



**Ronald Allamano t/a Allamano & Associates Advocates v House
of Procurement Limited & another (Civil Appeal E056 of 2024)
[2025] KEHC 252 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E056 OF 2024
H NAMISI, J
JANUARY 23, 2025**

BETWEEN

**RONALD ALLAMANO T/A ALLAMANO & ASSOCIATES
ADVOCATES APPELLANT**

AND

**HOUSE OF PROCUREMENT LIMITED 1ST RESPONDENT
BERNARD ODOTE 2ND RESPONDENT**

*(Being an Appeal from the Ruling and Order of Hon. E. M. Wamae Muindi,
Adjudicator delivered on 29 February 2024 in Milimani SCCC No. E9208 of 2023)*

JUDGMENT

1. This appeal arises from a claim filed in the Small Claims Court by the Appellant against the Respondent seeking the following orders:
 - i. Judgement in the sum of Kshs 250,000/=;
 - ii. Damages for loss of business opportunities and income;
 - iii. Cost of the claim (to be assessed by the Court);
 - iv. Interest at commercial interest rates from 1 September 2023 until payment in full;
 - v. Other appropriate relief that the Court deems fit and just to grant
2. The particulars of the claim as pleaded by the Appellant are that the 2nd Respondent approached the Appellant to offer legal services to him as well as the 1st Respondent. The 2nd Respondent represented



to the Appellant that the 1st Respondent would honour all the terms of the legal representation and settle all invoices in time. The Appellant placed reliance on the 2nd Respondent's representation and entered into a contract for the provision of legal service. The contract was formalised by way of a written letter of engagement which the 2nd Respondent executed on behalf of the 1st Respondent in his capacity as Managing Director of the 1st Respondent.

3. Pursuant to the terms of engagement, the Appellant offered various legal services and raised invoices. The same were not paid, thus necessitating the claim.
4. The Respondents entered appearance and filed their response to the claim, denying the Appellant's claim. In addition to denying owing the Appellant any money, they raised a Preliminary Objection on the following grounds:
 - i. That the Honourable Court lacks jurisdiction to hear and determine the matter as it is a dispute on legal fees payable to an Advocate by a client;
 - ii. That the officer with the jurisdiction to adjudicate this dispute is the Taxation Officer;
 - iii. That the present suit is incompetent, incurably defective, vexatious, frivolous and without any merit;
 - iv. That the continued pendency of the suit is an abuse of the process of this Honourable Court
5. Parties canvassed the Preliminary Objection by way of written submissions.
6. The Respondents submitted that the trial Court did not have jurisdiction to determine the matter since it concerned taxation of Advocates' fees. It was the Respondents' contention that contrary to the assertion by the Advocate that there was a retainer agreement between the parties, the same was merely a letter of engagement containing proposals on the working relationship between the parties. It was the Respondents' submission section 45 (1) which the Advocate sought to rely on refers to contentious business, yet drafting and reviewing contracts is not contentious business nor proceedings in a criminal court or court martial.
7. On their part, the Appellant argued that where there is a written retainer agreement setting out the fees and duly signed by parties, the costs of an Advocate are not subjected to taxation by the Court. They relied on the cases of Sheetal Kapila -vs- Narriman Khan Brunlehner [2021] eKLR, Rachuonyo & Rachuonyo Advocates -vs- National Bank of Kenya Ltd [2020] eKLR and Oluoch-Olunya & Associates Advocates -vs- Parklane Construction Ltd [2020] eKLR.
8. In its ruling, the trial court held that a claim for legal fees is outside the jurisdiction of the Small Claims Court and the claim was subsequently struck out.
9. Aggrieved by the judgement, the Appellant lodged an appeal on the following grounds:
 - i. That the trial Magistrate/Adjudicator erred in law in her interpretation and application of Section 45 (1) and 45 (6) as read with section 48 of the [Advocates Act](#);
 - ii. That the trial Magistrate/Adjudicator erred in law in failing to appreciate that the claim is within the jurisdiction of the Small Claims Court under Section 12 of the [Small Claims Court Act](#) (Contractual dispute);
 - iii. That the trial Magistrate/Adjudicator erred in law in failing to consider the Claimant's submissions in her ruling;



- iv. That the trial Magistrate/Adjudicator erred in law by failing to make a nexus between the law relied on and her reasons to dismiss the Claimant's claim;
 - v. That the trial Magistrate/Adjudicator erred in law by failing to appreciate that the Respondents admitted to the existence of client-Advocate relationship in their response to the claim;
 - vi. That the trial Magistrate/Adjudicator erred in law by awarding the Respondents costs
10. Parties canvassed the Appeal by way of written submissions.

Analysis and Determination

11. Section 38 of the *Small Claims Court Act* provides as follows:
1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
 2. An appeal from any decision or order referred to in sub section (1) shall be final.
12. In the case of *Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd* [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.
- “This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).”
13. Similarly in the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017)* [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:
- “This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”
14. The duty of this Court in this instance is similar to that stated herein above, which is essentially limited to points of law. In the case of *J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another* [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:
- “In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.



