



**Bashaeb Brothers Limited v Zakayo & another (Suing as the Administrator of the Estate of Erick Shivina Zakayo (Deceased)); Khakame (Suing as the Legal Representative of the Estate of Erick Shivina Zakayo (Deceased)) (Intended Interested Party) (Civil Appeal E116 of 2024) [2025] KEHC 19053 (KLR) (19 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 19053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E116 OF 2024**

**AC BETT, J**

**DECEMBER 19, 2025**

**BETWEEN**

**BASHAEB BROTHERS LIMITED ..... APPELLANT**

**AND**

**JONATHAN ZAKAYO & ANOTHER (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ERICK SHIVINA ZAKAYO (DECEASED)) ..... RESPONDENT**

**AND**

**KHAYASI KHAKAME (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ERICK SHIVINA ZAKAYO (DECEASED)) ..... INTENDED INTERESTED PARTY**

**RULING**

1. The Applicant moved the court vide a notice of motion application dated 20/02/2025 seeking the following orders;
  - a. That the court be pleased to order that Khayasi Khakame be enjoined in the suit as an interested part.
  - b. That the court be pleased to order that the remainder of the decretal amount after the determination of the Appeal be released to the intended Interested party on behalf of the deceased's estate.
  - c. The costs of this application be provided for.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn by the Applicant, who avers that she was the deceased's biological paternal grandmother and that she



singlehandedly raised the deceased as his biological father is mentally incapacitated and could not lodge any claim, while his mother passed away a while back.

3. She claimed that she had filed a suit on behalf of the deceased's estate, being Butali SPMCC NO. 235 OF 2022, but later realised that the deceased's paternal grandfather, Jonathan Zakayo Lando, who is the Respondent herein, had already rushed to court and filed a similar suit, being Butali SPMCC No. 153 of 2022, in which he had sued the Appellant in his capacity as the legal representative of the deceased.
4. According to the Applicant, her suit was stayed in a ruling dated 2<sup>nd</sup> December 2024 pending the hearing and determination of Butali SPMCC No. 153 of 2022, Jonathan Zakayo Lando & another (suing as the legal representatives of the estate of Erick Shivina Zakayo). The trial court delivered a judgement on 11<sup>th</sup> June 2024 in favour of the Respondent and awarded him Kshs. 1,375,096/=.
5. She asserts that the Respondent, vide a letter dated 12<sup>th</sup> September 2024, was compensated for part of the claim being Kshs. 687,548/=, which was half the decretal sum, which amount he never surrendered to the rightful beneficiary.
6. The Applicant now prays to be enjoined in the appeal as an interested party, and that the remainder of the decretal sum be released to her to benefit the deceased's father and surviving siblings.
7. On 24<sup>th</sup> April 2025, the Respondent filed a notice of preliminary objection stating that the application dated 20<sup>th</sup> February 2025 was an abuse of the court's process and that the law makes no provision for introducing a new party at the appeal stage and the matters raised do not constitute issues for determination in the appeal.
8. On 25<sup>th</sup> June 2025, the Applicant filed grounds of opposition opposing the preliminary objection, stating that it was misconceived and lacked merit, and further, was an abuse of the court's process.
9. The court directed that the application be canvassed by way of written submissions.

#### **Applicant/Intended Interested Party's Submissions**

10. The Applicant submitted that the sole issue for determination is whether a party can be enjoined in proceedings at the appellate stage. She submitted that it is the court's duty to assess the parties' importance and relevance to the suit. She cited the Court of Appeal of Tanzania in Tang Gas Distributors Ltd v. Said & Others (2014) EA 448 and Central Kenya Limited v. Trust Bank Limited & 5 Others (2000) eKLR.
11. She urges that the preliminary objection be dismissed with costs and that she be allowed to be joined as an Interested Party in the appeal.

#### **Appellant's Submissions**

12. In their submissions dated 25<sup>th</sup> July 2025, the Appellant cited Order 1, Rule 10(2) of the Civil Procedure Rules and contended that joinder of a party is not automatic but is at the court's discretion. It based its argument on the case of Kenya Medical Laboratory Technicians and Technologists Board & 6 others v. Attorney General & 4 others (2017) eKLR. It submitted that under certain circumstances, an interested party can be enjoined in a proceeding.
13. It asserted that the Applicant has not demonstrated how her joinder in the appeal would influence the settlement of the proceedings at the appeal level, which is on the award of quantum, as the issues she had raised were unrelated to the appeal. Further, it submitted that no prejudice would be suffered if she were not enjoined in the appeal as a party.



14. It asserted that the Applicant's interest in being joined at appeal is for commercial reasons, and further, she had not given sufficient reasons as to why she ought to be a party.

