



**Mboga (Deceased) v Kenya Forest Service; Nyamwea Mamboleo Advocates (Interested Party) (Cause 2 of 2014) [2024] KEELRC 2677 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2677 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 2 OF 2014  
NZIOKI WA MAKAU, J  
OCTOBER 29, 2024**

**BETWEEN**

**TIMON OTIENO MBOGA (DECEASED) ..... CLAIMANT**

**AND**

**KENYA FOREST SERVICE ..... RESPONDENT**

**AND**

**NYAMWEA MAMBOLEO ADVOCATES ..... INTERESTED PARTY**

**RULING**

1. The Application before the Court is the one dated 29<sup>th</sup> July 2024. It seeks a stay of execution and the joinder of Nyamweya Mamboleo Advocates who had acted for the Respondent/Applicant as counsel in the claim before the Court. It also sought an order directing the firm of Nyamweya Mamboleo Advocates to be ordered to pay the sum of Kshs. 1,617,600/- being the sum that was forwarded to the said firm of advocates to pay the decretal sum to the successful Claimant. It was asserted the Claimant's advocates had been paid the sum of Kshs. 1,800,000/- through his advocates on record on 11<sup>th</sup> October 2016 after the execution commenced against the Respondent.
2. The matter was to given direction that the motion be resolved through written submissions. The Interested Party did not file any submissions from the perusal of the Court file as well as the online portal (Court Tracking System). Only the Respondent/Applicant and the Claimant/Respondent filed any submissions.

**Respondent/Applicant's submissions**

3. The Respondent submits that enjoining the Interested Party is warranted due to its identifiable interest stemming from the possession of the decretal amount. The Respondent contends that the Interested Party has effectively assumed the role of an agent, as the funds held are those of the client. To support



this claim, the Respondent cites Bowstead and Reynolds on Agency (17<sup>th</sup> Edition, Sweet & Maxwell, Page 1-001), on principle- agent relationships as referenced in Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited & another [2015] eKLR in the following terms: -

“... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”

4. The Respondent also cites the description in Rule 1 of the Mutunga Rules on an Interested Party being a person or entity with an identifiable stake or legal interest or duty in proceedings before court but is not a party to the proceedings. And Rule 28(g) of the Employment and Labour Relations Court (Procedure) Rules on the court’s power to make any order that meets the ends of justice. The Respondent further submits that the actions of the Interested Party have deprived the Claimant's estate of the fruits of judgment and have exposed the Respondent to potential audit queries, as their records indicate that funds have already been disbursed. The Respondent relies on the finding in the case of Shah & another v Wambugu (Sued as Administrator of the Estate of the Late Jacob Juma) & 2 others; Chelogoi (Interested Party) (Environment & Land Case 312 of 2009) [2023] KEELC 19052 (KLR) (20 July 2023), which underscores the court’s discretion to allow the enjoining of an Interested Party at any stage of the proceedings, provided sufficient interest has been demonstrated. In conclusion the Respondent submits that the Intended Interested Party has not opposed the application, and therefore urges the court to permit the Attorney General to take over the conduct of the matter, given that the Respondent is a state agency.

#### **Claimant/Respondent’s submissions**

5. The Claimant/Respondent submits that the Interested Party has no identifiable stake in these proceedings. He cites the ongoing claim regarding the Interested Party at the Advocates Complaints Tribunal, arguing that this court would be sub judice if it attempted to resolve a dispute that is already pending before the tribunal. In support of this position, the Claimant/Respondent references the case of *Narok County Council v Trans Mara County Council and Another (Civil Appeal No. 25 of 2000)* [2000] eKLR, which establishes that parties are required to follow statutorily provided procedures before approaching the court. Furthermore, the Respondent draws the court’s attention to the provisions of section 80 of the *Advocates Act*, which states that an advocate's betrayal of trust—specifically failing to keep property or money and applying it as instructed—constitutes an offence. The Claimant/Respondent emphasizes that the dispute is primarily between the Applicant and its advocate, and avers that the court should only become involved after the Tribunal has made its findings. He asserts that, as a representative of the Applicant, the Interested Party cannot be enjoined in this matter on issues that are not necessary to the proceedings. Reinforcing this argument, the Claimant/Respondent reiterates that the Interested Party is not a necessary party in this case, as its presence is not essential for the enforcement of the decree or for the effective and complete adjudication of all issues in the suit. Consequently, the Claimant/Respondent concludes that the Applicant's attempt to transform advocates into litigants is untenable, and therefore, the application should be dismissed with costs.
6. The Court has considered the motion as well as the pleadings on the court file. Save for noting the Chamber Summons at para 3 thereof incorrectly indicates the case as Kisumu Industrial Cause No. 2 of 2013 in place of Cause No. 2 of 2014. It is trite that the principles of agency espoused in Bowstead & Reynolds on Agency are germane to this dispute. In the book, agency is defined as a 'Fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf'. In this case, the proposed intended interested party is the



Advocate who represented the Respondent in the main suit. It is asserted that he holds funds which are by implication held by a fiduciary or agent of the principal, the Respondent. Whereas agency between parties is common in commercial practice, a lawyer acting for the client does not become by dint of his or her holding money for the benefit of a become the fiduciary of the client as to make him or her a potential litigant in a dispute between the client and another. The mere holding of the funds does not in my considered view bring the lawyer to the same threshold as an interested party as indicated in the Rules of this Court or in the Mutunga Rules. The aspect of the motion to that effect therefore must fail as that is not tenable. It is noted by the Court that there is a dispute already ongoing before the Advocates Complaints Tribunal and as such it would be inappropriate for the Court to make any determinations in regard to that dispute. The matter of the amounts held is sub judice as it pending before a competent tribunal and cannot form the corpus of any litigation between the parties before me as proposed by the Respondent/Applicant.

7. From all accounts it is apparent the Claimant was paid the decretal sum from the exhibited Consent of 13<sup>th</sup> December 2018 signed between the Claimant's and Defendant's Counsel.
8. That leaves only the issue of representation of the Respondent/Applicant by the Honourable the Attorney General and the refund of a sum of Kshs 1,617,600/- that was paid to the Interested Party. The Respondent/Applicant is a state agency that can be given legal services by the office of the Attorney General beyond legal advice. It is therefore moot to try and distinguish the Respondent/Applicant from other agencies that are often given legal representation by the office of the Attorney General. It is my finding that the Respondent/Applicant can be represented by the office of the Attorney General and there is nothing to bar the Respondent/Applicant from seeking to be represented by the said firm of advocates. In my considered view, as the Respondent/Applicant is entitled to seek the services of an advocate of its choice and it has settled on the Attorney General, the Hon. Attorney General will be permitted to appear for the Respondent/Applicant in this matter. As the motion has substantively failed, I will order that each party bears its own costs.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF OCTOBER 2024**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

