



**Rachier & Amollo LLP v Tito t/a Tito & Associates Advocates &
2 others (Commercial Miscellaneous Application E401 of 2024)
[2025] KEHC 15156 (KLR) (Commercial and Tax) (24 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E401 OF 2024**

**MN MWANGI, J
OCTOBER 24, 2025**

BETWEEN

RACHIER & AMOLLO LLP APPLICANT

AND

JOHN TITO T/A TITO & ASSOCIATES ADVOCATES 1ST RESPONDENT

PATRICK SAGWA KISIA T/A STEG CONSULTANTS 2ND RESPONDENT

KAY CONSTRUCTION COMPANY LIMITED 3RD RESPONDENT

RULING

1. This Ruling is in respect to the 1st respondent's Notice of Preliminary Objection dated 16th December 2024. The background that gave rise to the said Preliminary Objection is that applicant filed a Notice of Motion application dated 25th November 2024 pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Section 80 of the *Advocates Act*, Rules 9 & 12 of the Advocates (Accounts) Rules and Order 23 Rule 1 of the Civil Procedure Rules, 2010. The applicant prays for orders for staying and striking out the garnishee proceedings, and for the Court to hold the 1st respondent personally liable for costs, and for the Court to exercise its residual disciplinary jurisdiction over the 1st respondent.
2. The application is premised on the grounds on the face of the Motion, and it is supported by affidavits sworn on 25th November 2024 by Dr. Jotham Arwa Okome, the Managing Partner of the applicant law firm. In opposition to the application, the 1st respondent filed a replying affidavit sworn on 16th December 2024 by John Tito, an Advocate of the High Court of Kenya practicing in the name and style of the 1st respondent law firm. The 1st respondent also filed the instant Notice of Preliminary Objection dated 16th December 2024 raising the following grounds –



1. That Applicant's application, Notice of Motion dated 25th November 2024 against 1st Respondent is blatantly defective before the Honourable Court and/or outright contravenes Order 1 Rule 2 as read together with Order 1 Rule 23 of the Civil Procedure Rules 2010 (As amended) (sic).
3. On 18th December 2024, this Court gave directions that the 1st respondent's Notice of Preliminary Objection would be canvassed first and by way of written submissions. The 1st respondent's submissions were filed on 6th January 2025 by the law firm of Mutunga Mwesigwa LLP Advocates, whereas the applicant's submissions were filed on 18th February 2025 by the law firm of Rachier & Amollo LLP.
4. Mr. Mwesigwa, learned Counsel for the 1st respondent submitted that the applicant in this suit is Patrick Sagwa Kisia T/a Steg Consultants, represented by John Tito T/a Tito & Associates Advocates, who instituted garnishee proceedings against Kay Construction Company Ltd and Rachier & Amollo LLP. He stated that instead of responding to the application against it, Rachier & Amollo LLP filed its own application and improperly joined learned Counsel for the applicant as a party, designating him as the 1st respondent. Mr. Mwesigwa referred to the provisions of Order 1 Rules 10(2) and 25 of the Civil Procedure Rules, 2010 (as amended) and stated that a party can only be added to proceedings with leave of Court.
5. Counsel contended that since the applicant did not seek leave of the Court before joining John Tito T/a Tito & Associates Advocates as a party to these proceedings, the 1st respondent's Notice of Preliminary Objection is properly grounded and ought to be upheld. To buttress these submissions, Counsel relied on the case of the Speaker of the National Assembly v Karume [1992] KECA 42 (KLR). He also relied on the Supreme Court case of Odinga v Independent Electoral and Boundaries Commission & 3 others (Petition 5 of 2013) [2013] KESC 2 (KLR) and argued that the firm of Rachier & Amollo LLP cannot rely on Article 159(2)(d) of *the Constitution*, as the law expressly required it to seek leave of Court before adding a party to the instant proceedings.
6. Mr. Ometto, learned Counsel for the applicant submitted that the application dated 25th November 2024 invoked the Court's residual disciplinary powers under the *Advocates Act* to punish the 1st respondent Advocate for alleged misconduct. He argued that such powers apply regardless of whether the Advocate is a party to the suit or not, since appearing before the Court is enough to invoke the Court's jurisdiction. Counsel asserted that the 1st respondent's Preliminary Objection is misguided as it overlooks the fact that the applicant invoked this Court's residual powers over Advocates.
7. Mr. Ometto further argued that the said Preliminary Objection is baseless and defective as it relies on Order 1 Rules 2 & 23 of the Civil Procedure Rules, 2010, which are irrelevant to the impugned application. He submitted that contrary to the legal precedent set by the Court in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, the 1st respondent's Preliminary Objection raises no pure point of law. He further submitted that listing and/or designating the Advocate in the citation is a procedural technicality that does not affect jurisdiction or the substance of the grievance under the *Advocates Act*. Counsel argued that procedural errors cannot invalidate the instant application, as this Court retains full power to discipline Advocates appearing before it.

Analysis And Determination.

8. Upon perusal of the 1st respondent's Notice of Preliminary Objection dated 16th December 2024 and the written submissions by Counsel for the parties, the issue that arises for determination is whether the 1st respondent's Notice of Preliminary Objection is merited.



