



Gathecha v Wairagu t/a Wairagu and Wairagu Advocates & another (Environmental and Land Originating Summons E015 of 2025) [2026] KEELC 1595 (KLR) (18 March 2026) (Ruling)

Neutral citation: [2026] KEELC 1595 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2025
JA MOGENI, J
MARCH 18, 2026

BETWEEN

CHARLES KIGWE GATHECHA APPLICANT

AND

**BENSON WAIRAGU T/A WAIRAGU AND WAIRAGU
ADVOCATES 1ST RESPONDENT**

MACKAY AND COMPANY ADVOCATES 2ND RESPONDENT

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated 20/06/2025 filed by the Defendants challenging the suit on the following grounds:-
 - a. Jurisdictional Issue: The Honorable Court lacks jurisdiction to entertain the dispute in its present form as the issues raised relate to a contested Advocate-client financial dispute which is mandatorily governed by Sections 48, 49, 50 and 51 of the *Advocates Act* Cap 6 Laws of Kenya. The statutory provisions require that Advocates' fees be subjected to prior taxation and therefore, the matter cannot proceed without complying with this mandatory procedure.
 - b. Failure to comply with Statutory Taxation Procedure: The application is fatally defective as it seeks to enforce payment of a disputed sum without first complying with the mandatory statutory procedure of taxing the Advocate's fees as stipulated under Section 48(1) of the *Advocates Act*. The failure to follow the proper procedure renders the application incompetent and improperly before the Court
 - c. Incompetence of the Application: The application is fatally incompetent as it seeks to enforce alleged breaches of a professional duty based on contested facts. The dispute, being a factual and legal contestation, is not suited to resolution via Originating Summons but instead



requires a substantive suit commenced by Plaintiff. The nature of the dispute involves issues that cannot be effectively determined through the simplified procedure of Originating Summons

- d. No valid Professional Undertaking to Enforce: There is no valid professional undertaking within the meaning of the [Advocates Act](#) or the Law Society of Kenya's Code of Ethics that can be enforced against the Respondent. The Respondents acted solely in a stakeholder capacity as per the terms of the Sale Agreement and did not enter into any professional undertaking that would create a binding obligation enforceable under the legal framework governing Advocates and their clients.
 - e. Abuse of Court Process: The application is otherwise an abuse of the Court process and should be struck out with costs. The Applicant has sought to circumvent the mandatory statutory provisions under the [Advocates Act](#) and has brought the matter before the wrong forum, thereby misusing the judicial system to address a dispute that should have been dealt with under the appropriate legal procedure.
2. Thus the 1st Respondent prays that this Honorable Court:
 - a. Strikes out or dismisses the Originating Summons in limine for failure to comply with the statutory requirements set out under the [Advocates Act](#) (Cap 16) Laws of Kenya.
 - b. Orders that the dispute be dealt with in the appropriate legal forum, after the Advocate's fees are properly taxed.
 - c. Awards costs of this Preliminary Objection and the entire application to the Respondents.
 3. Briefly, by a Sales Agreement dated 13/06/2024 Charles Kigwe Gathecha (the Vendor/Applicant) entered into a contract with Prefix Properties Ltd (the Purchaser) for the sale of land measuring approximately 2.023 Ha. The property is comprised in Title Number IR.20135411 (Certificate of Title dated 12th October 2018) and further identified by Land Survey Plan Number 283116.
 4. The Vendor was represented by M/s Wairagu & Wairagu Co. Advocates, while the Purchaser was represented by M/s Mac Kay and Company Advocates. Pursuant to Clause 4 of the Agreement, the purchase price of Kshs 125,000,000 was to be deposited into a joint escrow account held by both firms as stakeholders, pending the successful registration of the transfer and issuance of title to the Purchaser.
 5. The Vendor successfully discharged all contractual obligations, including the execution and delivery of all completion documents. Consequently, the transfer was registered, and a new title was issued in the Purchaser's name. However, the 1st Respondent (M/S Wairagu & Wairagu Co. Advocates) has only released Kshs 96,000,000, leaving an outstanding balance of Kshs 29,000,000 which has remained due and owing since July 2024.
 6. The 1st Respondent has failed to remit the balance, alleging without sufficient particulars that the funds are being held as legal fees for other matters. Furthermore, despite formal demands, the 1st Respondent has refused to release the following items belonging to the Applicant:
 - i. Share Certificate for Kisambi Investments Limited.
 - ii. Original Certificates of Title for LR Nos. 11407/676 and 11407/66.
 - iii. Deed Plans for LR Nos. 11407/669, 11407/670, 11407/674, 11407/675, and 11407/678.
 7. The Applicant maintains that the Respondents are in breach of their professional undertaking and fiduciary duty. The Applicant seeks the intervention of the Court under its inherent jurisdiction to



