

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC PETITION NO. 48 OF 2012

DOMITILLA WANZILA MUVANYA.....
PETITIONER

VERSUS

INSURANCE REGULATORY AUTHORITY.....1ST RESPONDENT

SAMMY MUTUA MAKOVE.....2ND
RESPONDENT

GODFREY KIMAIYO KIPTUM.....3RD RESPONDENT

MARY WANJIRU AZEBELE.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

MINISTER FOR FINANCE.....6TH RESPONDENT

AND

FELIX CHELIMO.....INTERESTED PARTY

RULING

The Respondent filed a notice of preliminary objection dated 23/5/2025 against the taxation of the Petitioner’s party and party bill of costs dated 24th May 2021 on the following grounds:-

- (a)** This Honourable Court is divested of jurisdiction under the law to entertain, interrogate and/or determine the taxation of the Applicant’s bill dated 24th May 2021 as the same is drawn and filed in direct contravention of the express provisions of Order 9 Rule 9 of the Civil Procedure Rules as was precedentially cemented in the case of

Sirikwa Squatters Group versus Commissioner of Lands and 9 others (Environment and Land Petition 4 of 2016) [2025] KEELC 4308 (KLR) [2] (21 May 2025) (Ruling).

- (b) This Honourable Court lacks jurisdiction to proceed with the taxation of the Applicant's party and party bill of costs dated the 24th May 2021 for failing to comply with Rule 62A (3) of the Advocates Remuneration Order which requires the Applicant's bill, in this circumstance, to be accompanied by a certificate setting out the dates that all the Advocates acted for the Petitioner.
- (c) The bill and its taxation thereof is a nullity *ab initio* that is bad in law and therefore proper candidate for striking out and/or dismissal forthwith, even *suo moto*, with costs.

In answer to the notice of preliminary objection, the Petitioner/Applicant filed a notice of motion application dated 7/7/2025 seeking an order in the following terms:-

1. Further proceedings in the Notice of Preliminary Objection dated 23rd May, 2025 be stayed pending hearing and determination of this application.
2. The Notice of Change of Advocate dated 24th May 2022 be effected.
3. The Petitioner be granted leave to file a certificate setting out the dates during which Mwaniki Gachuba Advocate acted in the petition.
4. The Notice of Preliminary Objection to the party and party bill of costs dated 23rd May, 2025 be deemed as spent.
5. Costs of this application be provided for.

The application is supported by grounds (a) to (i) set out on the face of the notice of motion the gravamen of which is that the Petitioner filed the notice of change of Advocate dated 24th May 2022 after the judgment had been delivered in this suit on 30/5/2016.

That Mwaniki Gachuba Advocate who had personal conduct of the Petition practiced in the name and style of Onyoni Opin and Gachuba Advocates.

That the Petitioner has neither sacked nor replaced Mwaniki Gachuba Advocate and he continues to act for her after the judgment was delivered.

That Mwaniki Gachuba Advocates now practices in the name and style of Mwaniki Gachumba Advocates.

That the notice of change of Advocates was necessary notwithstanding judgment in the petition had passed.

That the court has power to effect the notice of change of Advocate dated 24th May 2022 by virtue of Order 9 Rule 9 of the Civil Procedure Rules 2010.

That no party in the petition will suffer any injustice or prejudice if the motion is allowed.

The Respondent filed grounds of objection to the application dated 7/7/2025 aforesaid asserting that the court ought to prioritize the

preliminary objection which if upheld will render any further proceedings in this matter unnecessary.

That the firm of Mwaniki Gachuba Advocates is admitted in the application to have come on record after the delivery of judgment without consent of the previous advocates and without leave of court in direct contravention of the express provision of Order 9 Rule 9 of the Civil Procedure Rules.

That, now that it has been admitted that change of Advocates was irregular and improper, the bill of costs dated 24th May 2021 the application and mention notice dated 7/7/2025 and any other document filed by the said firm on behalf of the Petitioner being a stranger to the suit be struck out as was stated in the case of ***Seki Limited versus Humhrey Omolo and 22 others [2021] eKLR; Sinkwa Squatters Crop versus Commission of Lab and 9 others Environment and Land Petition 4 of 2016 [2025] KEELC 43 of (KLR) (21 May 2025) Ruling*** and ***Ernest Kevin Chelido versus Attorney General and 2 others (2015) eKLR*** and ***Paul Kiplagat Keter versus John Koech [2021] eKLR***.