In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

15. Turning to the grounds of appeal, I have read and considered the Record of Appeal and respective submissions by the parties.
16. On agreements with respect to remuneration, section 45 (1) of the *Advocates Act* provides thus:
 - (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—
 - (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
 - (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
 - (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.
17. The bone of contention herein seems to be the word "contentious" contained in section 45 (1). The Respondents' argument is that the Appellant cannot rely on this provision since the nature of the work undertaken was non-contentious. On the other hand, the Appellant's argument is that the section is applicable in view of the existence of a retainer agreement.
18. While it is true that the provisions of section 45 (1) specifically relate to contentious business, this section cannot be read in isolation. Section 44 provides thus:
 - 1) The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious.
 - (2) An order made under this section in respect of non-contentious business may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode or partly in another, and may regulate the amount of remuneration with reference to all or any of the following, among other, considerations, that is to say—
 - (a) the position of the party for whom the advocate is concerned in the business, that is, whether as vendor or purchaser, lessor or lessee, mortgagor or mortgagee, and the like;
 - (b) the place where, and the circumstances in which, the business or any part thereof is transacted;
 - (c) the amount of the capital money or rent to which the business relates;



- (d) the skill, labour and responsibility involved therein on the part of the advocate;
 - (e) the number and importance of the documents prepared or perused, without regard to length.
- (3) An order made under this section may authorize and regulate—
- (a) the taking by an advocate from his client of security for payment of any remuneration to be ascertained by taxation or otherwise, which may become due to him under any such order; and
 - (b) the allowance of interest.
- (4) So long as an order made under this section in respect of non-contentious business is in operation, taxation of bills of costs of advocates in respect of non-contentious business shall, subject to section 45, be regulated by that order.
- (emphasis mine)
19. It is common ground that, pursuant to the provisions of section 44, the Chief Justice has prescribed fees in regard to the remuneration of Advocates in respect of their business, whether contentious or non-contentious. Section 44(4), therefore, is key to unlocking the argument between the parties herein. The sub-section provides thus:
- (4) So long as an order made under this section in respect of non-contentious business is in operation, taxation of bills of costs of advocates in respect of non-contentious business shall, subject to section 45, be regulated by that order
20. From this section, it is discernible that the provisions cover both contentious business as specifically referred to in section 45 (1) as well as non-contentious business. A reading of section 45(3) is indicative that the section covers both contentious and non-contentious business. It provides thus:
- 3. An agreement made by virtue of this section, if made in respect of contentious business, shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof:
- Provided that any such agreement shall be produced on demand to a taxing officer and the client shall not be entitled to recover from any other person, under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his advocate in respect thereof under the agreement.
21. In *Muriu Mungai & Co. Advocates v New Kenya Co-operative Creameries Limited* [2020] eKLR, on the provisions of section 45 (3), Hon Justice Tuiyott opined thus:
- “The use of the words “ if made in respect of contentious business” is an acknowledgment ,I would think, that agreements with respect to remuneration for non-contentious matters can also be made between an advocate and his client.”



22. Bearing that in mind, the provisions of section 45 (6), which I reproduce here for clarity, then come into play.

(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48

23. The interpretation of sections 44 and 45 of the *Advocates Act*, therefore, is that where there is an agreement between the Advocate and client in relation to non-contentious business, then recovery of costs would not be subject to taxation.

24. Having said that, as was noted by the trial court, jurisdiction is so fundamental that it can be raised at any time. I concur with the Respondents' submission that jurisdiction of a court or tribunal to act when moved has to be explicitly and unequivocally provided under the law. The question that arises herein is whether the trial court was right in upholding the Preliminary Objection on the issue of jurisdiction and finding that the dispute herein, being a claim for legal fees, falls outside the jurisdiction of the Small Claims Court.

25. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarised the preliminary objection as seen from two of the judges in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, as follows:

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P added the following:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

26. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

27. In this instance, the preliminary objection raised by the Respondents raised facts which were outside the ambit of a preliminary objection. The same was based on the existence of a retainer agreement, which was a fact disputed by the Respondents. The matter was one that required further enquiry by the trial court, by calling evidence and analysis of that evidence. Determination of the existence of a



retainer agreement would fall squarely within the jurisdiction of the Small Claims Court as provided in section 12 (1) of the *Small Claims Court Act*, which states as follows:

- (1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—
 - (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract.

(emphasis mine)

28. The upshot of the foregoing is that the appeal succeeds. The Ruling of the lower court dated 29 February 2024 is hereby set aside. The claim shall be heard by any other Adjudicator other than Hon. Wamae Muindi, Resident Magistrate.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

.....for the Appellant

.....for the Respondents

Libertine Achieng.....Court Assistant

