

3. The suit is opposed by the Defendant *vide* a statement of defence dated 6.8.24 as well as a preliminary objection (the PO) of even date. The defendant further filed an application dated 7.8.24, seeking the striking out of the suit.
4. The objection in the PO is that the suit has been filed in the wrong forum as it raises issues that fall within the Advocates Complaints Commission and the Disciplinary Committee under Section 60 of the Advocates Act.
5. The PO clearly raises a jurisdictional issue and will be dealt with first.
6. The law on preliminary objections is well settled. A preliminary objection must be raised on a pure point of law. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, Sir Charles Newbold rendered himself thus:

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.

And Law, JA stated:

So far as I'm 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 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.

7. The law is that for a preliminary objection to be upheld, it must raise a pure point or points of law, which would completely dispose of the matter. As a minimum the factual basis ought not to be disputed.
8. Section 60 of the Advocates Act makes provision for complaints against advocates as follows:
 - (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.*
9. In his submissions, the Plaintiff cited the cases of **Champion Motor Spares Ltd v Phadke and others [1969] EA 42** and **Barry v. Keharchand (1919), 8 E.A.L.R. 102**, to argue that the courts did not decline jurisdiction in the suits seeking damages for professional

negligence. While this is so, it must be noted that these suits were determined way before Article 47 of the Constitution of Kenya, 2010 on the right to fair administrative action which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(3) enjoined Parliament to enact legislation to give effect to the right to fair administrative action. Parliament did enact the Fair Administrative Action Act (FAAA) which provides for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal.

10. Section 2 of the FAA defines administrative action to include *inter alia*, any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The alleged professional negligence that the Plaintiff complains of, constitutes an administrative action within the meaning of Section 2 of the FAAA.
11. Section 9 of the FAAA sets out the procedure for judicial review of an administrative action as follows:
 - (1) ***Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.***
 - (2) ***The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
 - (3) ***The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
 - (4) ***Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***
 - (5) ***A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.***
12. Section 9(2) of the FAAA is explicit that courts shall not review an administrative action or decision unless all the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. This is the doctrine of exhaustion.

13. The doctrine of exhaustion accords with Article 159(2)(c) of the Constitution which recognizes and entrenches the use of alternative mechanisms for dispute resolution in the following terms:

(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

14. The doctrine of exhaustion encourages disputants to seek other means of resolving their conflicts rather than, or before coming to Court. The jurisdiction of the Court should only be invoked when all other means of dispute resolution fail or are exhausted. This was the holding in the case of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** wherein the Court of Appeal stated:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

15. Our courts have time and again stated that where a clear procedure for redress has been provided by law, such procedure must be followed to the letter. One such case is **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** where the Court of Appeal stated:

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.

16. The Court may exercise its discretion to exempt a party from the obligation to exhaust all available remedies before applying to the Court for judicial review of any administrative action. Section 9(4) of the FAAA provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person

from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

17. For the Court to exercise its discretion in favour of a party, it must be demonstrated that exceptional circumstances do exist, to warrant such exemption and that the same is in the interest of justice. Notably, such exemption may only be made on application by the party desiring the same.
18. Section 60 of the Advocates Act makes provision for complaints against advocates. In the instant case, there is no suggestion by the Plaintiff that the mechanisms available in the said Act are ineffective and that were he to lodge a complaint against the Defendant thereunder, he would not get adequate or sufficient relief. It has also not been demonstrated that exceptional circumstances exist to warrant a departure from the statutory requirement, nor is there any application by the Plaintiff for exemption under Section 9(4) of the FAAA. In the circumstances, this Court cannot exercise its discretion as contemplated in Section 9(4) of the FAAA, in favour of the Plaintiff. Accordingly, by dint of Section 9(20) of the FAAA, this Court is stripped of the jurisdiction to entertain the Plaintiff's suit.
19. Jurisdiction is everything. Jurisdiction is what gives a court the power, authority and legitimacy to entertain a matter before it. The *locus classicus* on jurisdiction is the oft cited case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1.**, where Nyarangi, JA. famously stated:

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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.
20. After carefully analyzing the matter, the law and the authorities cited, this Court finds that there was failure on the part of the Plaintiff to exhaust the remedies available under the Advocates Act before approaching this Court. The objection raised by the Defendant as discussed herein is a pure point of law thus meeting the threshold set out in the **Mukisa Biscuit** case (supra). By dint of Section 9(2) of the FAAA, the Court lacks the jurisdiction to entertain the suit and must therefore down its tools. Having so found, the Court will not expend time considering the application to strike out the suit. Accordingly, the preliminary objection dated 6.8.24 is hereby upheld with the result that the suit herein being incompetent, is hereby struck out with costs to the Defendant.

DATED, SIGNED and DELIVERED in MALINDI this 31st day of October 2025

M. THANDE
JUDGE