



**In re Estate of Joram Njora Karaihira (Deceased) (Succession Cause 124 of 2003) [2024] KEHC 12182 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12182 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 124 OF 2003  
HI ONG'UDI, J  
OCTOBER 15, 2024**

**IN THE MATTER OF THE ESTATE OF JORAM NJORA KARAIHIRA (DECEASED)**

**BETWEEN**

**ELIJAH KARAIHIRA NJORA ..... PETITIONER**

**AND**

**GEOFFREY KAMONJA NJORA ..... OBJECTOR**

**RULING**

1. This ruling is in respect of the Notice Motion dated 6<sup>th</sup> February, 2024 and the Preliminary Objection dated 21<sup>st</sup> February, 2024.
2. In the application dated 6<sup>th</sup> February, 2024 objector/applicant prays for the following orders;
  - i. That this honourable Court be pleased to allow the firm of Odiya & Associates Advocates to come on record on behalf of the objector/applicant herein after judgment to replace the firm of G. N Kimani & Company Advocates who are currently on record on behalf of the beneficiaries/applicant.
  - ii. That the cost of this application be provided for.
3. The said application is based on the grounds thereof and the affidavit of the objector/applicant sworn on even date. He deposed that the suit herein was concluded and judgment entered on 19<sup>th</sup> October 2023 and after reviewing the whole conduct of his case and, the resultant decision of the court, he was desirous to change legal representation. He instructed the firm of Odiya & Associates Advocates to act for him in this matter but G. N. Kimani & Co. Advocates who were his previous advocates declined to give consent allowing newly instructed firm of advocates to come on record.
4. He deposed further that changing advocates to enable him have fair and preferred representation before the court was a constitutional right and the same ought to be granted as a matter of right. Additionally,



that he brought the present application on his behalf and that of his children who had been keenly following the trial from the onset. Further that it was in the interest of justice, fairness and expediency that this application and prayers sought be allowed.

5. This court on 9<sup>th</sup> May 2024 issued directions that Mr. Kimani advocate for the objector files the replying affidavit and preliminary objection in court but the same was not filed. Attempts by the deputy registrar to get hold of the said advocate have been futile since no contacts or email address was availed in any of their pleadings. In fact, the copy of the preliminary objection currently in the court file was availed by Odiya & Associate Advocates upon request by the deputy registrar.

6. In the Preliminary Objection the objector advocates pray for orders that;

That The honourable Court has determined all issues in the matter including confirming aspect of representation and is therefore functus officio

7. Both applications were canvassed by way of written submissions.

**Submissions by Odiya & Associates on the application dated 6<sup>th</sup> February 2024 and the Notice of preliminary objection dated 21<sup>st</sup> February 2024.**

8. The said submissions are dated 22<sup>nd</sup> May 2024 and filed in court on 26<sup>th</sup> July 2024. Counsel gave a brief background of the case and cited the provisions of Order 9 rule 9 of the Civil Procedure Rules which provides as follows;

“.....When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall be effected by order of the court –

- a. upon an application with notice to all parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be...”

9. She submitted that pursuant to article 48 of *the Constitution* the applicant has the right to access justice. Further, that the advocates on record had for over 10 years represented him without raising any fee note or fee invoice demanding payment. However, after delivery of judgment no formal request or fee note was raised but instead he requested for kshs. 100,000/= to file an appeal. Therefore, that the said advocate knew that the applicant owed him no fees at all.

10. The court’s attention was drawn to the case of Zachary Mogeni Vs Standard Chartered Bank (K) Ltd (2021) eKLR where the court opined as follows citing the case of Samson Okun Orinda Vs Ayub Muthee Igwet & 2 others [2013] eKLR where the court held

“...No advocate can impose himself upon a client simply because he has not been paid his professional fees in full. The Advocate who has not been paid his professional fees in full has a remedy to file Advocate/client bill of costs for taxation on his fees but he cannot simply say since I have not been paid my fees in full I shall continue to act for you whether you like it or not. Nor can he insist on being given a guarantee that all his unpaid professional fees would be paid before a new Counsel is allowed to come on record. As the law provides for mechanism on how an Advocate can recover his unpaid fees from his former client who has changed his Advocate, the former Counsel cannot be heard to say any change of advocate



should not be allowed as he would be greatly prejudiced if an incoming Advocate is allowed to come on record....

11. Regarding the preliminary objection, counsel placed reliance on the case of *Omondi v National Bank of Kenya Ltd & Others* [2001]1EA 177 where the court held as follows;

“...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter (sic) in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion...”

12. As to whether this court is *functus officio*, counsel placed reliance on the decisions in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR and *Leisure lodge v Japhet Asige and another* [2018] eKLR. He urged the court to allow the applicant's application dated 6<sup>th</sup> February 2024 with costs in the applicant's favour.

