

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION

MISC. APPPLN NO. E930 OF 2023

OREGO ODHIAMBO ADVOCATES.....
APPLIANT

VERSUS

THE INDEPENDENT ELECTORAL &
BOUNDARIES
COMMISSION.....RESPONDENT

RULING

- 1.** The Applicant in this **Miscellaneous Application and motion dated 29/09/2023** seeks orders for entry of judgment against the Respondent in the sum of Kshs. 2,900,000/= being the agreed legal fees arising from Instructions letter dated 26/07/2018, together with interest at court rates from date of the judgment until payment in full.
- 2.** The motion is pursuant to provisions of **Section 45(1) of the Advocates Act** and other provisions of the Law, and supported by the supporting affidavit sworn by Olendo Cecilia Advocates on an even date.
- 3.** Upon service of the motion, the Respondent filed a **Preliminary Objection (PO)** based on **Order 51 Rule 14(1) (a) of the Civil Procedure Rules (CPR)** that:-
 - 1) The application is incurably defective, incompetent and bad in law, in that it seeks substantive orders in a*

miscellaneous application which is not founded upon a substantive pleading;

2) That if any special jurisdiction of the court is being sought, it has not been specified.

3) That the application should be dismissed with costs.

4. Parties were granted opportunity to engage in out of court settlement but no consent was reached. Directions were therefore that both the preliminary objection and motion shall be disposed of by way of written submissions on 28/07/2005.
5. The court has perused the instructions letter dated 26/07/2018 in which the Respondent (IEBC) instructed the Applicant, Orego & Odhiambo Advocates to represent it in the matter of Presidential Election Petition No. 17 of 2018 at the Supreme Court of Kenya wherefrom by its instructions letter dated 26/07/2018 it agreed to pay legal fees in an all-inclusive sum of Kshs. 2.5 Million plus 16% VAT.
6. The said instructions were given under the hand of the then Ag. Commission Secretary/CEO Marjan Hussein Margan. Further, the commission agreed that the said instructions were to be construed and read within the meaning of the Advocates Act Section 45 and the Advocates Practice Rules and the entire corpus of Laws of Kenya. Upon being seized with the matter, the Advocates/Applicants undertook and represented the commission.

7. Judgment was delivered by the Supreme Court on 7/02/2019 upon which the Advocates notified the commission of the outcome, and reminded the commission to settle its legal fees by way of a final fee note 27/06/2019 which was received by the commission on 27/06/2019.
8. The Commission failed to pay the agreed legal fees necessitating the Applicant to seek judgment against the commission in respect of its legal fees. The instructions letter is attached as “ext. as “Exht. CO1”
9. Upon the above background the Respondent (commission) filed the Preliminary Objection dated 7/12/2023 after notice of appointment of new advocates were duly appointed, being Donex Juma Advocates to defend the application. Following therefore a replying affidavit to the motion was filed sworn on 28/07/2025 by one Crispine Otieno Owiye, Director, and Legal services of the Respondent Commission, in which the commission explained its reasons for failure to pay legal fees as agreed despite that the services were rendered.
10. Directions were taken that parties file submissions on both the preliminary objection and the motion. The Applicant’s submissions are dated 1/10/2205 and the Respondent’s are dated 27/10/2025.

Issues for Determination

- 1) *Whether the preliminary Objection dated 7/12/2025 raises a pure point of law, and merited*
- 2) *Whether the Notice of Motion is competent and merited.*

3) *Who bears costs of the application.*

- 11.** A Preliminary Objection must raise a pure point of law as pleaded which if argued may dispose of the suit. It cannot be sustained where facts are disputed and or require interrogation by way of evidence as held in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA696 KLR;**
- 12.** And recently reiterated in the **Oraro V. Mbaja [2005] KLR Kigwor Company Ltd v. Samedy Trading Company Ltd [2021] KETA 810 [KLR]** and in Supreme Court case of **Independent Electoral & Boundaries Commissions v. Cheperenger & 2 Others [2015]** where the latter emphasized that:-

