



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CIVIL APPEAL APPLI 4 OF 2006

JACKSON(MUGO) WANDERI.....1ST RESPONDENT/1ST APPELLANT
WILLIAM NGARE.....2ND RESPONDENT/2ND APPELLANT
DAVID MIANO.....3RD RESPONDENT/3RD APPELLANT
MARGARET WAITHERA.....4TH RESPONDENT/4TH APPELLANT
WINNIE ROSE WANGU.....5TH RESPONDENT/5TH APPELLANT
EPHRAIM GIKANDI.....6TH RESPONDENT/ 6TH APPELLANT
JANE GATHIGIA.....7TH RESPONDENT/7TH APPELLANT
AND
THE PUBLIC TRUSTEE.....1ST RESPONDENT
MARGARET WANGUI MURIUKI.....2ND RESPONDENT
PETER WANDERI KAGUNYA.....3RD RESPONDENT
BEATRICE WAITHERA.....4TH RESPONDENT
MARY NYAWIRA.....APPLICANT/5TH RESPONDENT
ELIZABETH WAITHENYA MURIUKI.....6TH RESPONDENT
BENSON IRUNGU KAGUNYA.....7TH RESPONDENT
JOHN MIANO KAGUNYA.....8TH RESPONDENT
DAVID GITHUI KAGUNYA.....9TH RESPONDENT
MARGARET WAITHERA.....10TH RESPONDENT

(Being an application to strike out a record of appeal from the ruling and order of the

High court of Kenya at Nairobi (Githinji, J) dated 29th April, 2004

in

RULING OF THE COURT

This appeal concerns the estate of one Stanley Muriuki Wanderi, the deceased, who upon death was survived by three wives and several children. Patrick John Kamau, the Assistant Public Trustee of the Republic of Kenya (as he then was), applied for a grant of letters of administration intestate ad colligenda bona, for purposes of collecting and preserving the estate of the deceased pending further representation to be granted. Apparently the intended beneficiaries of the estate would not agree on who would make the application. The three wives were Veronica Wachuka Muriuki, who was described as the first wife; Margaret Wambui Muriuki, the second wife, and Elizabeth Wathenya Muriuki, the third wife.

The application we are seised of is dated 31st December, 2008, and was filed in this Court on 2nd January, 2009 in Civil Appeal No. 4 of 2006. In the application, expressed to be brought under among other provisions, **rule 80** of the Court of Appeal Rules, the applicant seeks an order striking out the appeal for the simple reason that it is incompetent as she was neither served with the notice of appeal which originated this appeal nor the supplementary memorandum and supplementary record of appeal. Mr Gatonye for Jackson Mugo Wanderi, William Ngare, David Miano, Winnie Rose Wangu, Ephraim Gikandi, and Jane Gathigia, the appellants as respondents in the application, conceded that indeed the applicant was not personally served with a notice of appeal, the supplementary memorandum of appeal, and the supplementary record of appeal. His submission was that those documents as also all other documents were served upon Mr. Kimani Muhoro, advocate, who had been appearing for her in proceedings before the superior court. The issue then which dominated submissions before us was whether, on the facts and circumstances of this case, Mr. Kimani Muhoro was the proper person to be served.

A careful perusal of the record of appeal shows that on or about 4th January 1991, Margaret Wangari Muriuki and Elizabeth Wathenya Muriuki as widows of the deceased retained Messrs Khaminwa and Khaminwa & Co. Advocates to represent them in Nairobi High Court Administration cause no 14 of 1990. On 27th June, 1991 the said firm of advocates entered appearance to a citation dated 6th June 1991 on behalf of the applicant and three others who included Margaret Wambui Muriuki. The said firm also filed objection to making a grant in favour of Patrick John Kamau. However, by about 11th March 1996, Messrs Khaminwa & Khaminwa advocates appear to have ceased acting for all the other parties and was only on record for the applicant. By a chamber summons of that date the firm applied for an order that Kshs. 275,000 be paid to it as legal fees, from the estate of the deceased upon distribution of the said estate. There were several other applications in which the firm appeared for the applicant. Mrs Khaminwa, a partner in that firm (as she then was) was handling the matter on behalf of the applicant. At times Dr. Khaminwa would appear but those occasions were rare. Then on 9th May 1996, Mr Muhoro came into the picture as holding Mrs. Khaminwa's brief for the applicant. He is recorded as having addressed the court as follows:-

“petition was filed by the Public Trustee. Mrs Khaminwa has a busy diary in Mombasa. She wants to file a reply to the petition. She requests that matter be heard on 2nd or 5th July 1996. She is personally handling the matter.”