#### **Submissions by G. N Kimani & Co. advocates**

13. The said submissions are dated 27<sup>th</sup> May 2024. Counsel submitted that the application dated 6<sup>th</sup> February 2024 was brought under wrongful and defective provisions of law as sections 1A, 1B and 3A of the *Civil Procedure Act*, do not in any way provide for the relief sought in prayer 1 or 2 of the application and it was therefore dead on arrival. He urged the court to dismiss it with costs.

14. Regarding the preliminary objection, he submitted that he had raised a preliminary objection to the effect that this court had already judiciously and conclusively presided and determined all the issues of dispute in the present succession cause. Further, that this Court pronounced its Judgment on 27<sup>th</sup> April 2023 and a notice of appeal was lodged before the same court and court of appeal at Nakuru. Therefore, that all the issues for determination before this court including representation had been settled in the said judgment.

15. He cited the decision in *Telkom Kenya Ltd v John Ochanda* [2014] eKLR *Nairobi Civil Appeal No. 60 of 2013* where the Court held as follows;

“*Functus officio* was an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon”

16. He submitted further that it was a mandatory requirement under Order 9 Rule 9 that a party represented by an advocate post Judgment seeks leave in the event of a desire to change an advocate. That the purpose and objective of the said provision was to ensure that a client does not abuse the process of court by avoiding to discharge its obligation under law including settling of advocates fees for services rendered once Judgment was pronounced.

17. He urged the court to order in the alternative as a pre-condition of changing representation, depositing of the due fees of kshs. 2,500,000/= as per clause 6 of their replying affidavit or they await the taxation process. He further urged the court to dismiss the application dated 6<sup>th</sup> February 2024 with costs.



## Analysis and determination

18. I have considered the application and the preliminary objection herein and the submissions by both parties. I will first deal with the preliminary objection since it raises the issue of this court being *functus officio*. I find the issue for determination to be whether the preliminary objection dated 21<sup>st</sup> February, 2024 is merited.
19. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:

“So far as I’m 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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
20. The Court will also take into account that a preliminary objection must stem from the pleadings and raises a pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of *Oraro v Mbaja* [2005] 1KLR 141, where it was held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
21. In the instant preliminary objection one of the grounds raised therein is that this court has determined all issues in the matter including confirming the aspect of representation. In light of the authorities cited above this is clearly not a point of law but rather a factual issue which has to be ascertained by the court. Therefore, this ground fails.
22. The second ground is that this court is *functus officio* and therefore lacks jurisdiction to determine issues raised. In my opinion, the said ground raises a point of law. In *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* (*supra*) also relied on the objector/ applicant, the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads:

“...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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.
23. In the application dated 6<sup>th</sup> February 2024 which is the subject of the preliminary objection raised, the firm of Odiya & Associates Advocates are seeking to come on record on behalf of the objector/ applicant herein after judgment in place of the firm of G. N Kimani & Company. They are not seeking for a review or varying of orders issued in the judgment.



24. In light of the authority cited above, I find that this court is not functus officio when what is sought in the application is only change of representation post-judgment. This court can determine the aforementioned application pursuant to the provisions of Order 9 rule 9 of the Civil Procedure Rules which provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

25. Consequently, I find that the preliminary objection dated 21<sup>st</sup> February, 2024 is not merited and the same is dismissed entirely.

26. In addressing the application dated 6<sup>th</sup> February 2024 which seeks to have the firm of Odiya & Associates Advocates come on record on behalf of the objector/applicant after judgment to replace the firm of G. N Kimani & Company who are currently on record, this court is guided by the provisions of Order 9 Rule 9 of the Civil Procedure Rules (as cited herein above under paragraph 24). This Rule makes it mandatory that change of advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.

27. The reasoning behind the said provisions was well articulated in the case of S. K. Tarwadi v Veronica Muehlemann [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

28. Further, in Connection Joint –vs- Apollo Insurance [2006] eKLR, the court held that; -

“...Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect. By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate...”



29. In view of the above, it is clear that the provisions of Order 9 rule 9 of the Civil Procedure Rules as to change of an advocate after judgment is only meant to cater for the interests of the advocate whom the applicant wants to change. In this case the applicant filed an affidavit of service dated 21<sup>st</sup> February 2024 indicating service of the application on the firm of G. N Kimani & Company and the said firm has challenged the application on the grounds that its fees has not been paid.
30. Choice and change of an advocate for legal representation is one's right. However, this action has its legal consequences. The applicant claims that the law firm of G. N. Kimani was rendering pro-bono services to him and so did not serve him with any fee notes. He does not deny that legal services were rendered. He has however not produced any evidence to confirm his claim, relating to pro-bono services.
31. The above being the position, the court will not deny him the liberty to change advocates as per his application. The application dated 6<sup>th</sup> February, 2024 is therefore allowed on condition that the objector/applicant deposits in court the sum of Ksh 400,000/= as commitment fees within 30 days from today to await the taxing of counsel's bill of costs. Failure to comply with the condition will render the leave granted to be of no consequence to him. There shall be no order as to costs.
32. Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15<sup>TH</sup> DAY OF OCTOBER, 2024 AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