“(16) It is quite clear that a preliminary objection should be founded upon settled and crisp point of law, to the intent that its application to undisputed facts, leads to, but one conclusion. That the fact are incompatible with that point of law”

- 13.** The Respondent’s Preliminary Objection is predicated on **Order 14 (1) (a) of the CPR.** It provides:-
- 14 Endorsement on documents admitted in evidence.
- (1) Subject to Sub Rule (2) the shall be endorsed on every document which has been admitted in evidence in the suit following particulars
- 1(a) the number and title of the suit.

- 14.** The Respondent in its submissions in respect thereto flagged an issue for determination “*whether the instant suit is foundationally defective for reasons that it is premature*” and proceeds to submit on a Kenya Gazette Notice No. 13355 Vol. CXXXV No. 220 wherein concerns pending bills verification committee by the Cabinet Secretary for National Treasury and Economic Planning.
- 15.** Further submitting that the issue of legal costs to the Applicant is a pending Bill and ought to wait for verification process to be completed and the National Assembly to avail funding for Payment.
- 16.** In citing the case of Speaker of the **National Assembly V. James Njenga Karume (Civil Application No. 92 of 1993)** unreported, wherein the court of appeal rendered;
“.....*where 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 of an Act of parliament that procedure should be strictly followed*”.
- 17.** By the above, the Respondent submits that in view of the unique funding model stated above, the retainer agreement did not provide for any timelines for payment of the legal fees and therefore the suit must be dismissed and Applicant to await the finalization of the verification process.
- 18.** In retort, the Applicant in its submissions cites the case of **Mathenge & Another v. Olale & 3 Others [2025] KEEL**

4938 (KLR) (3rd July 2025) quoting the case of **Oraro v. Mbaja [2005] eKLR** to the effect and holding that:-

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be a contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection yet it bears factual aspects calling for proof, or seeks to adduce evidence, is not as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed”

- 19.** The Applicant therefore submits that the Respondents Preliminary Objection is baseless as is disguised as an attempt to argue the merits of the application.
- 20.** The above-learned pronouncements of the Superior Courts, including the Supreme Court are clear that a Preliminary Objection should not be blurred with factual details that one contested and that may call proof by evidence. I am afraid that the Respondent citing of **Order 14 (1)(a) CPR** is irrelevant and adds nothing to its submissions on the Preliminary Objection. To the contrary, it supports the opposition to the Preliminary Objection.
- 21.** On the issues raised about a verification committee on Pending Bills is also not in tune with the Applicant’s application for payment of its legal fees. In any event, a perusal of its submissions culminate to one thing; that the Applicants legal fee remains uncontested and what is sought

in my understanding is time to organize itself to pay the overdue legal fees.

- 22.** Without further interrogation, I come to the finding that the Preliminary Objection does not meet the threshold of a Preliminary Objection as held in the cited cases particularly the **Mukisa Biscuits case, Oraro V. Mbagu Case and the IEBC (supra)** it raises no pure point of law.

When a court has to hear evidence to ascertain the facts or to exercise its discretion, then it cannot be a pure point of law.

See also **Kingstey Kariuki, Catherine Otieno & Stephen Othieno** (suing in their capacity as **Chairman, Treasurer and Secretary of PAA Crescent Residents Association vs. Masaba Oriki & 3 Others [2005] eKLR**).

- 23.** For the foregoing, the Preliminary Objection fails and is dismissed with costs to the Applicant.

Motion Dated 29/09/2023

- 24.** The Applicant's affidavit case has already been stated at paragraphs 1 to 8 above.

In its replying Affidavit sworn on 28/07/2025, the Director Legal Services of IEBC, attempted to explain its failure to pay the agreed legal fees to the applicant; without raising any illegality or incompetence in the retainer agreement between the Applicant and the Respondent.