- discipline its officers and enforce the fulfillment of a professional undertaking, a remedy distinct from a standard claim for debt.
8. The Preliminary Objection was canvassed by way of written submissions. The Applicant filed Grounds of Opposition dated 29/08/2025 in response to the Preliminary Objection. The Grounds of Opposition centers on the argument that the Respondent is attempting to use a legal shortcut to bypass a factual trial.
 9. The Applicant contends that the points raised by the Respondent are not pure points of law but are matters of fact. They argue that these issues such as the existence of a professional undertaking require the Court to examine evidence and merits, making a Preliminary Objection an inappropriate tool.
 10. A significant portion of the opposition rests on the *Advocates Act* (Section 48(1)). The Applicant argues that the Respondent has misled the Court regarding a fee dispute because the Respondent has never raised a formal Bill of Costs.
 11. Legally, the Applicant argues, the Respondent is estopped from bringing a suit against the Applicant until such a bill has been sent.
 12. In the same breath, the Applicant claims the Respondent is creating a smoke screen regarding professional duties. They assert that there are no real contested facts regarding professional duty. That the actual issue is the illegal and irregular holding of the purchase price for property LR No. 11407/670.
 13. The Applicant maintains that the current Court is the correct forum for the dispute. They further argue that whether a valid professional undertaking exists is a factual question that must be determined through a full hearing, not dismissed via a Preliminary Objection.
 14. The Applicant ends by describing the Preliminary Objection as being fatal and defective, frivolous and vexatious. Further that it is a tactic designed to delay justice and deny the Applicant the proceeds from their property.
 15. The second Respondent informed the Court that they were not going to participate in the process of the Application. Therefore, only the 1st Respondent and the Applicant participated.

1st Respondent's Submissions

16. The 1st Respondent filed their submissions dated 17/09/2025 and respectfully moves this Honourable Court to uphold the Preliminary Objection and strike out the Applicant's Originating Summons in limine. The gravamen of the Respondent's case is that the suit is fundamentally incompetent, misconceived and procedurally infirm, as it attempts to bypass mandatory statutory processes for the resolution of Advocate-client fee disputes.
17. The 1st Respondent submits that he has provided extensive legal services to the Applicant for over fifteen years, including the successful management of high-value succession litigation involving an estate exceeding Kshs. 25 Billion. Despite the significant benefit derived from these services which enabled the Applicant to subdivide and dispose of the suit property the Applicant has failed to settle any legal fees.
18. That following an invoice dated 10/04/2025, for approximately Kshs. 46 Million, the 1st Respondent asserts a lawful Advocate's lien over Kshs. 29 Million currently held in escrow. Citing Black's Law Dictionary, the Respondent defines a lien as a legal right to retain property until a debt is satisfied. Furthermore, the Respondent relies on *Kasamani & Company Advocates v Piemo (2024) eKLR*,



which affirms that an Advocate is entitled to assert a lien over a client's funds or documents for unpaid fees even prior to formal taxation, provided the lien secures payment for professional work done.

19. The Respondent challenges the Applicant's contention that Clause 4 of the Sale Agreement constitutes a professional undertaking. Drawing from the precedent in *Ako Advocates LLP v Mehata* (2025) eKLR, the Respondent submits that for an undertaking to be binding and enforceable under the *Advocates Act* or the LSK Code of Ethics, it must be an express, unequivocal, and clear promise made in a professional capacity. A general contractual Clause within a Sale Agreement does not meet this threshold and cannot be transformed into a professional undertaking to circumvent the Respondent's right of lien.
20. Accordingly, it is the 1st Respondent argument that the Originating Summons is a premature attempt to escape the obligation to pay for professional services. Under Section 51(2) of the *Advocates Act*, disputes regarding an Advocate's fees must be subjected to the taxation process. The Respondent cites *Kenyariri & Associates Advocates v Kenyariri* (2022) eKLR, where the Court held that no enforcement regarding fees may issue before the statutory taxation process is complete. By rushing to Court for an unconditional release of funds immediately after being invoiced, the Applicant has ignored this mandatory procedure, rendering the suit incompetent.
21. Furthermore, the Respondent submits that this application meets the stringent criteria established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. The Objection is founded on pure points of law specifically the legal definition of an undertaking, the statutory validity of an Advocate's lien, and the failure to comply with mandatory taxation procedures. As these legal issues are dispositive of the entire suit, the Respondent urges the Court to dismiss the matter without an inquiry into the facts.
22. In conclusion, the 1st Respondent submits that in light of the Applicant's failure to settle professional fees and the breach of statutory procedures, the 1st Respondent maintains that the suit is an abuse of the Court process. The Court is urged to uphold the Preliminary Objection, strike out the Originating Summons in its entirety, and award costs to the 1st Respondent.