9. Mr. Ometto contended that the 1st respondent's Preliminary Objection is baseless and defective as it relies on Order 1 Rules 2 & 23 of the Civil Procedure Rules, 2010, which are irrelevant to the impugned application. It is a fact that the Preliminary Objection herein is anchored on the wrong provisions of the law since Order 1 Rules 2 & 23 of the Civil Procedure Rules, 2010, provides for the power of Court to order a separate trial and costs, respectively.
10. This Court is however mindful of the provisions of Sections 1A and 1B of the *Civil Procedure Act*, which mandate Courts to promote substantive justice by upholding the overriding objective namely, the fair determination of proceedings, efficient resolution of disputes, prudent use of judicial and administrative resources, and the timely as well as cost-effective disposal of cases. The effect of the overriding objective was considered by the Court of Appeal in the case of *Stephen Boro Gititha v Family Finance Building Society & 3 others* [2009] KECA 44 (KLR) as hereunder –

The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way... I must warn litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.

11. Bound by the aforementioned decision, this Court finds that reliance on the wrong provisions of the law in the instant Preliminary Objection goes to its form rather than its substance. This is because the substance of the objection would remain unchanged even if the 1st respondent had invoked the correct legal provisions.
12. In the circumstances, it is my finding that the said issue amounts to a procedural technicality within the meaning of Article 159(2)(d) of *the Constitution* of Kenya, 2010, and does not constitute a fatal defect. Accordingly, this Court finds that the instant Preliminary Objection is not fatally flawed.
13. Moving on to whether the 1st respondent's Preliminary Objection is merited, in order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, but it cannot be raised if any fact has to be ascertained, or if what is sought is the exercise of judicial discretion. What constitutes a valid Preliminary Objection was considered by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (supra) as follows –

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.

14. 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.

15. The 1st respondent contended that the original parties to this suit are Patrick Sagwa Kisia T/a Steg Consultants, as the applicant, represented by John Tito T/a Tito & Associates Advocates, who instituted garnishee proceedings against Kay Construction Company Ltd and Rachier & Amollo LLP. The 1st respondent asserts that it was improperly joined to this suit as the 1st respondent without leave of the Court.
16. It is not in contest that Rachier & Amollo LLP filed its own Notice of Motion application dated 25th November 2024 where it sued Counsel for Patrick Sagwa Kisia T/a Steg Consultants, John Tito T/a Tito & Associates Advocates, as the 1st respondent. He was however not originally a party to the proceedings herein save for his role in representing Patrick Sagwa Kisia T/a Steg Consultants. Rachier & Amollo LLP did not seek leave of the Court before joining John Tito T/a Tito & Associates Advocates as a party to these proceedings.
17. Rachier & Amollo LLP contended that its application invoked the Court's residual disciplinary jurisdiction under the Advocates Act to sanction the 1st respondent Advocate for alleged misconduct. Counsel argued that these powers may be exercised irrespective of whether the Advocate is formally joined as a party to the proceedings, as the said Advocates appearance before the Court is sufficient to confer jurisdiction. He submitted that the 1st respondent's Preliminary Objection is misplaced, and that citing or designating the Advocate in the pleadings is merely a procedural technicality which neither affects the Court's jurisdiction nor the substance of the grievance raised under the Advocates Act.
18. From the foregoing, this Court is of the considered view that this is a case for misjoinder of parties. Order 1 Rule 9 of the Civil Procedure Rules, 2010, states as follows on misjoinder and non-joinder of parties–

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
19. The Court of Appeal in the case of William Kiprono Towett & 1597 others v Farmland Aviation Ltd, Marco Dunn & Toby Dunn [2016] KECA 301 (KLR), held as hereunder in respect to the aforesaid provisions –

Most critically order 1 rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.
20. A reading of Order 1 Rule 9 of the Civil Procedure Rules, 2010, reveals that non-joinder of necessary parties or misjoinder of parties in a suit is an irregularity which does not go to the root of a suit. Further, this Court is empowered under Section 56 of the Advocates Act to deal with misconduct or offences by an Advocate. The said provisions state that –

Nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the judges of the Court to deal with misconduct or offences by an advocate,



or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.

21. Accordingly, this Court agrees with Counsel for the applicant that whether or not an Advocate is a party to the proceedings before it, it has the power to deal with misconduct and/or offences by an Advocate appearing before it.
22. In the premise, I am of the considered view that joining John Tito T/a Tito & Associates Advocates as a party to these proceedings is an irregularity which can be cured by an amendment and does not render Rachier & Amollo LLP's application dated 25th November 2024 fatally defective.
23. This Court finds the 1st respondent's Notice of Preliminary Objection dated 16th December 2024 being devoid of merits. It is hereby dismissed. Costs shall be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mwesigwa for the 1st respondent

Ms Owuor holding brief for Mr. Tito for the 2nd respondent

Ms Maina holding brief for Mr. Ometto for the 3rd respondent and also
appearing for the applicant

Ms B. Wokabi – Court Assistant.

Page 3 of 3 NJOKI MWANGI, J.