### **Respondent's Submissions**

15. The Respondent, in his submissions, addressed the issues raised in the preliminary objection dated 24<sup>th</sup> April 2025, and averred that, under the law, an intended party, whether or not an application is made, may be enjoined. He submitted that the parties have not moved the court to enjoin any other party in the appeal, nor has the court, on its own motion, enjoined any other party, and he contends that the application does not meet the threshold for joinder.
16. He relies on the case of Joseph Njau vs. Robert Maina Chege & 3 others (2002) eKLR on the guiding principle for a party to be enjoined in a case and avers that the Applicant failed to meet the requirements and that the appeal can be determined without involving the Applicant, as she would still benefit from the award the court will give.
17. He submits that the appeal raises triable issues that the court ought to determine on merit, and as such, the preliminary objection ought to be allowed.

### **Analysis and Determination**

18. I have carefully considered the application, the Applicant's supporting affidavit, the notice of preliminary objection by the Respondent and the rival submissions by the parties.
19. The main issue for determination is whether the intended interested party has met the legal threshold for joinder at the appellate stage. If the answer is in the affirmative, then the other issue for determination is whether this court should grant the prayer to release the remaining decretal sum to the Applicant on behalf of the deceased's estate.
20. The power of the Court to order joinder of parties is provided under Order 1 Rule 10(2) of the Civil Procedure Rules, which provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any person who ought to have been joined, or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
21. In Joseph Njau Kingori v Robert Maina Chege & 3 others [2002] eKLR, the High Court (Ringera, J, as he then was) enumerated the settled principles for joinder of parties as:
  - a. The applicant must establish a direct interest in the proceedings;
  - b. The applicant's rights must be directly affected by the outcome;
  - c. The presence of the applicant must be necessary to completely and effectually settle all questions involved;
  - d. The suit (or appeal) cannot be properly decided without the applicant.
22. Additionally, in M'imwenda & another v Mire [2024] KECA 1257 (KLR), the Court of Appeal restated the guiding principles for joinder of a party as follows:
  - a) It must be desirable to add the applicant as a party.



- b) The applicant's presence must enable the court to effectually and completely adjudicate the issues;
- c) The joinder must not embarrass, delay or prejudice the existing parties.
23. Applying the above principles to the present case, it is not disputed that the intended interested party had claimed an interest in the estate of the deceased as his paternal grandmother and asserts that she has been actively involved in the bringing up of the deceased since his father was mentally challenged and his mother had died. However, I note that this appeal arises from Butali SPMCC No. 153 of 2022 and is confined to issues related to the judgment, particularly the quantum of damages awarded by the trial court.
24. The Applicant's prayers are that she should have been the suitable person to represent the interest of the deceased, as she was the one who took care of him singlehandedly, and secondly, that the paternal grandfather, who is the Respondent, was given the decretal sum of Kshs. 687,548/= but has not accounted for or distributed it to the rightful beneficiaries, that is, the deceased's mentally incapacitated father and surviving siblings.
25. The role of an appellate court is well settled. An appeal is not a forum for the introduction of new causes of action. This court is required to determine the correctness, or otherwise, of the decision appealed against based on the record from the trial court.
26. The Applicant has raised issues that relate to the administration of the estate of the deceased, her entitlement to the decretal sum and the alleged misappropriation of the decretal sum by the Respondent, which are matters that fall within the jurisdiction of the Probate and Administration court.
27. I am persuaded by the submissions of the Appellant and the Respondent that the intended interested party has not demonstrated how her joinder in the appeal would assist this Court in effectually and completely determining the issues raised in the appeal. In my view, the appeal can be decided conclusively without joining the Applicant as a party.
28. Further, the Applicant's interests are protected under the *Law of Succession Act*, and she is at liberty to file an appropriate application for revocation of any grant issued to the Respondent or for an order that the Respondent do render accounts in respect to any proceeds received in this matter.
29. Consequently, the prayer for the release of the remaining decretal sum to the Applicant is premature and unattainable in these proceedings. The final decretal amount remains to be determined upon the hearing of the appeal. To grant such relief at this stage would mean that the court has already determined the outcome of the appeal and would contravene the established principle that an appellate court must confine itself to the issues properly raised in the appeal and ought not to resolve matters outside its jurisdiction.
30. From the above analysis, the Preliminary Objection dated 24<sup>th</sup> April 2025 is upheld.
31. Accordingly, I make the following orders:
- a) The Notice of Motion dated 20th February 2025 is hereby struck off.
- b) There shall be no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 19<sup>TH</sup> DAY OF DECEMBER 2025.**

**A. C. BETT**



## **JUDGE**

In the presence of:

Ms. Chebet holding brief for Mr. Okara for the Applicant

Ms. Gati for Appellant

No appearance for Ndinya Omollo for Respondent

Court Assistant: Polycap

