



**Thuku & another v Symon Thuo Gachahi Muhia t/a S.T.G Muhia & Associates Advocates
(Civil Suit 92 of 2017) [2023] KEHC 2049 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 92 OF 2017
CW MEOLI, J
FEBRUARY 23, 2023**

BETWEEN

**DAVID NDUNGU THUKU 1ST PLAINTIFF
SUSAN WANJIRU THUKU 2ND PLAINTIFF**

AND

**SYMON THUO GACHAHI MUHIA T/A S.T.G MUHIA & ASSOCIATES
ADVOCATES DEFENDANT**

RULING

1. David Ndungu Thuku and Susan Wanjiru Thuku (hereafter the 1st & 2nd Plaintiff(s), respectively, filed an originating summons dated 18.04.2017 seeking several orders against Symon Thuo Gachahi Muhia t/a S.T.G Muhia & Associates Advocates (hereafter the Defendant).
2. The orders sought are as follows. An order to compel the Defendant to deliver to the Plaintiffs or their advocate all certificates and documents of title in the immovable properties known as L.R No. 12882/77 and L.R No. 12882/78 as well as all correspondence and relevant documents passing between the Defendant (on behalf of the Plaintiffs as vendors) and third parties in respect of the sale of part of the said properties, which are in the Defendant's custody, possession, control and belonging to the Plaintiffs; and an order compelling the Defendant to file his detailed bill of costs in respect of the said conveyancing work undertaken on behalf of the Plaintiffs as vendors in respect of the sale of Plot B1, being approximately quarter-acre portion of the property known as L.R No. 12882/78 to Lucia Kambua Mulu, the sale of approximately half-acre portion of the property known as L.R No. 12882/78 to Lucia Kambua Mulu, and sale of 50% portion of the property known as L.R No. 12882/77 to James Mutua Mulinge. The summons is expressed to be brought pursuant to Section 45,



- 46, 47, 49 & 51 of the [Advocates Act](#) and Order 52 Rule 3, 4 & 10 of the Civil Procedure Rules, inter alia, on grounds on the face of the summons and amplified in the supporting affidavit sworn by 1st Plaintiff.
3. In response, the Defendant filed a notice of preliminary objection dated 15.08.2021 on grounds that the originating summons as brought under sections 45, 46, 49, and 51 of the [Advocates Act](#) falls within the jurisdiction of the Advocates Disciplinary Tribunal empowered to hear complaints of professional misconduct against Advocates; that the cause having arisen from an advocate-client relationship, any complaints against the advocates should be filed in the Advocates Disciplinary Tribunal and not this court; and that the originating summons offends the provisions of Section 44(3)(a) of the [Advocates Act](#) and the provisions of Section 60 of the [Advocates Act](#) which requires matters of this nature to be heard and determined by the Advocates Disciplinary Tribunal.
 4. Further that, the originating summons offends the provisions of Section 45 of the [Advocates Act](#); that the originating summons offends the provisions of Section 6 of the Advocates Remuneration Order which allows advocates to hold security for outstanding payment of fees from the clients; that the originating summons offends the provisions of Section 5(1) of the Advocates Remuneration Order as the billing in such a matter of exceptional importance and complexity is guided by the foregoing provision; that the suit lacks merit and is instituted and intended to vex and ruin the reputation of the Defendant after the Advocate-client relationship broke down; and that this court lacks jurisdiction to hear and determine this matter.
 5. The preliminary objection was canvassed by way of written submissions.

Counsel for the Defendant contended that the grounds in support of the originating summons the Plaintiffs appear to raise a complaint in relation to the conduct of the Defendant (Advocate) in the course of an advocate-client relationship and as such the instant cause of action lay with the Advocates Disciplinary Tribunal. He cited the substance of one of the complaints against the Defendant that relates to holding and refusal to release conveyancing documents in demonstration of the submission that the Advocates Disciplinary Tribunal has jurisdiction and statutory mandate to hear and determine all advocate-client related disputes.
 6. Invoking section 60 (1) of the [Advocates Act](#) counsel submitted that the Advocates Disciplinary Tribunal is legally mandated to handle all issues of professional misconduct relating to advocates and the Plaintiffs ought to have in the first instance sought redress before the Advocates Disciplinary Tribunal for determination. Counsel further called to aid the decision in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR to assert that this court cannot confer itself jurisdiction in the matter and any attempt to entertain the instant suit is tantamount to assuming jurisdiction of the Advocates Disciplinary Tribunal.
 7. Counsel went on to contend that the tribunal has authority to order the Defendant to return any documents belonging to the Plaintiff if satisfied that the documents are being illegally held. Lastly, it was submitted that Order 6 of the Advocates Remuneration Order entitles counsel to a lien over any documents for purposes of protecting his interest. Counsel urged the court to make a finding that it lacks jurisdiction to hear the instant matter and which ought to be referred to the Advocates Disciplinary Tribunal.
 8. The Plaintiffs failed and or opted not to file submissions in respect of the Preliminary Objection (PO) despite being given ample opportunity to do so.
 9. The court has considered the material presented by the respective parties and the record herein. The Defendant's Preliminary Objection (PO) is fundamentally premised on various provisions of the [Advocates Act](#) and Advocate Remuneration Order with specific reference being made to Section 44(3)



