



Nderitu v Cooperative Bank of Kenya Limited & 2 others; Cooperative Bank of Kenya Limited (Plaintiff); Kenya Continental Hotel Limited & 2 others (Defendant) (Civil Case 457 of 2002) [2024] KEHC 2275 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2275 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 457 OF 2002
MN MWANGI, J
FEBRUARY 23, 2024

BETWEEN

HELLEN NJERI NDERITU PLAINTIFF

AND

THE COOPERATIVE BANK OF KENYA LIMITED 1ST DEFENDANT

COOPERATIVE MERCHANT BANK LIMITED 2ND DEFENDANT

JAMES K. NDERITU 3RD DEFENDANT

AND

THE COOPERATIVE BANK OF KENYA LIMITED PLAINTIFF

AND

KENYA CONTINENTAL HOTEL LIMITED DEFENDANT

JAMES K. NDERITU DEFENDANT

HELLEN NJERI NDERITU DEFENDANT

RULING

1. The Notice of Motion dated 16th May, 2023, has been brought under Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Order 9 Rule 9(a) of the [Civil Procedure Rules, 2010](#). The applicants seek the following orders-

i. Spent;



- ii. That this Honourable Court be pleased to grant leave to the firm of Walker Kontos to come on record for the 1st defendant in the counterclaim and the Estates of the 2nd Defendant and the 3rd defendants in the counterclaim; and
 - iii. That costs of this application be in the cause.
2. The application is supported by the grounds set on the face of it, the supporting and supplementary affidavits, sworn on 16th May, 2023 and 5th July, 2023 respectively, sworn by Anne Wanjiru Nderitu, a director of the 1st defendant in the counterclaim, an Executor of the estate of the 2nd defendant in the counterclaim and an Administrator of the estate of the 3rd defendant in the counterclaim. The applicant further put in written submissions dated 6th July, 2023.
 3. In summary, the grounds are that on 26th May, 2022, prior to his death, the 2nd defendant in the counterclaim negotiated a settlement agreement with the plaintiff in the counterclaim on his behalf and on behalf of the 1st and 3rd defendants in the counterclaim, with a view of concluding this matter. That the 3rd defendant in the counterclaim passed away on 18th March, 2021 and the 2nd defendant in the counterclaim passed away on 16th January, 2023. That the directors of the 1st defendant in the counterclaim, the Executors of the estate of the 2nd defendant in the counterclaim and the Administrators of the estate of the 3rd defendant in the counterclaim have since approached the firm of Walker Kontos to come on record, with instructions for the firm to represent them in this matter, wherein judgment has already been entered. It was stated that leave of the Court is necessary for the said law firm to come on record, to enable the speedy conclusion of this matter which has been before Court for over two decades.
 4. The application was opposed through a grounds of opposition dated 18th May, 2023 filed by T.O. K'Opere & Co. Advocates, who are on record and have acted for the 3rd defendant in the main suit and the 1st & 2nd defendants in the counterclaim. The grounds are that the application is incurably defective since it has been on record since inception of the suit and it is inconceivable to have two different Advocates on record for the same parties in a suit; that the main suit is inseparable from the counterclaim and Walker Kontos cannot seek to come on record for the defendants in the counterclaim who are also the plaintiff and 3rd defendant in the main suit, save for the company in which the 1st plaintiff and 3rd defendant in the main suit (the 2nd and 3rd defendants in the counterclaim) are directors. The firm of T.O. K'Opere & Co. Advocates also filed written submissions dated 12th July, 2023.

Analysis And Determination.

5. I have considered the application, the grounds in support and in opposition of the said application. I have also considered the written submissions together with the authorities cited. The issue that arises for determination is whether the applicant has made out a case for grant of leave for Walker Kontos to come on record for the respective parties after entry of judgment.
6. In regard to the manner of effecting any change of Advocates after entry of judgment, T.O. K'Opere & Co. Advocates claims that Walker Kontos ought to have notified it out of courtesy of the intended change of Advocates and filed and served a notice of change of advocates before it filed the instant application.
7. The applicants however argued that the law provides that after entry of judgment, there must be 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.



8. Order 9 Rules 9 of the [Civil Procedure Rules](#), which is instructive, provides the following—
- “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.”
9. From the above, it is clear that under paragraph (a), the change of Advocates after entry of judgment can be effected upon an application with notice to all the parties. In [James Ndonyu Njogu v Muriuki Macharia](#) [2020] eKLR, cited in the applicant’s submissions, the Court observed as follows—
- “As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case where the Applicant’s Appeal had been dismissed, was that counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of Advocates before filing the application to set aside the orders of the Court.”
10. In view of the above provisions and authority, it is my finding that the application before this Court has been properly filed.
11. The applicants seek to have Walker Kontos come on record for the 1st defendant in the counterclaim, Kenya Continental Hotel Limited; the late James K. Nderitu, the 2nd defendant in the counterclaim and the 3rd defendant in the plaint and the late Hellen Njeri Nderitu, the 3rd defendant in the counterclaim and the plaintiff in the main suit. They claim that that the 2nd and 3rd defendant’s instructions to T. O. K’Opere & Co. Advocates and Adere & Co. Advocates ceased upon the demise of the James K. Nderitu, the 3rd defendant in the main suit, as well as the demise of the Hellen Njeri Nderitu, the plaintiff in the main suit.
12. On the other hand, the firm of T.O. K’Opere & Co. Advocates claims that it is still on record for the 1st and 2nd defendants in the counterclaim and the pending appeal (C. A. No. E506 of 2020) against the judgment of the High Court delivered on 3rd November, 2020.
13. As regards the 1st defendant, T. O. K’Opere & Co. Advocates highlighted that although Anne Wanjiru Nderitu claimed to be a director of the 1st defendant, both the 2nd and 3rd defendants in the counterclaim were its only directors and shareholders. T. O. K’Opere & Co. Advocates also contended that Anne Wanjiru Nderitu did not exhibit any official company search or a company resolution for her appointment, and authority to give instructions on behalf of the company, before the demise of James K. Nderitu and Hellen Njeri Nderitu.
14. In law, a company is a separate and distinct legal entity from its shareholders and directors. This principle was pronounced by the House of Lords in the case of [Salomon v A Salomon & Co Ltd](#) [1897] AC 22. I note from the record that the applicants have exhibited a limited grant appointing Anne Wanjiru Nderitu as the Administrator for purposes of defending this suit and the will of the late James K. Nderitu executed on 13th September, 2022, appointing her as one of his executrices. There is however no document exhibited to support her appointment as a director of the 1st defendant in the counterclaim before the demise of the deceased. Appointment of directors is the sole preserve of shareholders and that parties herein must complete administration of the estates of deceased and



