



**Iimbani Dispensary Project v Abdi (Miscellaneous Application  
195 of 2019) [2024] KEELC 5569 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5569 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS APPLICATION 195 OF 2019  
JO MBOYA, J  
JULY 29, 2024  
IN THE MATTER OF THE NATIONAL LAND COMMISSION  
AND  
IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF AN AWARD  
BETWEEN  
IIMBANI DISPENSARY PROJECT ..... APPLICANT  
AND  
ABDURAHAMAN MOHAMED ABDI ..... RESPONDENT  
RULING**

**Introduction and Background:**

1. The Applicant has approached the Court vide Chamber Summons Application dated 2<sup>nd</sup> April 2024; brought pursuant to the provisions of Section 55 of the [Advocates Act](#), Chapter 16 Laws of Kenya; and in respect of which, the Applicant seeks the following reliefs [verbatim]:
  1. That the Law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates be barred from participating in these proceedings as advocates for the Applicant;
  2. That all the pleadings filed by the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates be struck out; and
  3. That costs of the Application be borne by the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates.
2. The instant Application is premised and anchored on various grounds which have been highlighted at the foot thereof. Furthermore, the Application beforehand is supported by the Affidavit of one Julius Musyoka Kilonzo [Deponent] sworn on 2<sup>nd</sup> April 2024.



3. Upon being served with the Application beforehand, the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates proceeded to and filed a Replying Affidavit sworn by Cornelius Akinyi Omondi and Jessee Mburu Ndegwa and which Replying Affidavit is sworn on 14<sup>th</sup> June 2024.
4. For coherence, the Deponents of the said Replying Affidavit have contended inter alia that the Application beforehand is not only misconceived but same is a calculated ploy to deny the Claimants (sic) the fruits of their justice.
5. Suffice it to point out, that the Application beforehand came up for hearing on 19<sup>th</sup> June 2024 whereupon the Advocates for the respective parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently, the Court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
6. Pursuant to and in line with the directions of the Court, the respective advocates proceeded to and indeed filed their written submissions. Instructively, the written submissions under reference form part of the record of the Court.

### **Parties' submissions:**

#### **a. Applicant's Submissions:**

7. The Applicant herein filed written submissions and wherein same [Applicant] has adopted and reiterated the grounds contained in the body of the Application as well as the averments in the Supporting Affidavit. Furthermore, the Applicant has thereafter raised, highlighted and canvassed two [2] salient issues for determination.
8. Firstly, learned counsel for the Applicant has submitted that the Applicant herein only retained and engaged the law firm of M/S Mbuthia Kinyanjui & Co. Advocates to act for same [Applicant]. In this regard, it has been contended that arising from the instructions, the firm of M/s Mbuthia Kinyanjui & Co. Advocates proceeded to and indeed filed the requisite originating pleadings and proceedings vide Chamber Summons Application dated 12<sup>th</sup> November 2019.
9. Additionally, learned counsel for the Applicant has posited that upon the filing of the proceedings herein, its advocate on record prosecuted the suit/proceedings up to and including the conclusion thereof. Consequently, it has been contended that the firm of Mbuthia Kinyanjui & Co. Advocates is the only law firm that is on record for the Applicant and not otherwise.
10. Secondly, learned counsel for the Applicant has submitted that if the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates were to come on record, then same, namely, the law firm of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates, would be obligated to file and serve the requisite Notice of Change of Advocates in accordance with the law.
11. Pertinently, learned counsel for the Applicant has submitted that the said law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates have neither filed nor served any Notices of Change of Advocates in respect of the instant matter and hence same [M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates] cannot file any pleadings and/or take any action in respect of the instant matter.
12. At any rate, it has been contended that to the extent that the said law firms, namely M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates, are not legally on record same cannot therefore apply for execution in respect of the instant matter or at all.



13. Arising from the foregoing, learned counsel for the Applicant has thus submitted that the Application for execution of decree lodged by and on behalf of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates together with the Notice to Show Cause arising therefrom and dated 21<sup>st</sup> February 2024 are a nullity and thus void.
14. In a nutshell, learned counsel for the Applicant has implored the Court to find and hold that the impugned pleadings and documents, together with the court processes arising therefrom ought to be struck out and expunged from the record of the Court.

