

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MILIMANI
ELC CASE NO. 430 OF 2008

FIROZ NURALI HIRJI.....1ST
PLAINTIFF

SHAROK KHER MOHAMED ALI.....2ND
PLAINTIFF

VERSUS

MARCELLUS LAZIMA
CHEGE.....DEFENDANT

RULING

1. Before this court for determination is the notice of preliminary objection dated 23rd November, 2025 filed by the plaintiffs challenging the notice of motion dated 11th November, 2025 on the following grounds:

1. That both the firm of Khaminwa & Khaminwa and DR. Khaminwa himself are not the advocates on record for the applicant/ judgment debtor and they are therefore strangers to these proceedings and have no or no lawful standing to draft, lodge and or argue any matter or even to address this honourable court and the pleadings filed by them ought to be struck out and removed from the record.

2. That the applicant/judgment debtor is a contemnor who has failed and refused to obey the orders of the court and particularly the orders of Tuesday, 28th October, 2025 that required him inter alia, to lodge into court a full

account of all the payments allegedly made by the judgment debtor to the plaintiff/judgment creditor within 7 days from that date, that it to say, by the 4th October, 2025 and as such, he ought not have any audience before this honourable court until such time as he has purged himself of such contempt, obeyed all the court's orders and submitted himself to the authority of this honourable court.

2. The defendant filed a replying affidavit in response thereto sworn on 26th March, 2026. He deposed that the deputy registrar issued warrants of arrest against him and he instructed the firm of Khaminwa & Khaminwa Advocates to represent him. Owing to the urgency of the matter, the firm of Khaminwa & Khaminwa filed a notice to act alongside the firm of A.N Ndambiri & Co. Advocates. He deposed that Dr. Khaminwa informed the law firm through the letter dated 14th October, 2025 but there was no response. Further, Dr. Khaminwa represented him in court on 16th October, 2025 and 28th October, 2025. He admitted that Dr. Khaminwa did not file the notice to act alongside until 6th November, 2025 and the notice of motion dated 11th November, 2025 was filed after the notice was filed and served.

3. The defendant deposed that he is not in contempt and that he is allowed to appoint any advocate he desires to perform any task he sees fit. Further, THAT the notice to act alongside is not a notice of change of advocate. The defendant deposed that the instant objection is fatally flawed as the same is not grounded on points of law that if successful, will determine the issue before the court.
4. The preliminary objection was canvassed through written submissions. The plaintiffs filed their submissions dated 23rd November, 2025. The defendant filed his submissions dated 27th March, 2026. I have considered the preliminary objection, the response thereto and the written submissions filed by the parties. The issue for determination is *whether the notice of preliminary objection is merited.*
5. Law, J.A. in **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** stated as follows: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary

point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

6. Also, the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR**, it was held that: -

“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”

7. Further, Ojwang J (As he then was) in **Oraro -vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the Mukisa Biscuits case (supra) went on to state that:-

“A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal

principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

8. From the above cited authorities, it is clear that for a preliminary objection to succeed, the same must consist of a pure point of law, with the facts not disputed by the opposing party. Also, a preliminary objection should possess the ability to dispose off the issue that is before court without going to trial and lastly, the same ought to stem from and not outside of pleadings. Looking at the grounds challenging the notice of motion dated 11th November, 2025, the same does not raise pure points of law for the reasons discussed below.
9. To begin with and ideally, a notice of preliminary objection is argued through oral or written submissions. The nature of any preliminary objection is that the points of law raised against the pleadings if weighty, are capable of determining the issue before the court without the need of material support supplied

through affidavit evidence. When a replying affidavit is filed like in this case, it is clear that the grounds raised in the objection contain disputed facts which the opposing party seeks to rebut by adducing evidence. Without saying much, ground 2 of the preliminary objection fails to the extent that the court will be required to confirm the veracity of the contempt allegations made against the defendant. To do so, there is need to comb through evidence which goes outside the scope of a preliminary objection.

- 10.** The first ground of the objection raises a pure point of law as it touches on legal representation. The plaintiffs argued that any change of advocate after judgment has been entered must comply with **Order 9 Rule 9** of the **Civil Procedure Rules**. The plaintiffs submitted that the notice to act alongside filed by the firm of Khaminwa & Khaminwa Advocates is an impermissible device that has no basis in the rules as the same is used pre-judgment or where an advocate on record consents to a colleague joining them. The plaintiffs submitted that with the complaints made against the firm of A.N Ndambiri by the defendant, it is inconceivable that Mr. Ndambiri has consented to act together with the new counsel in this case. In sum, they argued that the said representation is a nullity.

11. On the other hand, while relying on the case **Chelule & Another v Kuria & Another [2024] KEELC 88 (KLR)**, the defendant submitted **Order 9 Rule 9** of the **Civil Procedure Rules** does not prohibit him from appointing any advocate to act alongside his current advocate. Further, that Dr. Khaminwa appeared before the court on several occasions introducing himself as the joint advocate and no objection was raised by the plaintiff or the court.
12. In the case of **Transzoia Securities Limited v Stuadae [2025] KECA 1048 (KLR)**, the court of appeal observed: **“Order 9 Rule 9 of the Civil Procedure Rules applies to representation in an ongoing or concluded suit in the lower court, but not on appeal.”** Emphasis mine. Where there is any change of advocate after judgment has been entered, the law provides that a process must be initiated to allow for any new representation by an advocate. It is not in doubt that judgment was delivered in this matter on 22nd September, 2017. While it may be easy to argue that the representation by the firm of Khaminwa & Khaminwa Advocates is improper, there is no evidence that a notice of change of advocates was filed. As it is, the firm of A. N

Ndambiri is still on record for the defendant. I do note the sentiments by the plaintiffs that it is inconceivable that Mr. Ndambiri has consented to act alongside Mr. Khaminwa. Let me say that the relation between an advocate and a client is a contractual relationship whose terms of engagement are not possibly known to other parties including the court unless such terms are disclosed. More so, if any communication was sent to the firm of A. N Ndambiri which did not elicit response, does that raise doubt that Mr. Ndambiri would not be in agreement allowing another firm to act alongside his firm? These are questions only Mr. Ndambiri would answer.

- 13.** In this case, the defendant has opted to add another law firm to act alongside the firm of A. N. Ndambiri. In my view, the notice to act alongside the firm of A.N Ndambiri is not fatal to the pleadings filed and the proceedings before this court.
- 14.** From the above, it is my finding that the notice of preliminary objection dated 23rd November, 2025 is hereby dismissed. I make no orders as to costs.

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 4TH DAY OF MAY, 2026.**

HON. MBOGO C.G.

JUDGE
04/05/2026.

In the presence of:

Ms. Benson Agunga - Court assistant

Mr. Khaminwa for the Defendnat/Applicant

No appearance for the Plaintiffs/Respondents

ORIGINAL