The Respondents filed written submissions dated 17th June 2025 in support of the preliminary objection and cited Order 9 Rule 9 of Civil Procedure Rules which provides:-

“a change to be effected by order of court or consent of parties (Order 9 Rule 9)

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 a consent filed between the ongoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

That the Advocate/Applicant did not file a consent from the outgoing Advocate to allow the court to validate the change, therefore the Advocate/Applicant is a stranger to this suit and all proceedings filed by the new firm should be struck off the record.

The Respondent cites the case of ***S. K. Tarmad versus Veronica Muehlemann (2018) eKLR*** where the Judge observed as follows:-

“In my view the essence of Order 9 Rule 9 of the Civil Procedure Rules 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 and the case of *Serah Wanjiru Kungu versus Peter Munywa Kimani [2013] eKLR*, where the court underscored that this rule protects against unfair displacement of Advocates without resolution of fees.

In ***Sirikwa Quarters Property versus Commission of Land and 9 others (Supra)*** M/s. Ngatia and Co. Advocates purported to come on record for the 7th Respondent in place of Kalya and Company without seeking leave of the court. Their argument which was dismissed was that they were coming in to replace the firm of Prof. Tom Ojienda and Associates who had equally come on record after judgment without leave.

Furthermore, the Respondent submitted that the Petitioner/Applicant did not comply with Rule 62A (3) of the Advocates Remuneration Order which provides that where there has been a change of Advocates, the bill shall be accompanied by a certificate setting out the dates during which all Advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.

That the Petitioner/Applicant did not file any such certificate or agreement accompanying the bill of costs filed.

That the bill of costs be struck out for the aforesaid reasons.

The Petitioner/Applicant submits that the Respondent waived the right to object to the change of Advocate dated 24/5/2022 which was served on the firm of Kipkende and Co. Advocates on record for the Respondent. That the said firm did not file any objection to the notice of change of Advocate until 3 years later when it filed the notice of preliminary objection on 23/5/2025. The Applicant relies on the case of ***Site Steel Rolling Mills Ltd versus Jubilee Insurance Co. Limited [2007] KEHC 2192 (KLR)***, where it was held that,

“Waiver can be express or implied. Disputes hardly arise where it is express. They however do where it is implied. An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intension than to

waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right."

The Petitioner further relies on the case of ***Serah Njeri Mwobi versus John Kimani Njoroge (2013) KECA 501(KLR)*** where the court held:-

"In our understanding, the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See Seascapes Limited versus Development Finance Company of Kenya Limited Nai Civil Appeal No. 247 of 2002.

The words waiver, estoppel and acquiescence have also been defined by the Halsbury's laws of England, 4th Edition, Volume 16. At page 992 where waiver has been defined as follows:-

"Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter, asserted, and is either express or implied from conduct. It may sometimes resemble a form of election and sometimes based on ordinary principles of estoppel, although, unlike estoppel waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it and allow the

contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent and the fact that the party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right...The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.”

The Petitioner further submitted that the preliminary objection is not supported by any filed pleadings be it grounds of opposition of bill of costs or a defence against the bill of costs.

That the said bill of costs with the notice of taxation was served on the Respondent's Advocate on 23/9/2022 and on the Respondent directly on 26/1/2023 after Kipkenda and Co. Advocates ceased to act for the Respondent. That on 21/5/2025, the Petitioner served to the Respondent a notice of taxation/ruling. That in spite of the foregoing, the Respondent did not file any reply or grounds of opposition to the bill of costs.

The Petitioner submits therefore, the notice of preliminary objection dated 23/5/2025 is inadmissible for want of a proper defence. That a preliminary objection must stem from pleadings and any preliminary objection raised before the filing of a defence is premature, inconsistent as the court cannot without proper facts decide on a point of law as was held in the case of ***Joho and another versus Shahbal and 2 others [2014] 34 (KLR)*** that:

“34. To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd. versus West End Distributors (1969) EA 698: 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...”

