Republic v Law Society of Kenya Compliance Department & another; Rabala (Ex parte Applicant) (Judicial Review Application E041 of 2025) [2025] KEHC 10338 (KLR) (Judicial Review) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10338 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E041 OF 2025

JM CHIGITI, J

JULY 17, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE LAW SOCIETY OF KENYA COMPLIANCE DEPARTMENT .... 1ST RESPONDENT

ADVOCATES DISCIPLINARY TRIBUNAL ..... 2ND RESPONDENT

AND

DONALD ODHIAMBO RABALA ..... EX PARTE APPLICANT

RULING

1. The Exparte Applicant herein filed an application dated 19th February, 2025 seeking the following orders against the Respondents;

    1. That this application be certified as urgent and heard on priority basis.
    2. That the Applicant's portal at the LSK be made active immediately pending the hearing and final determination of the matter herein.
    3. That the Applicant be granted an Order of Certiorari quashing the decision of the Respondents to deactivate the applicant's LSK portal for the year 2025.
    4. That an Order of Mandamus be issued compelling the Respondents herein to activate the Applicant's LSK Portal.

2. In responding to the application, the 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 16th April, 2025 that forms the subject for determination. It raises the following grounds:

    1. That the said Application is incompetent, bad in law, misconceived, a gross abuse of this Honourable Court's process and incurably defective.

    2. That this Honourable Court, having rendered its final Judgment on 21st November 2024 with respect to the claims of the parties herein through the Judgment of Justice Jairus Ngaah, it is not open for the Applicant to reopen the matter in the manner now proposed.

    3. That the Applicant's claim was adequately addressed in *HCJR No. E111 of 2024* pursuant to the Judgment of Justice Jairus Ngaah delivered on 21st November 2024, and the Applicant now seeks to revisit the matter under a different guise.

    4. That this Honourable Court is functus officio and is, therefore, devoid of jurisdiction or power to grant the orders sought by the Applicant.

    5. That the Application, as filed, is res judicata as it seeks orders that were adequately addressed by this Honourable Court.

    6. That by filing the instant Application, the Applicant is engaging in a fishing expedition and wasting judicial time, having already filed *Civil Appeal No. E111 of 2024* arising from the Judgment of Justice Jairus Ngaah delivered on 21st November 2024. Such conduct is contrary to the principles of procedural fairness and judicial efficiency.

    7. That the Application is devoid of merit, constitutes a blatant waste of this Honourable Court's judicial time, and remains incurably defective.

    8. That in light of the foregoing, the Application dated 19th February 2025 should be struck out with costs to the Respondents.

3. It is the Respondents' case that the Applicant previously filed *Judicial Review No. HCJR E111 of 2024* seeking orders of certiorari and prohibition against the Respondents, challenging the deactivation of his LSK portal and interference with his ability to practice as an advocate. The application was opposed by the Respondents and was dismissed by the High Court in a judgment delivered by Justice Jairus Ngaah on 21st November 2024. The Applicant thereafter filed *Civil Appeal No. HCJR EL 11 of 2024*, which is currently pending before the Court of Appeal.

4. Despite the pending appeal, the Applicant has instituted the present application under a new advocate, seeking similar reliefs, including a new prayer for an order of mandamus to compel the reactivation of his LSK portal. The Respondents assert that the High Court is now functus officio and lacks jurisdiction to entertain the matter, which is also res judicata. They contend that the current application is a gross abuse of the court process and should be struck out with costs.

5. Reliance is placed in the cases of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR and Civil Application No. 10 (E016) of 2022 *Gladys Boss Shollei v Judicial Service Commission & Others* where in the courts pronounced themselves on the doctrine of 'functus officio'

6. The Respondents further maintain that the application is *res judicata*. Reliance is placed in the case in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR cited in Civil Appeal E291 of 2023 *Abdi Isaaac Omar T/A Sabrin Shop Highrise Commodities Ltd* where the court addressed the elements for invoking the doctrine of *res judicata* as follows:

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

7. On the costs, the Respondents contend that it is trite law that costs follow the event. In *Republic v Rosemary Wairimu Munene, Exparte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd* the court held as follows:

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

8. It is the Respondents case that the Applicant cannot circumvent the doctrine of res judicata by introducing a new cause of action namely, a prayer for mandamus or by changing advocates, especially having already exercised his right of appeal in *Civil Appeal HCJR EL 11 of 2024*, which is still pending determination.

9. They pray that the Application be struck out with costs to them.The Exparte Applicant's case;

10. It is his case that the Respondents' deactivation of his LSK portal for the year 2025 constitutes a distinct and independent administrative action, separate from the 2024 deactivation previously challenged in *Judicial Review No. HCJR E111 of 2024*.

11. It is contended that the 2025 deactivation, executed without notice, hearing, or justification, directly impedes his ability to apply for his annual practising certificate a statutory requirement under the *Advocates Act*, Cap 16 and thereby threatens his ability to lawfully engage in legal practice.

12. The Exparte Applicant maintains that although an appeal arising from the 2024 decision is pending before the Court of Appeal in *Civil Appeal HCJR E111 of 2024*, the present application seeks relief for a new and continuing violation of his rights under Article 47 of the *Constitution* and Section 4 of the *Fair Administrative Action Act*, 2015.

13. It is urged that this Honourable Court assumes jurisdiction and grants appropriate relief to prevent ongoing and irreparable harm to his livelihood and to uphold constitutional guarantees of fair administrative action.

14. The Applicant contends that the doctrines of *functus officio* and *res judicata* are inapplicable because the 2025 deactivation of his LSK portal constitutes a fresh administrative action and a new cause of action, thereby invoking this Court's jurisdiction under Article 165(3)(b) of the *Constitution* to adjudicate alleged violations of his constitutional rights.