Applicant's Submissions

23. The Applicant filed their written submissions dated 29/08/2025 and submits that the Preliminary Objection (hereinafter PO) filed by the 1st Respondent is a procedural ploy designed to delay the realization of sale proceeds and should be dismissed with costs. The Applicant maintains that the 1st Respondent's attempt to strike out the suit in limine fails to meet the established legal threshold for such an Objection.
24. According to the Applicant he argues that the 1st Respondent's Objection does not consist of pure points of law as required by the landmark authority of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* (1969) EA 696. Citing the observations of Sir Charles Newbold, the Applicant contends that a PO is only appropriate when the Court can dispose of a matter based on pleadings without ascertaining new facts or exercising judicial discretion.
25. He insists that a PO must only deal with a pure point of law where the facts are undisputed. Since the 1st Respondent raises issues regarding unpaid fees and the interpretation of a professional undertaking, then these are factual matters that require the Court to hear evidence.
26. In this instance, the Applicant asserts that the issues raised specifically the existence of an Advocate's lien and the nature of the professional undertaking are factual disputes that require a full hearing on



their merits. The Applicant categorizes the 1st Respondent's Objection as sharp practice intended to confuse the issues and unnecessarily increase costs.

27. The Applicant clarifies that the funds in question which is Kshs. 29 Million are the balance of a purchase price for property L.R. No. 11407/670, held by the 1st and 2nd Respondents as stakeholders under a Sale Agreement dated 13/06/2024. The Applicant submits that the transaction was successful and the title was transferred; therefore, the Respondents have no justifiable reason to withhold the money.
28. A central pillar of the Applicant's submissions is that an Advocate cannot unilaterally decide how much of a client's money to keep without a formal Court process. That the 1st Respondent claims a lien of Kshs. 29 Million based on an invoice. Yet, the Applicant argues that an invoice is not a debt until it is taxed/verified by the Court.

Citing the case of *Kivindyo v. Nzioki Mutua & Associates (2023) KEHC 21798* the Applicant states that this case is used to prove that an Advocate's fee only becomes due after the Bill of Costs has been taxed. The Applicant argues that until taxation occurs, there is no ascertained debt. Therefore, exercising a lien on untaxed fees is improper and illegal.
29. That as a matter of fact, Advocates holding money as stakeholders for onward transmission have no right of lien over such funds. The Applicant cited the case of *Simon Njumwa Maghanga v. Joyce Jeptarus Kagongo (2014) eKLR*. In his submissions, the Applicant draws a sharp legal distinction between money held for legal fees and money held as a stakeholder. He advances the argument that Kshs. 125 Million was paid by a third-party purchaser into an escrow account in which the 1st Respondent was a stakeholder, not a recipient of fees.
30. Accordingly, he submits, once the condition of the stake of the transfer of title was met, the money belonged to the Applicant. The 1st Respondent's role as an officer of the Court was to transmit those funds, not to intercept them for unrelated historical legal fees.
31. Contrary to the 1st Respondent's denial, the Applicant asserts that Clause 4 of the Sale Agreement constitutes a valid professional undertaking. Relying on *Naphtali Paul Radier v. David Njogu Gachanja (2006)* and *Arthur Igeria v. Michael Ndaiga (2017)*, the Applicant posits that an undertaking is a declaration of intention made by a Solicitor upon which a party reasonably relies. The Applicant maintains that the Court possesses inherent disciplinary power to enforce such undertakings to prevent a breach of duty by its officers, a power that is distinct from any separate claim for legal fees.
32. The Applicant affirms that this Court is properly clothed with jurisdiction under Article 165 of *the Constitution* and the principles in *Owners of the Motor Vessel "Lilian S" v. Caltex Oil (1989)*. Specifically, the suit is brought under Order 52, Rule 4 of the Civil Procedure Rules, which expressly empowers the Court to summarily order an Advocate to deliver money or securities to a client.
33. The Applicant justifies why they brought an Originating Summons rather than a standard Complaint and states that the suit is procedurally sound under Order 52, Rule 4 of the Civil Procedure Rules. That this specific rule allows a client to move the Court summarily to compel an Advocate to deliver money or securities. It is a shortcut provided by law specifically to deal with Advocates who withhold client funds, making the 1st Respondent's claim that the suit is incompetent legally incorrect.
34. The Applicant concludes by stating that because no Bill of Costs has been taxed or even filed, the 1st Respondent cannot claim a lien. The retention of the funds is characterized as predatory, irregular, and illegal. The Applicant urges the Court to dismiss the Preliminary Objection and proceed to hear the Originating Summons on its merits to ensure the Applicant enjoys the proceeds of his property.



