



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okoiti v Equity Bank & another (Civil Case 356 of 2014)  
[2022] KEHC 12499 (KLR) (Civ) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 12499 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CIVIL  
CIVIL CASE 356 OF 2014  
JN MULWA, J  
JUNE 30, 2022**

**BETWEEN**

**PAUL MAKOKHA OKOITI ..... APPLICANT**

**AND**

**EQUITY BANK ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to a Notice of Preliminary Objection dated February 8, 2022 filed by the 1<sup>st</sup> Defendant on the following grounds:
  - i. This Honourable Court has no Jurisdiction to entertain the Plaintiff's Application dated August 24, 2021 as it has become functus officio having fully discharged its duty in the matter by delivering a judgment on October 17, 2019 and a Ruling on September 24, 2020.
  - ii. The application is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith, even suo moto.
2. The Plaintiff who is an unrepresented litigant responded vide a document titled 'Notice To The Court - Objection Against Appearance of The Lawyer (Kimondo Gachoka & Co. Advocates) In Court Over The Preliminary Objection Dated October 27, 2021'. He contended that the firm of Kimondo Gachoka & Co. Advocates has never filed a valid resolution by the 1<sup>st</sup> Defendant appointing it to act on their behalf in this matter and as such, all documents filed by firm must be struck out with costs to the Plaintiff. He also urged that the said firm should not be allowed to address this court on the preliminary objection without filing a notice of appointment by Equity Bank (K) Limited.
3. The preliminary objection was canvassed by way of written submissions.



4. The 1<sup>st</sup> Defendant reiterated that the Plaintiff's application is a non-starter in view of this court's judgment and subsequent ruling on the Plaintiff's application for review. It contended that entertaining the Plaintiff's application would be tantamount to re-opening litigation which is against the doctrine of *functus officio*. Reliance was placed on *Telkom Kenya Ltd v John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd* [2014] eKLR and *Raila Odinga & 2 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR where the courts discussed the principles of the doctrine of *functus officio*. Further, it was submitted that the 1<sup>st</sup> Defendant's Advocates were duly instructed and came on record vide a Memorandum of Appearance dated July 8, 2014 and filed on July 9, 2014. In the 1<sup>st</sup> Defendant's view therefore, the Plaintiff's application is just but an attempt to frustrate it.
5. On the other hand, that Plaintiff submitted that his application raises new issues which have not previously been adjudicated upon. He contended that the 1<sup>st</sup> Defendant's preliminary objection is not based on a pure point of law as required by the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696. The Plaintiff also faulted the 1<sup>st</sup> Defendant for failing to raise the question of jurisdiction at the earliest opportunity and in support, relied on the case *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. He therefore urged that the preliminary objection be dismissed with costs.
6. The only issues for determination are whether the 1<sup>st</sup> Defendant's raised a proper preliminary objection and whether this court is *functus officio* in so far as the Plaintiff's application is concerned.
7. It is well settled that a preliminary objection must be based on a pure point of law and must be also capable of disposing of a suit or an application, as the case may be, from the pleadings. In the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (supra)* at 700, Law, JA stated thus:
 

“...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.”
8. Sir Charles Newbold P. added at page 701:
 

“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 the 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.”
9. The first ground in the 1<sup>st</sup> Defendant's preliminary objection concerns the doctrine of *functus officio*. The *Black's Law Dictionary, 9<sup>th</sup> Edition* defines *functus officio* as:
 

“[having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
10. In Petition 5, 4 & 3 of 2013 (Consolidated): *Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 others* [2013], the Supreme Court while expounding on the doctrine of *functus officio* cited 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 that:

“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.”

11. The court also cited the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 where it was held that:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor—’ does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

12. Upon considering the above authorities, the court finds that the objection raised by the 1<sup>st</sup> Defendant is capable of disposing of the Plaintiff’s application without having to ascertain facts from elsewhere apart from the court record. This is so particularly since the background of the matter is not in dispute. The preliminary objection was therefore properly raised.

13. Is the court functus officio with respect to the Plaintiff’s application dated August 24, 2021? To answer this question, it is necessary to highlight a brief background of the matter. The Plaintiff instituted this suit vide a Plaint dated 10<sup>th</sup> June 2014. The 1<sup>st</sup> Defendant entered appearance through the firm of Kimondo Gachoka & Company Advocates on July 9, 2014 and filed its Statement of Defence on 23<sup>rd</sup> July 2014. After full trial, this court dismissed the suit herein in a judgment delivered on 17<sup>th</sup> October 2019. Being aggrieved by the decision, the Plaintiff opted to file an application for review and setting aside of the judgment, which application was also dismissed in a ruling delivered by Njuguna J. on September 24, 2020. Unrelenting, the Plaintiff approached this court once again through the impugned Notice of Motion dated August 24, 2021. The application challenges the involvement of the firm of Kimondo Gachoka & Company Advocates in these proceedings on the basis that there was no resolution by the 1<sup>st</sup> Defendant’s Board of Directors instructing it to defend this suit on behalf of the bank.

14. At this point, it is important to note that the Plaintiff was unrepresented by counsel from the onset and thus the court appreciates that as a lay person, he may not be well acquainted with the legal procedures like an advocate is. Nevertheless, the law applies to all parties equally and the court can only be lenient to a party where procedural technicalities arise. In the instant case, whereas it is true that the issues raised in the impugned application have never been adjudicated upon by this court, it is obvious that they are now spent. This is because the court discharged its duty in respect to this suit when it delivered its judgment of October 17, 2019 and ruling of September 24, 2020 on review. At this point therefore, the court cannot reopen this case for purposes of determining any new issues that may arise between the parties which should have been litigated before the judgment. I therefore find that the court is functus officio and therefore has no jurisdiction to determine the Plaintiff’s Notice of Motion dated August 24, 2021.



15. For the foregoing, the 1<sup>st</sup> Defendant's Notice of Preliminary Objection dated February 8, 2022 is hereby allowed. The Plaintiff's Notice of Motion dated August 24, 2021 is dismissed with no orders as to costs.
- Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**J. N. MULWA**

**JUDGE.**

