



**Ngunjiri & another v Gathoni (Civil Appeal E022 of 2024)
[2026] KEHC 60 (KLR) (16 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 60 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E022 OF 2024
BM MUSYOKI, J
JANUARY 16, 2026**

BETWEEN

ERIC NGUNJIRI 1ST APPELLANT

JOSEPH WASONGA 2ND APPELLANT

AND

ESTHER GATHONI RESPONDENT

(Being an appeal from the ruling and orders in the Small Claim's Court at Ruiru (Hon. K.K. Tawai, Adjudicator/RM) dated 26th August 2024 in claim number E463 of 2024)

JUDGMENT

1. The appellants filed a claim in the lower court against the respondent for a sum of Kshs 395,316.60 and costs of the claim. The appellants claimed that they assisted in representing the respondent's brother one Michael Mwaura in a matter where the respondent and the said brother were having dispute over their father's estate. The extent of their assistance was that the 1st appellant who was an advocate of the High Court and the 2nd appellant who had not yet been admitted as an advocate introduced the respondent's brother to the firm of advocates the appellants were working in and stood as guarantors for payment of the legal fees and costs. The firm of advocates represented the respondent's brother to a point where the respondent and the brother reached an agreement dated 7th April 2022 in which one of the terms of the agreement was that the respondent was to meet all the fees and costs incurred in the process of the dispute.
2. The respondent filed a response to the claim dated 29th July 2024 and denied being indebted to the appellants and in addition filed a notice of preliminary objection dated 12th August 2024 in which she raised the following reasons;



1. The Honourable court was bereft of the requisite jurisdiction to hear, determine and or/make any orders and/or grant relief in respect to the claimant's claim which lies with the taxing master as the same is provided for under the Advocates Remuneration Order 2006 as this is an Advocate/Client Bill of costs.
2. The claimant's suit as drawn and filed is lacking in particular and defective in substance and thus ought to be struck out in the first instance.
3. In the ruling which triggered this appeal, the trial court upheld the preliminary objection after holding that the cause of action was advocate-client relationship between the respondent's brother and the appellants. In their memorandum of appeal dated 6th September 2024, the appellants have raised the following grounds;
 1. That the learned Magistrate erred in law in failing to appreciate that, in various aspects, the preliminary objection raised by the respondent did not satisfy the requisite threshold as established in *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1960) EA 696*.
 2. That the learned Magistrate, in upholding the respondent's preliminary objection, delved into issues of facts that require proof, and which could only be ascertained upon consideration of the substance and merits of the claim.
 3. That the learned Magistrate erred in fact and in law to the extent that she found and held that there was an advocate-client relationship, notwithstanding that this finding did not, in any way, arise by clear implication out of the pleadings on record.
 4. That the learned Magistrate erred in law in failing to consider and/or completely disregarding the appellant's submissions and authorities relied upon, hence occasioning a grave miscarriage of justice.
 5. That the learned Magistrate erred in fact and in law by making a determination that is not supported by law and, consequently, unduly and unlawfully limiting the appellant's non-derogable right to a fair hearing.
4. I have read the ruling of the trial court and submissions of the appellant dated 16th August 2025 as well as those of the respondent dated 8th September 2025. Having done so, I have formed the opinion that the single issue for determination in this matter is whether the respondent's preliminary objection qualified as such to warrant striking out of the claim.
5. It has been held in several cases and it is an established principle of law that a preliminary objection is that which would dispose of the matter in its entirety and which does not need interrogation of issues of facts or veracity of the evidence required to prove the case. It must be an objection that can be decided by looking at the pleadings and the law without the necessity of interrogating the evidence or facts which would need proof. The Court of Appeal restated this position in *Attorney General & another v Andrew Maina Githinji & another (2016) KECA 817 (KLR)* where it held that;

‘ 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.’



6. In this matter and in my opinion, the cause of action was the agreement allegedly entered between the respondent and his brother on 7-04-2022 in which the respondent committed to pay unspecified amount of costs and fees. It is clear that the appellants were not representing the respondent in the dispute. Whether the contract dated 7-04-2022 is enforceable by the appellant against the respondent is another issue all together and in my view a matter of factual evidence.
7. The trial court held that the cause of action was advocate client-relationship between the appellant and the respondent's brother. This could be expanded and rephrased to mean that there was no client-advocate relationship between the appellant and the respondent. It would not in the circumstances have been possible for the appellants to file an advocate-client's bill of costs against the respondent. In that regard, the first limb of the preliminary objection had no ground to stand on.
8. I have observed that the trial court held that there was no certificate of taxation for advocate/client bill of costs and she wondered where the appellants got the figures they pleaded from. In other words, the trial court was saying that before the appellants could file the claim, there should have been a certificate of taxation between the appellants and the respondent's brother. That may be so, but in my view, that was a matter of evidence which would have called upon the appellants to proof where they got the figure from. To make a decision on it, the court would have to interrogate how the the costs incurred by the respondent's bother was arrived at. I am guided by the holding of Honourable Justice J.B. Ojwang as he then was in *Oraro v Mbaja* (2005) KEHC 3182 (KLR) thus;

‘ I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.’
9. Flowing from the above, I reach the inevitable conclusion that the trial court erred in upholding the preliminary objection and striking out the claim. I allow this appeal and make the following orders;
 - a. The ruling and orders of the Small Claims Court at Ruiru in claim number E463 of 2024 dated 26th August 2024 is hereby set aside and the claim reinstated for hearing and determination on merits.
 - b. The matter is hereby remitted to the trial court for hearing and determination.
 - c. The appellants shall have the costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT .

Judgment delivered in presence of Mr. Ngunjiri, the 1st appellant and appearing for the 2nd appellant and Mr. Mwaura for the respondent.