From that day on apart from 28th May 1996 when the record shows that Mrs. Khaminwa appeared for the applicant with Mr. Muhoro, the latter was the advocate appearing for her. At times he would ask another advocate to hold his brief, and other times he would appear with another counsel. For instance on 5th March 2004 he appeared with Mr. Obel for the applicant. He examined and cross-examined witnesses on her behalf. At the close of the trial written submissions were ordered to be filed. Mr Kimani Muhoro filed submissions on behalf of the applicant and signed the same as:-

“KIMANI MUHORO & COMPANY ADVOCATES

FOR THE 3RD WIDOW ELIZABETH WATHENYA.”

Thereafter he indicated as follows:-

“DRAWN & FILED BY

KIMANI MUHORO & COMPANY

ADVOCATES

EMBASSY HOUSE, 6TH FLOOR

HARAMBEE AVENUE P O BOX 52341

NAIROBI

TO BE SERVED UPON:

1. WAWERU GATONYE & COMPANY ADVOCATES

COTTS HOUSE, 6TH FLOOR

P. O. BOX 55207

NAIROBI

2. KHAMINWA & KHAMINWA & CO. ADVOCATES

P. O. BOX 43758

NAIROBI.”

The document bears the date 12th January, 2004. The superior court later, on 29th April, 2004, delivered its ruling, the subject matter of this appeal. Following that decision a notice of appeal was filed, dated 31st December, 2008. Kimani Muhoro & Co. advocates were served with a copy thereof, and likewise with a record of appeal.

It is the applicant's contention and case that she had not changed her advocate and that Messrs Khaminwa & Khaminwa, have all along been her advocates, and although with her consent Mr. Kimani Muhoro, represented her, he was only holding brief for Mrs. Khaminwa who had relocated to Mombasa.

Mr. Gatonye for all the appellants was of a contrary view. He submitted before us that Mr. Kimani Muhoro having been appointed with the consent of the applicant he became substantively the advocate for the applicant. He filed written submissions in his name on behalf of the applicant and described himself as counsel for the applicant. In his view **rule 76 (2)** of this Court's rules covers the situation. He further submitted that as there is no standard form prescribed for giving notice of change, the written submissions signed by Mr. Muhoro as counsel for the applicant gave sufficient notice of change in legal representation of the applicant. Besides, he said two advocates were appearing for the applicant. As Mr. Muhoro, one of those two advocates, was served it cannot be said that the applicant was not served.

We have carefully gone through the record of appeal. It is quite clear to us that the applicant is not complaining that she was not served with a record of appeal. Her complaint is that she was neither served with the notice of appeal, memorandum of appeal or the supplementary record of appeal. The record of appeal was lodged in court on 16th January, 2006. By dint of the provisions of **rule 87** of the Court of Appeal Rules service of the record of appeal is required to be effected within 7 days after lodging the memorandum of appeal. The memorandum of appeal for this appeal is included in the record.

In the foregoing circumstances can it be said that the applicant had not been served with the record of appeal. Notwithstanding the provisions of **O.III rule 6**, of the Civil Procedure Rules, the applicant having granted authority to her advocate, Mrs. Khaminwa, to delegate her brief, it should not lie in her mouth to complain that Mr. Kimani Muhoro had no authority to accept service on her behalf. Indeed as we stated earlier Mr. Kimani Muhoro, regarded himself as effectively the advocate who had conduct of the applicant's case for and on behalf of the applicant. The court was not notified that Mr. Kimani Muhoro had ceased to handle the applicant's case. The applicant brought Kimani Muhoro into this matter and in our view it will be preposterous to hold that he lacked authority to accept service of the notice of appeal on behalf of the applicant. Mr. Kimani Muhoro did not protest that he was not the advocate for the applicant or that he did not have authority to accept service on behalf of the applicant.

In the foregoing circumstances, and considering the peculiar facts and circumstances of this matter, we decline to allow the motion dated 31st December, 2008, and filed in court on 2nd January, 2009, and accordingly dismiss it with costs.

Dated and delivered at Nairobi this 23rd day of October,2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR