



Interactive Gaming & Lotteries Limited v Ngatia & Associates Advocates (Civil Appeal 309 of 2019) [2025] KECA 1759 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1759 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 309 OF 2019
M NGUGI, P NYAMWEYA & WK KORIR, JJA
OCTOBER 24, 2025**

BETWEEN

INTERACTIVE GAMING & LOTTERIES LIMITED APPELLANT

AND

NGATIA & ASSOCIATES ADVOCATES RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi, Milimani Commercial & Admiralty Division, (M. Kasango J.) on 29th November 2018 in Commercial Misc. Appl. No. 15 of 2016)

JUDGMENT

1. The main issue in this appeal is the question of the appropriate orders to issue consequent to a finding that a preliminary objection raises contested facts. The appeal arises from a ruling of the High Court of Kenya at Nairobi, Commercial and Tax Division (M. Kasango J.) delivered on 29th November 2018 in Commercial Misc. Application No. 15 of 2016 where the learned trial Judge found that a preliminary objection raised by Interactive Gaming Lotteries Limited, the appellant herein was “overruled, rejected and dismissed with costs to Ngatia & Associates Advocates” (the respondent herein), and directed that it proceeds to taxation. The said preliminary objection was in relation to an Advocate-Client Bill of Costs dated 28th January 2016 that had been filed by the respondent, which the appellant objected to on the following grounds:
 1. That there exists no Advocate- Clients relationship between the Applicant and the Respondent
 2. That in the absence of retainer, the Court lacks requisite jurisdiction to tax the Bill of Costs



2. The preliminary objection was canvassed by way of written submissions, and the learned trial Judge held as follows in the impugned ruling:

- “ 11. I wholly agree with the advocate’s submissions that the client erred to have raised contested matter (sic) by way of preliminary objection. This practice was frowned upon in the case of Mukisa Biscuit (supra) where the Court stated:-
“The matter was raised in the guise of a preliminary objection, which it was not. It should have been raised in the form of an application by way of motion...”
12. Similarly here, the client should have filed an application which application would have been supported by affidavit evidence and the advocate would have responded by affidavit evidence.
13. For the client to have filed a preliminary objection it could only do so by raising a pure point of law which is argued on assumption that all the facts pleaded by the advocate, and in this case the facts are the narration in the bill of costs, were correct: if the assumption of the advocate are correct then the preliminary objection must and does fail because the advocate has a basis of taxing the bill of costs since he stated in the bill of costs that he acted on the instructions of the client.”

3. Being dissatisfied with the decision of the trial Court, the appellant has raised four (4) grounds in its Memorandum of Appeal dated 9th July 2019, in which it seeks the following orders from this Court:

1. This appeal is allowed and the Ruling and order of the Learned Judge of the Superior Court delivered on 29th November 2018 in Commercial Misc. Appl. No. 15 of 2016 be set aside and substituted with an order allowing the Appellant’s preliminary objection dated 20th April 2016
 2. Alternatively, that this appeal is allowed and the Ruling and Order of the Learned Judge of the Superior Court delivered on 29th November 2018 in Commercial Misc. Appl. No. 15 of 2016 be set aside and substituted with an order striking out the Appellants Preliminary objection dated 20th April 2016.
 3. Costs of the Appeal.
4. We heard the appeal on this Court’s virtual platform on 26th November 2024. Learned Counsel Mr. Jude Orange appeared for the appellant and relied on two sets of written submissions dated 24th July 2020 and 9th September 2020, while learned Senior Counsel Mr. Fred Ngatia, who appeared for the Respondent, relied on written submissions dated 25th August 2020. In commencing determination of the appeal, we are mindful of our duty as a first appellate Court as set out in the decision of *Selle and Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123, namely, to reconsider the evidence, evaluate it, and draw conclusions of facts and law. We will depart from the findings by the trial Court only if they were not based on evidence on record; where the said Court is shown to have acted on the wrong principles of law as was held in the case of *Jabane vs Olenja* (1986) KLR 661; or where its discretion was exercised injudiciously as was held in the case of *Mbogo & another vs Shah* (1968) EA 93.
5. Mr. Orange’s submissions consolidated the four grounds of appeal into two related issues, namely, whether the appellant’s preliminary objection was competent, and secondly whether the issue of retainer was determined without evidence. According to counsel, the learned trial Judge erred by



- dismissing the preliminary objection instead of striking it out, despite finding it incompetent for raising contested factual issues. Further, upon finding the preliminary objection incompetent the issue of disputed retainer could not be determined on its merits and consequently, the objection could not be dismissed but could only be struck out. Lastly, that striking out the objection would have afforded the appellant another opportunity to take the learned Judge's advice and filed a competent application upon which a merit determination of the question of disputed retainer would have been done.
6. Reliance was placed on the decision of the East African Court of Appeal in the case of *Ngoni-Matengo Co-operative Marketing Union Ltd vs Alimahomed Osman* [1959] 1 EA 577 (CAD) where it was held that the proper course of action for a court where an appeal that was before it was not a properly constituted appeal was to strike it out as being incompetent, rather than to dismiss it .
 7. On the second issue, counsel argued that the dismissal of the objection erroneously implied that there had been a merit determination of the issue of retainer raised in the objection in the absence of any evidence in that regard. Additionally, that in dismissing the appellant's preliminary objection and referring the Bill of Costs to the taxing master for taxation, the learned Judge effectively determined that there was a retainer despite observing that this was not a question that could be determined on the basis of the material before her. Moreover, despite the advice that the appellant should file an application supported by an affidavit to which the advocate would have responded by affidavit evidence, the learned Judge proceeded to find that the retainer had been proved even in the absence of such evidence. Therefore, that the respondent's statement in the bill of costs was improperly treated as proof of retainer.
 8. Reliance was placed on the decisions in the cases of *Ochieng' Onyango, Kibet & Ohaga Advocates vs Akiba Bank Limited* [2007] eKLR , *Omulele & Tollo Advocates vs Mount Holdings Limited* [2016] eKLR and *Hezekiel Oira T/A H. Oira Advocate vs Kenya Broadcasting Corporation* [2015] eKLR that the burden is upon an advocate to establish the retainer. Counsel submitted that the client in the matter subject of the bill of costs was *Flint East Africa Ltd* which was totally unrelated to the appellant, and that the respondent did not attach any evidence that the appellant instructed it to represent *Flint East Africa Limited*.
 9. Accordingly, that in the absence of evidence of a retainer, there was no advocate/ client relationship that existed between the respondent and the appellant and the Bill of Costs should be dismissed. In the alternative, should this Court uphold the finding that the preliminary objection was incompetent for raising contested matters, it should substitute the order of the trial court dismissing it with an order striking out the objection to enable the appellant present a competent application disputing retainer and have the matter determined on merit.
 10. The submissions by learned Senior Counsel, Mr. Ngatia, were that the appellant's preliminary objection was incompetent and while citing the decision of the Supreme Court of Kenya in *Independent Electoral Boundaries Commission vs Jane Cheperenger & 2 others* [2015] eKLR and of this Court in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 on the circumstances in which a preliminary objection may be raised, he urged that the appellant's objection failed to meet the threshold laid out in the *Mukisa Case* since the question of the existence of an advocate client relationship was contentious and required ascertainment of facts. Furthermore, that this appeal is an academic exercise, since the appellant filed an application following the order appealed against, and the issue has been determined by a subsequent decision of the trial court.
 11. Learned Senior Counsel asserted that the dismissal of the preliminary objection did not prejudice the appellant at all and the two grounds of appeal must fail. Reliance was placed on the case of *Grace Mwenda Munjuri vs Trustees of the Agricultural Society of Kenya* [2017] eKLR where this Court



faulted the trial court for upholding an objection and dismissed the objection. The respondent denied that the position would be different had the objection been struck out as opposed to dismissing it. Further reliance was placed on the case of Kenya Commercial Bank Ltd vs Oburi & Okiah, Kisumu Civil Appeals 199, 200 & 210 of 1999, which demonstrated that a dismissal order that was supposed to be a striking out order did not render a second application res judicata.

12. On the issue of whether there was determination on the question of retainer by the trial Court, learned Senior Counsel submitted that the parties filed submissions and addressed the trial Court on twin issues namely; on the merit of the preliminary objection and whether there was a retainer or not since the appellant had made the question of a retainer an issue before the High Court, and that the parties placed sufficient material before the trial Court to enable it determine the twin issues. Senior counsel distinguished the authorities cited by the appellant on this ground. Accordingly, the parties are bound by their pleadings and issues for determination can only be derived from the parties' pleadings. There was therefore no error on the part of the trial Court in determining the twin issues together as it was efficient use of judicial resources and ought not to be criticised. Senior counsel detailed the instructions received by the respondent from the appellant to act on behalf of Flint East Africa Ltd, and urged that a retainer need not be written but can be implied from the conduct of the parties.
13. We have considered the arguments put forth by the appellant and respondent. We indicated at the beginning of this judgment that the main issue in this appeal is the orders which should follow once a Court finds that a preliminary objection raises contested facts. We have so framed the issue because both the appellant and respondent are in agreement that the issue of retainer of the respondent by the appellant was contested, and have proceeded on the basis that the trial Judge made certain findings on this contested issue. Accordingly, the appellant's main grievance is that the final orders made by the trial Court in the circumstances were inappropriate and in error.
14. It is settled that preliminary objections are based on pure points of law, as confirmed by the Supreme Court of Kenya in the cases of Independent Electoral Boundaries Commission vs Jane Cheperenger & 2 others [supra] and Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 others [2015] eKLR, in which the following holding by Law J.A in Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (supra) was cited with approval:

“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.”
15. To ascertain whether a point is pure law, the Supreme Court in Aviation & Allied Workers Union Kenya (supra) held that “the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record”. It is in this context that we understand the learned trial Judge to have made the observation that by bringing the preliminary objection, the appellant must have proceeded on the assumption that all the facts pleaded by the advocate in the subject Bill of Costs, including that he acted on the instructions of the client were correct, and if this were to be so he then had a basis for taxing the bill of costs.
16. We therefore find that the learned trial Judge did not make any finding or determination on any contested issue, but simply pointed out the implications and consequences of the application of the law and principles on preliminary objections to the circumstances of the objection that was before the Court. In any event, the learned trial Judge did specifically make a finding that the issue of retainer of the respondent by the appellant was contested, and properly reached the conclusion that the preliminary



objection was not merited in light of the threshold requirements set out hereinabove by the Supreme Court.

17. On the course of action that the learned trial Judge then ought to have followed after finding that the appellant's preliminary objection involved contested facts, we are not persuaded that there is a hard and fast rule that once such a finding is made, then it necessarily follows that the preliminary objection should be struck out, as opposed to being dismissed. We hold this view for three main reasons. Firstly, as we have noted in the foregoing, a decision as regards a preliminary objection raising contested facts is a decision that touches on the merit of that preliminary objection, thus making it liable to dismissal, which is a common response for the court. It is also notable in this regard that the nature of a preliminary objection is such that it raises a question of law which it contends should be dealt with separately, before any other issue in the proceedings is examined, on the basis that that question is preliminary in nature; and that as a result, its resolution will make examination of the rest of the case unnecessary and inappropriate.
18. If a preliminary objection is found not to have merit, the court will proceed with the hearing of the main suit, and the issues raised in the failed objection can still be addressed as part of the overall arguments in the case, and this is the factor that distinguishes the decision in *Ngoni-Matengo Co-operative Marketing Union Ltd vs Alimahomed Osman* [supra] that was cited by the appellant, which decision involved the competence of the entire substantive appeal and not of a preliminary objection.
19. Secondly, there is still the option of striking out a preliminary objection where it is found to be improperly raised or lacks a legal basis. This option is normally employed in cases where a preliminary objection does not raise any points of law and is therefore frivolous or improperly before a Court.
20. Thirdly and lastly, a preliminary objection may raise a mixed bag of points of law and contested facts, and the issues of law raised are intertwined with the facts that they cannot be decided separately on a preliminary basis. In such circumstances, a court has the discretion, and should be at liberty to postpone the determination of the preliminary objection and reserve the objections to be heard alongside the main suit.
21. We consequently find this appeal not to have any merit for the foregoing reasons. The appeal is accordingly dismissed with costs to the respondent.
22. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.



Signed

DEPUTY REGISTRAR.