- (a), 45 & 60 of the [Advocates Act](#) and Order 5(1) and 6 of the Advocates Remuneration Order. The court must first determine whether in the circumstances of this suit, the preliminary objection raised by the Defendant raises a pure point of law and whether the preliminary objection is well grounded.
10. As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, Law J. A. stated:
- “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, will dispose of the suit. Examples are 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.....
- 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 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”
11. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating 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.”
12. In *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR the Court of Appeal cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR where the latter court emphasized that: -
- “(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).”
13. The same court in *Mulemi v Angweye & Another* (Civil Appeal 170 of 2016) [2021] KECA 214 further distilled the constituent ingredients of a preliminary objection in *Mukisa Biscuits* (supra) by stating as follows:-
- “.....a preliminary objection may be distilled as follows:
- i) It must be a pure point of law;



- ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
- iii) If argued as a pure point of law, it may dispose of the suit;
- iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court's discretion.

14. The Defendant's objection challenges the jurisdictional authority of this court to entertain the instant proceedings primarily on the ground that the dispute herein falls within the preserve of the Advocates Disciplinary Tribunal. No doubt the issue of jurisdiction as raised herein is a point of law as the pleaded facts are not disputed. The locus classicus on jurisdiction is the celebrated in case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi. JA held as follows;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

15. The Supreme Court in Samuel Kamau Macharia (supra) rendered itself in part on the question of jurisdiction as follows:-

"(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

16. Is the preliminary objection well grounded? The High Court draws its original jurisdiction from Article 165 (3) of the Constitution of Kenya. The Court of Appeal in the case of Speaker of National Assembly v Njenga Karume [1992] eKLR held that :-

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act



of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

17. In *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR the Supreme Court held that in order to give a prescriptive answer to a jurisdictional question, the first port of call is to determine the nature of the dispute. The originating summons before the court is brought pursuant to Section 45, 46, 47, 49 & 51 of the *Advocates Act* as read with Order 52 Rule 3, 4 & 10 of the Civil Procedure Rules. From the Plaintiffs’ pleaded case and reliefs sought in the summons, and the depositions in support thereof, the Plaintiffs essentially invoke the discretion of this court to order the Defendant to deliver accounts and documents in his possession and to file his bills of costs as the advocate-client relationship between the parties herein has irretrievably broken down. To my mind, as crafted, the originating summons while raising certain pertinent issues between the parties does not neatly qualify in the category of a complaint against the Defendant in his professional capacity. Equally, the provisions invoked by the Plaintiffs donate jurisdiction to this court.

18. Section 47 (1) of the *Advocates Act* upon which the summons is premised provides that;-

“(1) The jurisdiction of the Court to make orders for the delivery by an advocate of a bill of costs, and for the delivery up of or otherwise in relation to, any deeds, documents or papers in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the Court.”

19. Whereas Order 52 Rule 4 of the *Civil Procedure Rules* (CPR) provides that;-

- (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—
 - (a) the delivery by the advocate of a cash account;
 - (b) the payment or delivery up by the advocate of money or securities;
 - (c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;
 - (d) the payment into or lodging in court of any such money or securities;
 - (e) the delivery up of papers and documents to which the client is entitled.
- (2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.
- (3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate’s lien, if any, as the court deems fit.”

20. On the other hand, section 60 (1) & (6) of the Advocates Acts states that;-

“

“(1) A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.

.....



- (6) Where an advocate against whom the Tribunal is hearing a complaint relating to fees and costs has not filed a bill of costs in Court, the Tribunal may upon the request of the complainant, order such an advocate to produce before it a detailed fee note:

Provided that where the advocate fails to comply with an order of the Tribunal under this subsection, the Tribunal may determine the fee payable to the advocate in such sums as it deems fit.”

21. I concur with Ogola. J in *Republic v Advocates Disciplinary Tribunal & another Ex Parte Joseph Karanja Kanyi* [2019] eKLR wherein he stated in respect of Section 60(1) of the *Advocates Act* that professional misconduct encompasses a wide spectrum of conduct. Undeniably, the mandate of the Advocates Disciplinary Tribunal (the tribunal) is to hear complaints against advocates in respect of “professional misconduct” and “complaints relating to fees. None of these complaints is expressly pleaded herein.
22. It is the court’s view therefore that the Plaintiffs grievance is not a complaint in respect of “professional misconduct” against the Defendant, falling within the purview of the Advocates Disciplinary Tribunal. This court is empowered under Section 47 (1) of the *Advocates Act* and Order 52 Rule 4 of the Civil Procedure Rules (CPR) to hear and determine the Plaintiff’s suit as pleaded, including the question of any lien asserted by the Defendant in that regard.
23. Consequently, the court is not persuaded that the preliminary objection by the Defendant is well taken and the same is dismissed with costs. This is an old suit that ought to go to hearing without any further delay.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23rd DAY OF FEBRUARY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiffs: Mr Mshweshwe

For the Defendant: Mr. Muriuki

C/A: Carol