25. The Respondent in the retainer agreement signed on 26/07/2018 by the CEO/AG Commissioner in respect of Supreme Court petition No. 17/2018 IEBC Marjan Hussein Marjan was clear that the said agreement was to be construed and read within the meaning of **Section 45 of the Advocates Act.**

Section 45 Provides:

“subject to this Action, an Advocate and his client may before, after or in the course of any contentions business made an agreement fixing the amount of the Advocate’s remuneration in respect thereof”

26. It went a head to state further that:

“...As Section 45 indicates under such agreement, the parties fix or put cap on the Advocates instrustious fees..... both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer agreement..... that the retainer agreement is valid and binding....”

27. The above sediments were earlier expressed in the Court of Appeal case of **Ahmednassir Abdikardir & Co Advocates V. National Bank of Kenya Ltd [2026] eKLR** affirming that a written fee agreement under **Section 45** is binding and enforceable, and once proved, it ousts the need for taxation, by stating that:-

“Section 45 (1) of the Advocates Act, further fortifies the Advocates entitlement to negotiate either a fee or an agreement fixing the amount of the Advocates remuneration”.

- 28.** The above therefore boils to one thing; that the prayers in the **motion dated 29/09/2023** are merited.
- 29.** On the issue of competency of the Application for having been filed via a miscellaneous application as opposed to a substantive suit, requiring a full hearing, I hold the view that the Applicant's by way of the miscellaneous application is purely based on undisputed straightforward and uncontested issues to which a substantive suit by way of a plaint or originating summons would have been appropriate by dint of **Section 2 of the Civil Procedure Act, or other 3 Rule 1 of the Civil Procedure Rules.**
- 30.** Miscellaneous Applications are typically used for resolution of procedural issues, generally to seek court's indulgence or orders that are ancillary to agreements and/or uncontested matters; as explained in the case of **Golden Century Limited v. Joseph (in miscellaneous Applications No E 224 of 2024 [2025] KEEL 4337 (KLR))**; and the Court of Appeal case of **Telematics International Ltd v. Stok Company Ltd & Another [2017] eKLR.**

31. In such circumstances therefore, there would be no need to move the court by a substantive suit. In the **Ahmednasir Abdi Kadir & Co. Advocates v. National Bank Ltd (supra)** once a contractual obligation has been entered between a client and the advocate in respect to legal fees, the court has jurisdiction to enforce it as a contractual obligation without recourse to taxation as anchored in **Section 45(i) of the Advocates Act**. This is what the Applicant has done; and approached the court by this application to do, to enter judgment against the Respondent in the agreed sum of Kshs. 2,500,000/- plus VAT at 16%.

32. At Paragraph 1(b) of the impugned agreement between the client and the Advocates, it was agreed as follows:-

b) For attending court for the hearing the substantive matter or of an application or when the substantive matter or application is actually heard fully or partially, shall be two Million five hundred thousand (Kshs. 2,500,000) all inclusive)+ 16% VAT.

33. At Par. G. of the agreement it reads:-

This instruction shall be construed and read within the meaning of the Advocates Act in particular Section 45 thereof, the Advocates Remuneration Order, the Advocates Remuneration Order, the Advocates Practice Rules and the entire corpus of laws of Kenya.

34. This court's duty is to enforce the retainer agreement between the parties hereto. The objection to grant of the orders sought by the Respondent (IEBC) are found to be baseless. Internal mechanisms of payments of pending bills are not and cannot be part of the agreement as aforesaid. The Applicant was and is not party to the said arrangements within the Respondents internal mechanisms.

35. In the end, the court grants prayer No. 1 of the motion, in the following terms:- Judgment is therefore entered for the Applicant against the Respondent in an all-inclusive sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000 all-inclusive) plus 16% VAT.

**The applicant shall have costs of the application.
Orders accordingly.**

Delivered Dated and Signed at Nairobi this 5th day of February, 2026.

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JANET MULWA.
JUDGE