**b. Submissions on Behalf of M/s P. G Kaingu & Co. Advocates And Wanjiru Thungu & Co. Advocates:**

15. The law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates filed a Replying Affidavit sworn by sworn by Cornelia Akinyi Omondi and Jessee Mburu Ndegwa on 14<sup>th</sup> June 2024; whose contents have been adopted and reiterated in the written submissions.
16. Furthermore, the named advocates have thereafter raised, amplified and canvassed two pertinent issues for consideration by the Court.
17. First and foremost, it has been contended that the Applicant herein duly and lawfully instructed and retained the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates to act for it in respect of the subject matter. In this regard, it has been submitted that arising from the instructions the two [2] law firms duly filed Notices of Appointment of Advocates.
18. Instructively, it was pointed out that the law firm of M/S Wanjiru Thungu & Co. Advocates filed a Notice of Appointment of Advocates dated 12<sup>th</sup> January 2021 whereas the law firm of M/S P. G Kaingu & Co. Advocates is also said to have filed its Notice of Appointment of Advocates for and on behalf of the Applicant.
19. Flowing from the contention that M/S P. G Kaingu & Co. advocates and Wanjiru Thungu & Co. Advocates have duly filed Notices of Appointment in respect of the instant matter, it has been submitted that the said law firms are therefore lawfully on record for the Applicant.
20. Secondly, the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates have further contended that arising from the fact that same are lawfully on record for the Applicant, same [M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates] were at liberty to file the various pleadings and documents which are complained against. Furthermore, it has also been contended that the Application for execution of the decree filed by the said law firms is lawful and legitimate.
21. Further and in addition, the law firm of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates have also posited that the court process, namely the Notice to Show Cause that was issued by the Court and arising from the Application for execution, was and is therefore lawful.
22. In view of the foregoing, the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates have thus contended that the Application beforehand is not only misconceived but same [Application] is also a calculated move to deny (sic) the Applicants of the fruits of [sic] their justice.
23. Consequently and in this regard, the Court has been invited to dismiss the Application.



### **Issues for Determination:**

24. Having reviewed the Application beforehand and the response thereto and upon taking into consideration the written submissions filed by and on behalf of the parties, the following issues crystallise [emerge] and are thus worthy of determination:
- i. Whether the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates are lawfully on record for the Applicant or otherwise; and
  - ii. If the answer to issue one is in the negative, whether the pleadings and documents filed by the said law firms are lawfully on record or otherwise.

### **Analysis and Determination:**

#### **Issue Number One (1)**

##### **i. Whether the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates are lawfully on record for the Applicant or otherwise**

25. It is common ground that the original pleadings namely the Chamber Summons Application dated 12<sup>th</sup> November 2019; and which commenced the subject proceedings was filed by the firm of M/S Mbuthia Kinyanjui & Co. Advocates for and on behalf of the Applicant herein.
26. Furthermore, upon the lodgement of the Originating Chamber Summons, the suit beforehand was prosecuted by the law firm of M/S Mbuthia Kinyanjui & Co. Advocates up to and including the delivery of the Ruling on 7<sup>th</sup> October 2021, when the Application was allowed and judgement was entered in favour of the Applicant herein.
27. To the extent that the original pleadings and documents were filed by the firm of M/S Mbuthia Kinyanjui & Co. Advocates on behalf of the Applicant herein and taking into account that same [M/S Mbuthia Kinyanjui & Co. Advocates] remained on record up to and including the delivery of the final Ruling, there is no gainsaying that if another law firm was retained and/or instructed to take over the conduct of the instant matter, then same [such law firm] would be obliged to file the requisite notice of change of advocates.
28. Suffice it to point out that it is the filing and service of a Notice of Change of Advocates in accordance with the provisions of Order 9 Rules 5 and 6 of the Civil Procedure Rules, 2010, that would automatically vest and/or confer mandate to and/or in favour of the incoming advocate(s).
29. Given the significance of the provisions of Order 9 Rules 5 and 6 of the Civil Procedure Rules, 2010, it is pertinent to reproduce same. Consequently, the said provisions are reproduced as hereunder:

[Order 9, rule 5.] Change of advocate. 5. 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 the court in which such cause or matter is proceeding and served in accordance with rule 6, 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.

[Order 9, rule 6.] Service of notice of change of advocate. 6. The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of



appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).

30. In the absence of a Notice of Change of Advocates duly filed and served in accordance with the prescription of the law, the legal position is to the effect that the previous advocate remains lawfully on record until same seeks and obtains an order for cessation to act in the matter. [See Order 9 Rules of the Civil Procedure Rules, 2010].
31. Other than the foregoing, it is important to underscore that a Notice of Appointment of Advocate can only be filed and lodged where the party instructing the designated advocate, has hitherto, acted in person and is thereafter keen to cease acting in person and to instruct an advocate.
32. For good measure, in such a scenario, the appointed advocate is obligated to file and serve a Notice of Appointment of Advocate in accordance with Order 9 Rule 7 of the Civil Procedure Rules, 2010 subject to service thereof in accordance with Order 9 Rule 6 of the Civil Procedure Rules, 2010.
33. For brevity, it suffices to reproduce the provisions Order 9 Rule 7 of the Civil Procedure Rules, 2010.
34. Same are reproduced as hereunder:

[Order 9, rule 7.] Notice of appointment of advocate. 7. 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.
35. Taking into perspective the provisions supra, it is evident and apparent that an advocate duly instructed in a matter where there has previously been another advocate, cannot purport to file a Notice of Appointment of Advocate. Furthermore, it is common knowledge that a Notice of Appointment of Advocate is not synonymous with a Notice of Change of Advocates.
36. Quite clearly, the filing of the Notices of Appointment of Advocates by the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates, respectively, were and remain acts in futility.
37. Pertinently, if the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates, respectively, were duly instructed in respect of the instant matter, then it behoved same to comply with and adhere to the provisions of the law.
38. At any rate, there is no gainsaying that the rules of procedure and particularly the ones regulating the instructions of recognized agents, are critical insofar as the duly instructed and retained agents, are imbued with authority to do a number of things inter alia compromising suits on behalf of clients. [See Order 9 Rule 1 of the Civil Procedure Rules, 2010].
39. Arising from the foregoing, it is my finding and holding that the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates, respectively, were obligated to comply with the law. Consequently, the failure to comply with the law vitiates their appearance and participation in respect of the instant matter.
40. Before departing from the issue herein, it is worthy to underscore that the rules of procedure are pertinent and paramount. Consequently, same ought to be complied with, unless there is sufficient and good justification for non-compliance, which must no doubt, be explained and/or accounted for.



41. To this end, it is worthy to take cognisance of the holding in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR where the Court of Appeal stated and held thus:

A five-judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the Case of *Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012* as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

## Issue Number Two (2)

### **A ii. If the answer to issue one is in the negative, whether the pleadings and documents filed by the said law firms are lawfully on record or otherwise.**

42. Having discussed issued number one [1] and having come to the conclusion that the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates are not properly on record, the next question relates to and touches on the legality of the documents and court processes filed by same.
43. To start with, it is elementary learning that only a recognized agent duly appointed in accordance with the law can file pleadings, take actions and/or make such appearance as may be required under the law on behalf of the instructing client.
44. On the contrary, where one has not been duly and lawfully instructed, such a person or firm of advocates cannot purport to file any pleading or documents or to make any appearance purportedly on behalf of the client/principal. Notably, if any such pleadings and/or documents are filed, then same are irregular and thus illegal.
45. In my humble view, the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates respectively had no authority and/or capacity to file the documents including the impugned Application for execution, or at all.
46. Additionally, the Applications for execution having been filed by the law firms of M/S P. G Kaingu & Co. Advocates and Wanjiru Thungu & Co. Advocates, who are not on record for the Applicant; then the Notice to Show Cause and any other court process arising therefrom are illegal and null and void.
47. Simply put, a stranger cannot seek to originate court process in a matter wherein same [stranger] has not been instructed. Nevertheless, where any court process issues and/or emanates from an illegal action and/or appearance, then the court process and/or orders in question, are void and thus a nullity ab initio.
48. In this respect, I am reminded of the dictum in the case of *Benjamin Leonard Mc foy vs. United Africa Company Limited* [1961] All ER 1169, where Lord Denning MR [as he then was] remarked thus:
- “If an Act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every



proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

49. Arising from the foregoing, my answer to issue number two [2] is to the effect that the documents inter alia the Application for execution that was filed by the impugned law firms, were illegal, null and void.
50. Furthermore, any court process and/or orders that were issued on the basis of the illegal pleadings and documents by the impugned law firms are equally invalid and thus void for all intents and purposes. In any event, the doctrine of ex nihilo nihil fit [out of nothing comes nothing] suffices.

**Final Disposition:**

51. Flowing from the discussion [details in terms of the preceding paragraphs] it must have become crystal clear that the Application beforehand is indeed meritorious.
52. Consequently and in the premises, the Application dated 2<sup>nd</sup> April 2024; be and is hereby allowed. Besides the costs attendant thereto, which are hereby assessed and certified in the sum of Kenya Shillings Thirty Thousand Only (KShs. 30,000/-) shall be borne by Mr. P.G Kaingu Advocate and Ms. Wanjiru Thungu Advocate respectively.
53. It is so Ordered.

**DATED, SIGNED AND DELIVERED ON THE 29<sup>TH</sup> DAY OF JULY 2024**

**OGUTTU MBOYA**

**JUDGE.**

In the presence of:

Benson – Court Assistant.

Ms Odhiambo h/b for Mr. Mbuthia Kinyanjui for the Applicant.

Mr. P.G Kaingu (sic) for the Applicant.

Ms. Wanjiru Thungu (sic) for the Applicant.

N/A for the Respondent

