

by the Supporting Affidavit sworn by the Plaintiff on 27th January 2025.

4. In his defence to this suit, Mr MOSES KURGAT Advocate filed a Preliminary Objection against this Summons. The same which is dated 5th February 2025, is on the following grounds:

- (1) *That these proceedings are in contravention of Sections 6 and 7 of the Civil Procedure Act (Cap 21 Laws of Kenya).*
- (2) *That the same parties herein have NAIROBI HIGH COURT MISC APPLICATION NO. E1129 OF 2024; which is pending before this court.*
- (3) *That this Court lacks jurisdiction to entertain this Summons, as the Plaintiff PHYLLIS KANDIE has not exhausted the mandatory procedure under Rule 13 of the Advocates Remuneration Order.*
- (4) *That these proceedings are an abuse of the court process, hence this suit ought to be struck out.*

5. The Objection was canvassed by way of written submissions. With each party filing its submissions. The Plaintiff's submissions are dated 3rd February 2025. While the Defendant's submissions are dated 31st January 2025. The Plaintiff has in her submissions opposed the objection.

Analysis and Determination

6. I have considered the Summons (together with its Supporting Affidavit) and the Defendant's Preliminary Objection. I have also considered the parties' rival submissions, as well as the applicable law and legal principles.

7. The legal threshold for Preliminary Objections is as stated by the East Africa Court of Appeal in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696**; which is principally that a Preliminary Objection should be on a pure point of law, and not factual matters or contested issues that need to be established through interrogation of the facts (fact-finding).
8. Of the four grounds raised in this Preliminary Objection, only the third ground (the one on jurisdiction) is a proper one to be raised by way of a Preliminary Objection. The rest are factual matters that require this Court to get out of its sit and inquire into the facts, including those that are in other proceedings and other court files.
9. This need for fact-finding to establish asserted facts, makes this Objection an improper Preliminary Objection. Further, a substantial part of the Defendant's filed submissions in support of this Objection, are on the merits of the suit itself. Such require trial and a merit determination. Hence ought to be raised in a Replying Affidavit in opposition to the Originating Summons itself, which in itself will be treated at a Plaint and the Replying Affidavit as a Defence.
10. On jurisdiction, I hold that the High Court has a special jurisdiction under the Advocates Act to compel an Advocate to deliver to his Client or former Client, documents, files or funds held by the Advocate.
11. Whether the client (the Plaintiff herein) has exhausted the avenues of dispute resolution under the Advocates Remuneration Order as claimed by the Advocate, is a factual matter to be determined at the hearing of this suit; and not only on the pleadings, but also on evidence to be

adduced at trial. Let us cross the bridge when we get there. For now, the pleadings have not even closed, and neither has the pre-trial conference been held.

12. On the issue of exhaustion, it is my considered view, that it is not only a factual issue to be established by evidence and proof, but non-exhaustion can in my view not oust the jurisdiction of Court.

13. On whether the *sub judice* rule can be raised by way of a Preliminary Objection, I hold a contrary view. That it can be raised even orally or through an Application. But not by way of a Preliminary Objection as did the Defendant. For reason for instance that while a Preliminary Objection leads to dismissal of a suit *in limine, sub judice* for its part, unlike a Preliminary Objection, leads to a stay of proceedings only; and not dismissal.

14. In the end I hold that this is not only an improper Preliminary Objection, but it is also misconceived, as this Court has jurisdiction to entertain this suit. This Objection therefore fails, and is hereby dismissed with costs.

DATED and DELIVERED at NAIROBI on this 18th day of December 2025.

**PROF (DR) NIXON SIFUNA
JUDGE**