rule to earn the court’s intervention is for such an advocate to express the desire to cease acting and then cause the desire to cease acting to be brought to the attention of his client.”
 5. I have considered the threshold set in the above case law in light of the uncontested position herein. Where an advocate has expressed an intention to cease acting and more so on the ground of lack of instructions, such an advocate should be set free to allow the instructing client to act for themselves or appoint another advocate.
 6. In the result, I make orders as follows:
 - a. Prayer (1) of the application dated May 16, 2023 be and is hereby allowed as prayed.
 - b. There will be no orders as to costs as the application was not defended.
 - c. The applicant shall serve this order on the appellants within the next 14 days through the appellants’ last known postal and email address.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OCTOBER, 2023.

M. GACHOKA CIARB, FCIARB



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

