



**Arwa & Change Advocates LLP v Muturi (Sued in his Own Capacity and as the Administrator of the Estate OF THE Late Sister Florence Wangari Yongi) & another (Commercial Case E129 of 2022) [2023] KEHC 24650 (KLR) (Commercial and Tax) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 24650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E129 OF 2022  
MN MWANGI, J  
APRIL 25, 2023**

**BETWEEN**

**ARWA & CHANGE ADVOCATES LLP ..... PLAINTIFF**

**AND**

**FRANCIS YONGI MUTURI (SUED IN HIS OWN CAPACITY AND AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SISTER FLORENCE WANGARI YONGI) ..... 1<sup>ST</sup> DEFENDANT**

**SMITH LACIEN, LLP ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to a Notice of Preliminary Objection filed pursuant to a Chamber Summons application dated 28<sup>th</sup> February, 2023 by the 1<sup>st</sup> defendant/applicant herein. The said application is premised on the provisions Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 52 Rule 3 and Order 2 Rule 15 of the *Civil Procedure Rules*, 2010, Sections 45(5) and 46 of the *Advocates Act*, Chapter 16 of the Laws of Kenya, Articles 23, 47, 48, 50, 165, and 159(2) (d) of the *Constitution* of Kenya and any other enabling provisions of the law. The 1<sup>st</sup> defendant/applicant seeks the following orders-
  - i. Spent;
  - ii. That this Court be pleased to strike out this suit on account that it is ill-conceived, hypothetical, non-justiciable, and otherwise an abuse of the process of court.
  - iii. That this Honorable Court be pleased to declare that the Retainer Agreement dated July 17, 2020 in relation to instituting proceedings in a contentious suit



filed in the Chicago, Illinois, INC Case 1:19-cv-03927, *Francis Yongi Muturi v The Boeing Company and Rosemount Aerospace*, as consolidated in INC Case 1:19-cv-02170, *Re: Ethiopian Airlines Flight ET 302 Crash (“Wrongful Death Suit”)*, executed between the applicant and the respondent in relation to fees is invalid for offending the provisions of Section 46(a) and (c) of the [Advocates Act](#), Chapter 46 of the Laws of Kenya and consequently direct that any costs due to the respondent be taxed by the Registrar;

- iv. That this Honorable Court be pleased to declare that the applicant had a right to terminate the respondent from acting for him in any manner or in any capacity, notwithstanding the existence of any agreement in relation to fee as articulated in Section 45(5) of the [Advocates Act](#), Chapter 16 of the Laws of Kenya;
  - v. That this Honorable Court be pleased give such directions as convenient, just, and equitable in respect of the payment or settlement of any costs due to the respondent, bearing in mind the circumstance of his termination; and
  - vi. That the Honorable Court be pleased to grant such other orders as are convenient and just in the circumstances; and
  - vii. That all Costs in respect of this application to be awarded to the applicant.
2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 28<sup>th</sup> February, 2023 by Francis Yongi Muturi, the 1<sup>st</sup> defendant/applicant herein.
3. In opposition thereto, on 16<sup>th</sup> March, 2023, the plaintiff/ respondent filed a Notice of Preliminary Objection dated 16<sup>th</sup> March, 2023, which raises the following grounds –
- i. That this Honourable Court lacks jurisdiction to entertain the Chamber Summons application dated 28<sup>th</sup> February, 2023 as per the dictates of Section 45(2) of the [Advocates Act](#);
  - ii. That the said Chamber Summons application dated 28<sup>th</sup> February, 2023 has been filed out of time as it violates the mandatory provisions of Section 45(2A) of the [Advocates Act](#);
  - iii. That the orders sought by the Chamber Summons application dated 28<sup>th</sup> February, 2023 are untenable as the application is an omnibus application that goes beyond the scope of the provisions of Section 45 (2) of the [Advocates Act](#);
  - iv. That the said Chamber Summons application dated 28<sup>th</sup> February, 2023, violates the provisions of Section 45(5) of the [Advocates Act](#) as there is no lawful change of Advocate that has been carried out as per the said provisions of the law;
  - v. That the said Chamber Summons application to the extent that it seeks the invalidation of the Tripartite Retainer Agreement dated 17<sup>th</sup> July, 2020, is in violation of the functus officio doctrine as the same issue was canvassed by the Honourable Court in the ruling dated 8<sup>th</sup> December, 2022 and directed to *viva voce* hearing;



