Adam (Suing as a Personal Representative of the Estate of the Deceased Ahmed Adam) v Greenbelt Warehouse Limited & 3 others (Environment and Land Case E0126 of 2024) [2025] KEELC 5426 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5426 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND CASE E0126 OF 2024

EK MAKORI, J

JULY 10, 2025

BETWEEN

HANTER AHMED ADAM ..... PLAINTIFF

SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF THE DECEASED AHMED ADAM

AND

GREENBELT WAREHOUSE LIMITED ..... 1ST DEFENDANT

IBRAHIM DIRIYE ..... 2ND DEFENDANT

ABDI DIRIYE ..... 3RD DEFENDANT

JACKSON GIKANDI ALIAS NGIBUINI GIKANDI T/A GIKANDI & COMPANY ADVOCATES ..... 4TH DEFENDANT

RULING

1. We have a Preliminary Objection (PO) filed by the 4th defendant dated February 7, 2025, challenging this court's jurisdiction on the grounds that this matter is already before the Disciplinary Committee of the Law Society of Kenya. At the same time, the 4th defendant filed an application on the same date seeking to be removed as a party to these proceedings, having provided legal services and deposited the relevant title document with this court.

2. The court ordered the PO to be canvassed through written submissions.

3. I received written submissions from the 4th defendant's learned counsel, Mr. Gikandi, as well as submissions from learned counsel Ms. Cherono, representing the plaintiffs, and the court expresses its gratitude.

4. Based on the materials and submissions presented before me, I delineate the issues for the court's determination: the sustainability of the PO, the appropriateness of removing the 4th defendant as a party in these proceedings, and the determination of liability for costs.

5. The principles upon which this court is invited to assess the merit of a notice of PO were established in the well-known *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. This case outlined the criteria for a PO, which include raising a clear point of law, demonstrating the accuracy of all facts pleaded by the opposing side, and showing that no fact needs further investigation. The court will consistently follow these principles in its decisions.

6. The Court of Appeal in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga* [2016] KECA 817 (KLR) reiterated the same position on what would constitute a PO and held as follows:

> "The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the *Mukisa Case* (*supra*). That is, first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained."

7. The thrust of a PO in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A. in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR:

> "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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

8. Mr. Gikandi, representing the 4th defendant, argues that the supporting affidavit sworn by the fourth defendant on February 7, 2025, has brought to light relevant documents that clarify the true nature and context of the dispute. The plaintiff responded to these allegations with a letter dated October 22, 2024, submitted to the Disciplinary Committee of the Law Society of Kenya. The Law Society of Kenya acknowledged receipt of the matter through a letter dated November 12, 2024. Later, the 4th defendant submitted a detailed response via a letter dated November 21, 2024, along with annexures that refuted the allegations.

9. Counsel asserts that it is evident the issues raised in this case against the 4th defendant mirror those already addressed before the Law Society of Kenya. The plaintiff is effectively trying to prosecute the same allegations simultaneously in two separate forums, namely, the Honorable Court and the Advocates Disciplinary Tribunal. Such duplicative litigation violates well-established principles of procedural fairness, the rule of law, and the doctrine against abuse of the court process. Allowing a party to pursue the same matter with conflicting outcomes in parallel proceedings risks encouraging forum shopping and ultimately damages the credibility of judicial processes, thereby creating inefficiency.

10. Moreover, such conduct sets a troubling precedent that may lead to confusion and erode public confidence in the administration of justice. The Advocates Disciplinary Tribunal, functioning through the Law Society of Kenya, is the statutory body expressly authorized to hear and determine complaints concerning the professional conduct of advocates. It is a specialized forum equipped with the legal authority, procedural framework, and subject-matter expertise necessary to handle such matters.

11. Counsel argues that the Honorable Court should refrain from taking jurisdiction over issues that are clearly within the Advocates Disciplinary Tribunal's authority, especially when disciplinary processes have already begun. This view is supported by important decisions, including the ruling in *Republic v Advocates Disciplinary Tribunal; Amugune (Ex parte Applicant)* [2023] KEHC 23664 (KLR), as well as the cases of *T. O Kopere v The Disciplinary Committee Law Society of Kenya and Another* [2012] KEHC 5093 (KLR), and *Disciplinary Committee and Interested Party Daniel Mutisya Ngala, Ex parte Danstan Omari Mogaka* [2015] eKLR.

12. Ms Cherono, on behalf of the applicant, holds the view that the Preliminary Objection (PO) seeks to rely on technicalities to mask clear professional misconduct and breaches of fiduciary obligations. These are substantive legal issues that can only be properly addressed at trial, not at this interlocutory stage.

13. Counsel asserts that, pursuant to Clause 5.3 of the Sale Agreement, the 4th defendant committed to retain the duly registered transfer and the title deed in his custody until complete payment of the purchase price by the purchaser. Instead, he negligently and unlawfully released the title to the 1st, 2nd, and 3rd defendants without confirming that the vendor had received the payment. This egregious breach forms the core issue of the dispute currently before this court.

14. Counsel believes what is raised does not meet the threshold set in the Mukisa Biscuits Case on pleading pure points of law only.

15. Counsel argues that in this case, it is clear that whether the 4th defendant breached his undertaking, acted negligently, or facilitated a fraudulent transaction are all issues that require examining facts and evidence. These are not purely legal points and cannot be decided quickly through a PO.

16. Counsel asserts that criminal investigations and correspondence from the Directorate of Criminal Investigations (DCI) do not supersede this lawsuit. The criminal process functions independently of civil liability. See *Kenya Anti-Corruption Commission v Deepak Kamani and Others* [2014] eKLR; the existence or resolution of criminal proceedings does not prohibit or suspend civil claims arising from the same facts.

17. Furthermore, the DCI's correspondence originates from 2021 and was based on a complaint by third parties seeking to revoke the grant due to alleged fraud. Those allegations were never proven in court, and the Probate documents establish the plaintiff as the beneficiary of the property involved. The objectors failed to appear and prove their claims, and the court has since ruled, making that issue final and closed.

18. I have considered the submissions by both counsels regarding whether the plaintiff's PO has met the threshold established in the Mukisa Biscuits Case. It is undisputed that an inquiry has been initiated into the professional conduct of the 4th defendant in relation to the Sale Agreement between the parties and the retention by the 4th defendant of the disputed title document, given that all purchase monies had not been paid to the seller as endorsed in the agreement. The 4th defendant was, in essence, entrusted with a fiduciary duty to act in the best interest of his clients. Proceedings before the Advocates Disciplinary Tribunal are quasi-criminal, rather than civil.

19. As correctly observed by counsel for the plaintiff, Ms. Cherono, whose opinion I concur with, the existence of criminal investigations or criminal charges over the same subject matter does not preclude

the initiation or continuation of a civil lawsuit. See *Kidero v Ethics and Anti-Corruption Commission and 13 others* [2023] KECA 62 (KLR). Notably, that:

> "In short, courts will not ordinarily grant a stay of civil proceedings simply by virtue of the existence of parallel criminal proceedings arising out of the same events or subject matter. This is the import of section 193A of the *Criminal Procedure Code* which expressly permits parallel criminal and civil proceedings. The above being the general proposition of the law, to surmount the arguability threshold, an applicant bears the burden of showing how the continuance of the civil action will lead to a "real danger of prejudice" against him in the concurrent criminal and civil proceedings. As was held by a Constitutional Bench of the Supreme Court of *India in M. S. Sheriff v The State of Madras and others* (AIR 1954 SC 379):

> "No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment."

20. It follows, then, that the pendency of quasi-criminal proceedings before the Advocates Disciplinary Tribunal against the 4th defendant cannot serve as a bar to initiating a civil suit. The cases cited by the 4th defendant emphasize that quasi-criminal charges regarding professional or unethical conduct are filed with the Advocates Disciplinary Tribunal; however, the said Tribunal lacks jurisdiction to handle civil matters.

21. This then leads me to the consideration of whether the plaintiffs should have initially exhausted the prescribed mechanisms outlined for disciplinary proceedings against an advocate before initiating this matter. Mr. Gikandi contends that, given the existence of a specific process for disciplining advocates, this process ought to be followed prior to approaching the court. Conversely, Ms. Cherono, representing the plaintiffs, asserts that the mechanisms for addressing professional misconduct by advocates are neither adequate nor effective, and that the remedies sought in this case will not be available. Furthermore, she argues that the Advocates Disciplinary Tribunal lacks jurisdiction to adjudicate the issues raised in this lawsuit.

22. Courts, when handling complex claims, must evaluate each case individually. The primary adjudicative body needs to have proper jurisdiction to address the issue and be sufficiently capable and effective. In such cases, the court may suspend proceedings until the primary adjudicative forum resolves the matter. However, the primary forum must be properly equipped with the necessary mechanisms and jurisdiction to fully address all issues raised by an interested party. See the Supreme Court decision in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR), the Apex Court held thus:

> "It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations as is the case in the present dispute.

> The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC.....
>
> In addition to the above findings, since the appellant's claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts therefore clearly fell into in error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals."

23. As previously stated, the Advocates Disciplinary Tribunal is responsible for adjudicating quasi-criminal proceedings concerning the professional and ethical conduct of advocates. It does not handle civil matters. The claim herein pertains to contractual obligations arising from the actions of the 4th defendant. The reliefs sought cannot be satisfactorily granted by the Advocates Disciplinary Tribunal; therefore, it will not constitute an appropriate and effective forum for resolving the issues presented. Accordingly, the Preliminary Objection (PO) on this ground also fails.

24. On the issue of locus standi. The plaintiff, acting as the personal representative of the deceased vendor's estate, has been granted ad litem to bring this suit. Nowhere has it been shown that the plaintiff is bent on distributing the estate of the deceased through this legal action. The objection on this ground is not sustainable.

25. Regarding the application submitted by the counsel for 4th defendant dated February 7, 2025, seeking to be excused from participation as a party in these proceedings, the 4th plaintiff argues that the main issue concerns the title document, which has appropriately been deposited with the court upon application; therefore, his involvement in the transaction as an advocate has been completed, and he should be removed as a party in these proceedings.

26. The counsel for the plaintiff asserts that the claim against the 4th defendant extends beyond merely delivering the title document to include a breach of fiduciary duty regarding how he managed the title document entrusted to him. Furthermore, the claim is based on breach of contract and complicity in the disputed transfer. Specific breaches by the 4th defendant include his failure to comply with the undertaking to hold the title in trust until payment was received in full by the vendor, as well as his active involvement in facilitating the transfer of the contested property under controversial circumstances. I agree that these matters will have to await a full trial.

27. I am persuaded by the authority cited to me by the counsel for the plaintiff, *Yaya Towers Ltd v Trade Bank Ltd (In Liquidation)* [2000] eKLR. Striking out a claim by a party is a drastic measure that should be used sparingly and only in the clearest cases. This is not one of them. The plaintiff's claims against the 4th defendant are substantive, factual, and grounded in law. A hearing on the merits will be necessary.

28. Further counsel for the plaintiff argues, with which I agree, that the threshold for striking out the claim against the 4th defendant has not been met in this case. The plaintiff has articulated a clear and coherent cause of action against the 4th defendant, specifically, breach of contractual and professional duty. As reaffirmed by the landmark case of *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1, a cause of action should only be struck out when it is so weak that it discloses no reasonable claim and is incapable of being salvaged. The plaintiff's claim against the 4th defendant is neither hopeless nor frivolous; it raises significant issues that warrant examination at a full trial.

29. I concur with the counsel for the plaintiff that, based on the materials available, the 4th defendant cannot be excluded from these proceedings at this stage. It is not a case warranting a summary dismissal by the court; instead, it must proceed to a full trial.

30. In summary, both the PO dated February 7, 2025, and the application filed on the same date lack merit and are hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 10TH DAY OF JULY, 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Anyango, for the Plaintiff

Ms Olouch for the 4th Defendant,

Happy: Court Assistant

In the absence of:

Lisanza for the 1st Defendant