15. It is alleged that the Respondents' 2025 actions are unlawful, procedurally unfair, unreasonable, and ultra vires, thereby entitling him to judicial review remedies of certiorari to quash the deactivation decision and mandamus to compel the restoration of portal access. The Applicant asserts that the

Respondents have a statutory duty under the *Advocates Act* to facilitate access to practicing certificates, and their failure to do so amounts to a breach of public duty.

16. The Applicant contends that the Respondents' decision to deactivate his LSK portal was an unlawful and arbitrary exercise of discretion, contrary to the principles of fairness and legality established under Article 47 of the *Constitution* and the *Fair Administrative Action Act*. Citing *R v Wilkes* (1770), the Applicant emphasizes that discretion must be exercised judicially, guided by law and reason, not caprice or whim.

17. According to him, the Respondents failed to provide notice, an opportunity to be heard, or the evidence relied upon key procedural safeguards required before making an administrative decision affecting legal rights. As such, the impugned decision is procedurally unfair, substantively unlawful, and should be quashed by this Honourable Court through the issuance of appropriate judicial review remedies.

18. The Applicant submits that the doctrine of exhaustion of alternative remedies does not bar the Court's jurisdiction in this matter, as the impugned decision by the Respondents arose during the application of the alternative remedy under Section 60 of the *Advocates Act*.*Fleur Investments Limited v Commissioner of Domestic Taxes & Another* [2018] eKLR, it is argued that while courts generally defer to statutory dispute resolution mechanisms, they are justified in intervening where there is manifest abuse of discretion, arbitrariness, or breach of natural justice.

19. The Applicant invokes Articles 47 and 165(6) of the *Constitution*, asserting that this Court retains supervisory jurisdiction where there is an alleged violation of constitutional rights and procedural fairness. Relying on

19. The Applicant further submits that the Respondents' decision to deactivate his LSK portal was procedurally improper, arbitrary, and in violation of his constitutional rights under Articles 47, 48, 49, and 50 of the *Constitution*, as well as Sections 4(3) and 4(4) of the *Fair Administrative Action Act*.

20. While acknowledging that judicial review is not meant to substitute the administrator's decision, as clarified in *Suchan Investment Ltd v Ministry of National Heritage & Culture & 3 Others* (2016), the Applicant argues that this Court retains the mandate to assess whether the decision-making process adhered to principles of fairness and legality.

21. It is his case that the 12-month deactivation period has lapsed, no further sanctions have been imposed, and that he has provided sufficient evidence to warrant the Court's intervention. Accordingly, he humbly prays that this Honourable Court grants the reliefs sought, including reactivation of his portal, and awards costs against the Respondents.

Analysis and Determination:

22. This court has been invited to determine whether the 1st and 2nd Respondents Notice of Preliminary Objection dated 16th April, 2025 should be allowed.

23. A preliminary objection must be one that addresses a point of law. It must be one that wades away from the law and delves in the factual issues.

24. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

> "....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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...."

25. The Respondents have to demonstrate that the Notice of Preliminary Objection herein can be sustained.

26. The 2025 portal activation generates a new or builds into a Continuing cause of action that is available and justiceable. This is so because this court takes note of the fact that Advocates status is supposed to remain active every year.

27. The issues of the applicants 2024 portal activation is an issue that is alive and pending in the Court of Appeal such that the doctrine of *res judicata* does not apply.

28. The suit that is before this court touches on distinct question of the 2025 portal activation for the applicant.

29. The question of the 2024 portal activation belongs to the past litigation.

30. The *Civil Procedure Act* Cap 21, at Section 7 provides as follows;

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
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> Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
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> Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
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> Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
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> Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
>
> Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

31. The doctrine of res judicata is not novel. Its genesis is in Section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya which provides that:

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

32. The Supreme Court in a decision rendered on 6th August, 2021 in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR comprehensively dealt with the different facets making up the doctrine of res judicata.

33. The Apex Court went ahead and rendered itself on the threshold for proving the applicability of the doctrine. The Court stated as follows:

> "(86) We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
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> a. There is a former Judgment or order which was final;
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> b. The Judgment or order was on merit;
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> c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

34. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

i. What issues were really determined in the previous Application;

ii. Whether they are the same in the subsequent Application and were covered by the Decision.

iii. Whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

35. The fact that the Applicant has a pending appeal before the Court of Appeal cannot form the basis for barring the applicant from seeking an order for the activation for Law Society of Kenya Portal for the year 2025.

36. What has been presented as a Notice of Preliminary Objection cannot avail in the circumstances. It calls for a lot of factual considerations, analysis and data examination and a lot of analysis of entries which will help the court to ascertain reasons that informs the deactivation.

37. No doubt the court needs to be informed and told of the linkage between the 2024 and 2025 portal deactivation of counsel. This can only happen at the full hearing of the suit.

38. The Respondent also argued that the court is *functus officio*.

Daniel Malan Pretorius, in "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*," (2005) 122 SALJ 832, has thus explicated this concept:

> " 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."

39. I am of the view that this court is not bound by the principles of functus officio given that the court in the instant suit is being invited to determine the question of the activation of the portal for the year 2025, which is distinct and separate from the 2024 and I so hold.

Disposition;

40. The 1st and 2nd Respondents Notice of Preliminary Objection dated 16th April, 2025 lacks merit.

Order;

The 1st and 2nd Respondents Notice of Preliminary Objection dated 16th April, 2025 is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2025.

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J. CHIGITI (SC) JUDGE