- vi. That applicants are approbating and reprobating by claiming on one hand; that this Honourable Court lacks jurisdiction to render a determination in relation to the Tripartite Agreement dated 17<sup>th</sup> July, 2020 that involves an American firm, and; on the other hand, requesting the Honourable Court to preside over the invalidation of the said agreement;
  - vii. That the said Chamber Summons application is in violation of Contract Law and principles by claiming that a Tripartite Agreement is illegal in relation to one party but the same remains legal in relation to another party;
  - viii. That the applicant's Chamber Summons application violates the legal principle barring Courts from rewriting contracts between parties as it attempts to rewrite the contract by removing the plaintiff/respondent only and leaving the other parties to the contract under similar terms; and
  - ix. That the Chamber Summons application dated 28<sup>th</sup> February, 2023 is defective, frivolous and otherwise an abuse of the Court process and should be struck out *in limine*.
4. This Court gave directions on 20<sup>th</sup> March, 2023 for the Preliminary Objection to be heard first and for written submissions to be filed. The plaintiff/applicant in the Preliminary Objection was granted seven days to file and serve their written submissions therefore, they ought to have done so on or before the 27<sup>th</sup> March, 2023. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were given seven (7) days to file their written submissions after service. As such, they should have filed the said submissions on or before 3<sup>rd</sup> April, 2023.
5. At the time of writing this ruling, which was done after the 3<sup>rd</sup> day of April, 2023, none of the parties herein had complied with the Court's directions issued on 20<sup>th</sup> March, 2023 in regard to filing of written submissions to the Notice of Preliminary Objection dated 16<sup>th</sup> March, 2023.

### **Analysis And Determination.**

The issue that arises for determination is if the Preliminary Objection raised by the plaintiff/respondent herein is merited.

6. In the case of *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd* [1969] EA 696 the Court set out what constitutes a Preliminary Objection in the following words –

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the said case, Sir Charles Newbold P., stated as follows-

“..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but



unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.” (emphasis added).

7. The plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants signed a Tripartite Retainer Agreement dated 17<sup>th</sup> July, 2020 with a view of receiving compensation arising from the loss of the 1<sup>st</sup> defendant’s sister who died in the Ethiopian airlines flight ET302 crash. The 1<sup>st</sup> defendant has since filed an application seeking to invalidate the said Retainer Agreement as against the plaintiff for offending the provisions of Section 46 (a) and (c) of the *Advocates Act*. Grounds No. i, ii & iii of the Preliminary Objection relate to the provisions of Section 45(2) & (2A) of the *Advocates Act*, Cap 16 Laws of Kenya. I will therefore determine them together. They provide that-

“ 1. ....

2. A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years’ standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—

- a. that the agreement be upheld; or
- b. that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or
- c. that the agreement be set aside; or
- d. that the costs in question be taxed by the Registrar, and that the costs of the application be paid by such party as it thinks fit.

2A. An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later. (emphasis added).

8. From the record, it is evident that the plaintiff received the first batch of funds, deducted 28% of the money and remitted the balance to the 1<sup>st</sup> defendant. It is also evident that the remainder of the funds due to the 1<sup>st</sup> defendant have not yet been released to any of the parties herein. A perusal of the plaint reveals that prayer (d) of the reliefs sought therein is for judgment to be entered against the 1<sup>st</sup> defendant for the sum of USD. 980,000.00 being 14% of the compensated amount or such other ameliorated sums determined as a result of any further negotiations. I am therefore of the considered view that this amounts to a demand for payment.

9. Pursuant to the provisions of Section 45(2A) of the *Advocates Act*, an application seeking to challenge the validity of a Retainer Agreement, and/or for orders to vary/set aside such an agreement ought to be filed within one year after the making of the said agreement or within three months after a demand in writing for payment has been made, whichever is later. In view of the fact that the Retainer Agreement the subject of this matter is dated 17<sup>th</sup> July, 2020, and the plaint was served upon the defendants herein



on 13<sup>th</sup> April, 2022, the application herein ought to have been filed on or before 12<sup>th</sup> July, 2022. It is therefore my finding that the instant application offends the provisions of Section 45(2A) of the Advocates Act for having been filed out of time.