transmission of shares must be done before a meeting of the company is held to appoint directors. See *Mbogo & another v Registrar of Companies; Roberty Njoka Muthara (Interested Party)* (Civil Case E820 of 2020) [2021] Eklr. It is therefore my finding that the firm of T.O. K'Opere & Co. Advocates is still on record for the 1st defendant.

15. As to the 2nd and 3rd defendants in the counterclaim, I note from the death certificates exhibited by the applicant that the 3rd defendant in the counterclaim passed away on 18th March, 2021 and the 2nd defendant in the counterclaim passed away on 16th January, 2023.

16. In the case of *Edward Thiong'o Wachira v Washington Nderitu Komu t/a Nderitu Komu & Co. Advocates & 2 others* [2021] eKLR, the Court held thus:

“... I am in agreement with the Applicant that the instructions that had been given by the 3rd Respondent to the firm of Gathara Mahinda & Company Advocates ceased on his death on 22nd October 2019. The said instructions could only be revived by the 3rd Respondent's legal representative... although the said firm of advocates remained on record having acted for the deceased 3rd Respondent while he was alive, the firm had no instructions to take any further action in the matter on behalf of the 3rd Respondent...”

17. Guided by the above authority, I am inclined to agree with the applicant's submission that following the demise of Hellen Njeri Nderitu and James K. Nderitu, the instructions to their respective Advocates ceased and can only be revived by the deceased's representatives.

18. T. O. K'Opere & Co. Advocates went on to argue that it is a party in the succession proceedings for the late James K. Nderitu (P & A No. E224 of 2023) as a creditor and caveator under Rule 15 of the *Probate & Administration Rules* and that no Grant of Probate or Representation was issued by the Court to the applicants allowing anybody to give instructions on behalf of the Estate. The applicant however argued she has properly instructed Walker Kontos to come on record for the 2nd applicant in this suit by dint of authority bestowed upon her by the will of the 2nd applicant. I note that the applicant exhibited the late James K. Nderitu's last will and testament executed on 13th September 2022, appointing the applicants as his executrices.

19. In *Kothari v Qureshi & Another* [1967] EA 564, the Court held that-

“Where a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of death of the testator.....An executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as is possible until he has to prove his title ... and if the will is ultimately proved no one can question the validity of such acts.”

20. Along the same lines of reasoning, I find that the executrices of the late James K. Nderitu properly instructed Walker Kontos to come on record for the applicants in this suit by dint of the authority bestowed upon them by the will.

21. T.O. K'Opere & Co. Advocates claim that through this application, the applicants are seeking to evade payment of its legal fees. The rationale for Order 9 Rules 9 was underscored by Hon. W. Korir J., (as he



then was), in *S. K. Tarwadi v Veronica Mueblemann* (HC Malindi Misc. Civil Appl. No. 6 of 2018) [2019] eKLR, as follows-

“...the essence of Order 9 Rule 9 *CPR* is to protect advocates from mischievous clients who will wait until a judgment has been delivered then sack the advocate and either replace him with another advocate or act in person.”

22. On this issue, the principle is that the Court will not prevent a party from appointing its Advocate of choice unless it is shown that there is prejudice. In *William Audi Odode & Another v John Yier & Another* Court of Appeal Civil Application No. Nai 360 of 2004 (KSM33/04), the Court of Appeal (Hon. Okubasu J), stated the following-

“Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.”

23. In light of the above, I find that there is no prejudice to be suffered by T. O. K’Opere & Co. Advocates since its legal fees are to be recovered in the succession proceedings for the late James K. Nderitu (P & A No. E224 of 2023), in which it is a party, as a creditor and caveator under Rule 15 of the Probate & Administration Rules. In similar vein, there is no prejudice to be occasioned by T. O. K’Opere & Co. Advocates by the firm of Walker Kontos coming on record for the late Hellen Njeri Nderitu as the legal costs of work done so far by T. O. K’Opere & Co. Advocates will be recovered in Succession Cause No. E3560 of 2022, In the matter of the Estate of Hellen Njeri Nderitu (Deceased).

24. The upshot is that the application dated 16th May, 2023 is partially successful. It is hereby allowed in the following terms-

- i. The firm of Walker Kontos Advocates is hereby allowed to come on record for the Estates of the 2nd and 3rd defendants (deceased) in the counterclaim (who are the 3rd defendant and the plaintiff in the main suit).
- ii. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the applicants

Mr. Ongonjo h/b for Mr. K’opere for the 1st defendant in the main suit

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J