This was buttressed in the case of George Waweru Njuguna versus Pauline Chesang Gitau Kamuyu [2017] KEELC 1861 (KLR) as follows:

“I am in agreement with the plaintiff that the issues raised by the defendant have been wrongly brought before the court by way of a preliminary objection. First, as I have stated earlier in this ruling the defendant is yet to file a statement of defence to the plaintiff’s claim herein. It is clear from the cases cited above that a preliminary objection must arise expressly or by implication from the proceedings. I am of the view that in the absence of a defence on record by the defendant, the defendant’s preliminary objection has no basis. Secondly, from the defendant’s submission, there is no doubt that many of the issues raised by the defendant cannot be determined without calling evidence. The defendant’s preliminary objection is based on two issues, namely, time bar and res judicata. The court would not be able to determine when the cause of action accrued in favour of the plaintiff against the defendant without evidence. The same applies to the determination of the issue as to whether or not the previous cases between the plaintiff and the deceased are related to the present suit and the effect of the decisions in the

said cases on this suit. The same can only be brought to the attention of the court through affidavit or oral evidence at a plenary hearing.

Due to the foregoing it is my finding that the defendant's preliminary objection is premature and has no merit. The same is accordingly dismissed with costs to the plaintiff."

The court has carefully considered the rival argument by the Respondent/Objector and the Petitioner/Applicant and states with regard to order 9 Rule 9 that the Petitioner/Applicant did not file an application with notice to all parties seeking an order to change Advocates from the court. The Petitioner/Applicant did not also obtain a consent between the outgoing Advocate and the proposed incoming Advocate. The Petitioner/Applicant admits this irregularity but raises the defence of waiver and estoppel on the basis that the Respondent did not object to the direct filing of notice of change of Advocate for a period of three (3) years and so the Respondent must be held by the court to have waived his right to object to the same and/or that the court should hold that the Respondent is estopped by fact of inordinate delay from raising this objection 3 years later.

The Petitioner/Applicant did not follow the law and was never promised by the Respondent that the Respondent had absorbed the Petitioner from that default or that the Respondent would not in future rely on that default in a claim against the Respondent in future. The Petitioner has not established a defence of waiver or equitable estoppel in his favour.

The provisions of Order 9 Rule 9 do not contemplate sanitization of non-compliance by the fact of delay by any of the parties of the suit who ought to have been notified of an application seeking orders to change an Advocate on record.

In the present case however, the Respondent was served with the notice of change of Advocates without the prerequisite application but did not raise any objection to the change. It must be remembered that Mr. Gachuba Advocate was on record for the Petitioner from the beginning of the suit serving in a different firm and only notified that he had continued to represent the Petitioner but in a new firm. It is pertinent to note that no objection to Mr. Gachuba, continuing to represent the Petitioner by the previous firm where Mr. Gachuba was a partner was raised or filed. The Respondent has not filed any grounds of opposition to the application by the Advocate for Petitioner/Applicant to be validated by the court as being on record and to be granted leave to file a certificate setting out the dates when Mwaniki Gachuba Advocate acted in the petition.

The court is of the conclusive view and finding that Order 9 Rule 9 was enacted to protect the interest of an Advocate who is being replaced by a new Advocate after judgement, so as not to be occasioned prejudice by way of loss of fees for work done. This rule was not enacted as a sword to be activated to prevent payment of costs for work done by an Advocate who at all material times acted for the party who seeks to have his costs taxed by the court having changed his employer or principal after judgment.

The Respondent in objection has not established any prejudice it would suffer if the notice of change of Advocates dated 24/5/2022, is validated by

the court as prayed in the notice of motion dated 7/7/2025, in view of the fact that there has been no objection from the firm of Advocates previously on record to the coming of the new firm and that this Applicant be also granted opportunity to file a certificate setting out the dates which Mwaniki Gachuba Advocate acted in the petition.

Accordingly, the preliminary objection cannot defeat the notice of motion dated 7/6/2025 to which the Respondent filed no response or grounds of opposition.

The Respondent has not established any time bar to the reliefs sought in the application. Accordingly, the preliminary objection dated 23/5/2025 is dismissed and the application dated 7/7/2025 granted in the following terms:-

- (i) The notice of change of Advocate dated 24/5/2022 is ratified and Mwaniki Gachuba Advocate is properly on record in this matter.
- (ii) The Petitioner/Applicant is granted leave to file a certificate setting out the dates during which Mwaniki Gachuba Advocates acted in the petition.
- (iii) The notice of preliminary objection to the party and party bill of costs dated 23/5/2025 is dismissed.

Dated at Nairobi this **18th Day of December 2025.**

Mathews Nduma
JUDGE

Appearance:

Mr. Gachuba for Petitioner/Applicant

Mr. Omondi for Respondent/Objector

Mr. Kemboi – Court Assistant