10. In regard to whether the instant application goes beyond the scope of the provisions of Section 45(2) of the Advocates Act, I am of the view that this is an issue that calls for rebuttal by factual evidence to demonstrate if the contention holds any substance or not. The Court shall also be required to analyze the pleadings in support and in opposition to the instant application so as to determine whether it goes beyond the scope of Section 45(2) of the Advocates Act. It is trite that facts that require to be analyzed and/or verified through evidence, cannot form points of Preliminary Objection but can only be addressed by way of a replying affidavit.
11. The plaintiff contended that the instant application violates the provisions of Section 45(5) of the Advocates Act as there is no lawful change of Advocate that has been carried out as per the said provisions of the law. Section 45(5) provides that-

“If, after an advocate has performed part only of the business to which any agreement made by virtue of this section relates, such advocate dies or becomes incapable of acting, or the client changes his advocate as, notwithstanding the agreement, he shall be entitled to do, any party, or the legal personal representatives of any party, to such agreement may apply by chamber summons to the Court to have the agreement set aside or varied, and every such application shall be dealt with in accordance with subsection (2):

Provided that, in the case of a client changing his advocate, the Court shall have regard to the circumstances in which the change has taken place and, unless of opinion that there has been default, negligence, improper delay or other conduct on the part of the advocate affording to the client reasonable ground for changing his advocate, shall allow the advocate the full amount of the remuneration agreed to be paid to him.”

12. The issue of whether there has been a lawful change of Advocates in the compensation proceedings arising from the loss of the 1<sup>st</sup> defendant’s sister who died in the Ethiopian airlines flight ET302 crash is also a matter that calls for rebuttal through evidence. It is the finding of this Court that in order to address this issue fully, the Chamber Summons application dated 28<sup>th</sup> February, 2023 would have to go on for hearing so that parties can be given an opportunity to ventilate their cases through evidence. Consequently, the Preliminary Objection fails on this ground.
13. On whether the Chamber Summons application dated 28<sup>th</sup> February, 2023 violates the doctrine of *functus officio* to the extent that it seeks the invalidation of the Tripartite Retainer Agreement dated 17<sup>th</sup> July, 2020, it is this Court’s finding that it does not. A Court only becomes *functus officio* when it has performed all its duties in a particular case. The Supreme Court of Kenya when expounding on the doctrine of *functus officio* in Raila Odinga & Others vs. IEBC & Others [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832. It states thus-

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has



been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

14. The plaintiff’s case is that this issue was canvassed by the Court in its ruling delivered on 8<sup>th</sup> December, 2020. I have perused the said ruling and seen that at paragraph 14, the Court held that the issue of whether the documents were forged or the interpretation of the terms of the said contract will require evidence to be tendered and cannot be determined at this interlocutory stage. It is therefore evident that no Court has determined whether or not the Tripartite Retainer Agreement dated 17<sup>th</sup> July, 2020 should be invalidated. The doctrine of *functus officio* cannot be invoked in the circumstances.
15. In my considered view, grounds vi, vii, viii, & ix in the Preliminary Objection herein do not constitute pure points of law as defined by the Court in *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd* (supra). The said grounds call for rebuttal of evidence by way of affidavits. In order to address the said grounds fully, the Chamber Summons application dated 28<sup>th</sup> February, 2023 would have to be heard on merit. For instance, the issue of whether the instant application is in violation of the law of contract and principles, by claiming that a Tripartite Agreement is illegal in relation to one party but the same remains legal in relation to another party, can only be conclusively determined after all the parties herein are accorded an opportunity to adduce evidence, either in support or in opposition to the said issue.
16. The sum total of the grounds of Preliminary Objection raised is that they not only raise points of law but also factual issues that need to be ascertained. However, having found that the application dated 28<sup>th</sup> February, 2023 offends the provisions of Section 45(2A) of the *Advocates Act* for having been filed out of time, the said application cannot be sustained due to effluxion of time.
17. The upshot is that I uphold the Preliminary Objection herein based on the provisions of Section 45(2A) of the *Advocates Act*. I hold that the said ground of Preliminary Objection is merited and its net effect is to render the Chamber Summons application dated 28<sup>th</sup> February, 2023 incompetent. The said application is hereby dismissed. Costs of the said application and the Notice of Preliminary Objection shall abide the outcome of the suit herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF APRIL, 2023.**

**NJOKI MWANGI**

**JUDGE**

