



**In re Estate of Hadi Ali Ahmed (Deceased) (Succession Cause  
209 of 2009) [2024] KEKC 17 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEKC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOMBASA  
SUCCESSION CAUSE 209 OF 2009  
AH ATHMAN, CK  
JUNE 13, 2024**

**BETWEEN**

**MKASI SEIF SMITH ..... 1<sup>ST</sup> PETITIONER**

**SANIA HEMED SALIM ..... 2<sup>ND</sup> PETITIONER**

**AND**

**MAAWIYA BAUSI FAMAU ..... RESPONDENT**

**RULING**

1. The petitioner's application dated 23<sup>rd</sup> January, 2024 seeks orders that this Honourable court be pleased to amend and rectify judgment of distribution of share issued on 2<sup>nd</sup> October, 2014 and substitute the name of Zena Hemed, Hafswa Hemed, Maawiya Bausi (deceased) and Maawiya Bausi Famau.
2. The applicant deposed that some legal heirs, namely Zena Hemed and Hafswa Maawiya Bausi are now deceased and the respondent is not entitled to any share of the estate of the deceased because his wife and child are all deceased. He deposed that the application is the only avenue available to enable the rectification and amend the correct share of the late Hadi Ali Ahmed.
3. The respondent filed a preliminary objection on the grounds that the application is fatally defective. He contends the court is ex-officio, and after the death of a heir, the correct procedure is for the heirs to file a fresh suit.
4. The applicant reiterated the contents of his affidavit in support of his application.



5. A preliminary objection should raise pure points of law. It raises weighty issues of law which if successful the entire suit collapses. It is defined in the well-known case of *Mukisa Biscuits v West End Distributors Limited* [1969] EALR as that which:

“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.”
6. The court further stated that:

“So far as I am aware, a Preliminary Objection consists of a pure 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.’
7. The doctrine of *functus officio* provides that a judicial officer can exercise his judicial function with respect to a particular matter only once. Once he or she has delivered the judgment on the merit, he or she cannot vary or revoke it. The Supreme Court expounding on the concept in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others v Iebc & Others* [2013 eKLR (of *functus officio*) 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:

“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.”
8. However, a judicial officer is allowed to handle applications on a decided matter for review and directions necessary to perfect the decision. The Supreme Court in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others v Iebc & Others* [2013 eKLR cited with approval the case of *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550 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. [emphasis supplied]”
9. In this application the applicants have not raised any pure point of law. They have merely repeated the facts in their affidavit. The facts are contested and need to be tested through *viva voce* evidence and cross examination to be ascertained. They do not qualify as points of law.
10. Further, this is a 2009 succession matter that was decided in 2014, ten (10) years ago. The court in that judgment conclusively determined the issues therein. The death of some heirs forms another estate other the one in this matter. The correct procedure is to file a fresh suit for determination of the estate, heirs and their respective shares of the deceased legal heir. The judgment, rulings and orders of this matter may be annexed thereto for clarity and evidence.



11. The preliminary objection is merited. No orders as to costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON 13<sup>TH</sup> JUNE, 2024.**

**HON. ABDULHALIM H. ATHMAN**

**CHIEF KADHI**

In the presence of

Mr. Salim Kerrow, Court assistant

Ms. Kinyua for applicant

Mr. Hamza for Respondent

