



REPUBLIC OF KENYA



KENYA LAW
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**Kamau t/a Mbiyu Kamau & Co Advocates v Waweru (Civil Appeal
E118 of 2025) [2026] KEHC 2797 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E118 OF 2025
FN MUCHEMI, J
FEBRUARY 27, 2026**

BETWEEN

MBIYU KAMAU T/A MBIYU KAMAU & CO ADVOCATES APPELLANT

AND

JOHN CHEGE WAWERU RESPONDENT

(Being an Appeal from the Ruling of Hon. Mary Kamau (RM/Adjudicator) delivered on 24th April 2025 in Thika Small Claims Court SCCCOMM No. E325 of 2025)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E325 of 2025 whereby the trial court held that it had no jurisdiction to hear and determine the suit as the claim was for legal fees arising from advocate client relationship.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 10 grounds of appeal summarized as follows:-
 - a. The learned adjudicator erred in law and in fact in finding that the Small Claims Court lacked jurisdiction to hear and determine the claim.
 - b. The learned adjudicator erred in law and misapplied the provisions of Part IX of the *Advocates Act* which is applicable only where advocate client costs are in dispute or require taxation and assessment yet the present claim arose from a clear, signed, written and undisputed contractual agreement for professional services.
 - c. The learned adjudicator failed to appreciate that Section 45 of the *Advocates Act* permits written agreements for fees between advocates and clients which agreements are enforceable as



contracts unless challenged on grounds of illegality, fraud, or undue influence which was not the issue before the court.

3. Directions were issued that parties put in written submissions and the record shows that the appellant complied by filing submissions on 28th October 2025. The respondent on the other hand did not comply.

The Appellant's Submissions

4. The appellant relies on the case of Owners of the Motor vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 and submits that the *Small Claims Court Act* Section 12(1) confers jurisdiction to determine civil claims not exceeding Kshs. 1 million including those arising from contracts for services. The trial court acknowledged that the claim was within its monetary jurisdiction and did not fall under any exclusion under Section 13 yet erroneously declined jurisdiction. The appellant argues that its claim relates to contracts for services and not among the exclusions under Section 13(5) of the Act. By declining to exercise its jurisdiction conferred by parliament under Section 12 of the Act, the trial court acted ultra vires and contrary to the doctrine of separation of powers thereby usurping a legislative function.
5. The appellant argues that the trial court erred by invoking Part IX of the *Advocates Act* which applies only to advocate client fee disputes requiring taxation or assessment yet the present claim was not for legal fees but for payment of services rendered pursuant to a written agreement.

Issues for determination

6. The main issues for determination are:-
 - a. Whether the appeal is properly before the court.
 - b. Whether the lower court had jurisdiction to hear and determine the claim.

The Law

7. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

8. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another v Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters



they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

Whether the appeal is properly before the court.

9. Section 38 of the Act provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

10. The Court of Appeal in *Mwangi v Wambugu* [1984] KLR 453 commented of what amount to points of law as follows:-

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

11. Similarly in *Peter Gichuki King’ara v Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the *Elections Act*, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.

12. I have perused the grounds in the memorandum of appeal and noted that the grounds are on matters of law which essentially revolve around the jurisdiction of the court to hear and determine the claim whereas the appellant argues that his case was a contract of services and not for legal fees.

13. The law on the question of jurisdiction was enunciated in the case of *Owners of the Motor Vessel “Lilian S” v Caltex Kenya Limited* [1989] KLR 1 where the court held:-

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 judgment is given.

14. On the source of jurisdiction, it was held in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others* (2012) eKLR that:-

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

15. The jurisdiction of the Small Claims Court is anchored in Section 12 of the *Small Claims Court Act* and it stipulates:-



- (1) Subject to this Act, the rules and any other law, the court has jurisdiction to determine any civil claim relating to-
 - a. A contract for sale and supply of goods and services;
 - b. A contract relating to money held and received;
 - c. Liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of moveable property;
 - d. Compensation for personal injuries; and
 - e. Set off and counterclaim under any contract.
 - (2) Without prejudice to the generality of subsection (1), the court may exercise any other civil jurisdiction as may be conferred under any other written law.
 - (3) The pecuniary jurisdiction of the court shall be limited to one million shillings.
16. According to the Statement of Claim dated 28th February 2025, the matter arose from the respondent undertaking to pay legal fees to the appellant in the sum of Kshs. 910,000/- upon the respondent receiving the title documents for land parcel Loc.5/Kabati/467. It is therefore clear that the cause of action relates to legal fees owed by the respondent to the appellant. An action for recovery of fees due to an advocate is governed by the *Advocates Act* particularly Part IX and such suit ought to be determined by the High Court.
17. Section 45 of the *Advocates Act* provides for agreements with respect to remuneration whereby the advocate and client may make an agreement fixing the amount of the advocate's remuneration and it provides:-
- (1) Subject to Section 46 and whether or not an order is in force under Section 44, an advocate and his client may- before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
 - i. Before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
 - ii. Before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.
 - (2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision is final, shall have the power to order-
 - a. That the agreement be upheld; or
 - b. That the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the court may deem just; or



- c. That the agreement be set aside; or
 - d. That the costs in question be taxed by the Registrar and that the costs of the application be paid by such party as it thinks fit.
18. Parties in the instant case had agreed on the fees and executed an agreement. Such a scenario calls for a party to either have the agreement upheld, varied or set aside which can only be done in the High Court. In that regard, the cause of action is not one of contract of services as alleged by the appellant but one for remuneration of advocates under Section 45 of the *Advocates Act* which clearly states that such cases should be determined by the High Court. In that regard, the Small Claims Court has no jurisdiction to hear and determine the claim due to its nature, that is, it was for advocate- client fees based on an agreement executed between the parties.
19. Consequently, I find that the magistrate did not err in finding that the Small Claims Court lacked jurisdiction to determine the claim before it.
20. I find no merit in the appeal and I hereby dismiss it with costs to the respondent.
21. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF FEBRUARY 2026.

F. MUCHEMI

JUDGE