Analysis and Determination

35. The matter for determination before this Court is a Notice of Preliminary Objection dated 20/06/2025, filed by the 1st Respondent. The Objection seeks to strike out the Applicant's Originating Summons in limine on grounds of jurisdictional incompetence, failure to comply with statutory taxation procedures under the Advocates Act (Cap 16), and the inappropriateness of the Originating Summons procedure for resolving what the 1st Respondent (hereinafter "Respondent") characterizes as a contested factual dispute.
36. The crux of the dispute involves Kshs. 29,000,000/-, being the balance of purchase price from the sale of LR No. 11407/670. The Applicant contends these funds are held by the Respondents as stakeholders and ought to have been released upon the successful transfer of title. Conversely, the Respondent asserts a right of Advocate's lien over these funds, citing an outstanding fee note of approximately Kshs. 46,000,000/- arising from over fifteen years of legal service.
37. The starting point for any analysis of a Preliminary Objection is the locus classicus *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. The Court of Appeal therein established that a Preliminary Objection must consist of a pure point of law which, if argued, may dispose of the suit. As Law, J.A. articulately put it, it must arise from the pleadings and not require the Court to ascertain new facts.
38. Having considered the pleadings, the Preliminary Objection, and the respective written submissions, the Court identifies three pivotal issues:
- i. Whether the Preliminary Objection meets the threshold established in the *Mukisa Biscuit* case.
 - ii. Whether the Court's jurisdiction is ousted by the mandatory taxation provisions of the Advocates Act.
 - iii. Whether an Advocate's lien can be exercised over funds held in a stakeholder capacity in the absence of a taxed Bill of Costs.
39. In the present case, the Applicant argues that the Respondent's Objection is a procedural artifice because it involves contested facts regarding the existence of a professional undertaking and the nature of the legal fees. However, the Respondent counters that the failure to comply with statutory conditions precedent specifically taxation under Section 48 of the Advocates Act is a pure legal bar to the suit's competence.
40. The 1st Respondent relies heavily on Section 48(1) of the Advocates Act, which prohibits an Advocate from suing for costs until one month after a bill has been delivered, and Section 51, which outlines the taxation process. The Respondent cites *Kenyariri & Associates Advocates v Kenyariri* [2022] eKLR, arguing that the Court cannot entertain fee disputes outside this framework.
41. However, this Court must distinguish between a suit brought by an Advocate for fees and an application brought by a client for the delivery of property. The Applicant has invoked Order 52, Rule 4 of the Civil Procedure Rules, which provides a summary mechanism for a client to compel an Advocate to deliver up money or securities.
42. The Supreme Court, in *Samuel Kamau Macharia v Kenya Commercial Bank Ltd* [2012] eKLR, reminded us that jurisdiction is either given by the Constitution or by statute. This Court finds that its jurisdiction under Article 165 of the Constitution and Order 52 of the Civil Procedure Rules is not automatically ousted simply because an Advocate claims a fee dispute exists. To hold otherwise would allow any Advocate to freeze client funds indefinitely by merely alleging an unpaid fee.



43. The most critical legal question here is the intersection of stakeholder capacity and Advocate's lien. Black's Law Dictionary defines a lien as a

“Legal right or interest that a creditor has in another's property until a debt... is satisfied.”

44. The 1st Respondent cites *Kasamani & Company Advocates v Piemo* [2024] eKLR to justify a lien prior to taxation. However, the Applicant correctly points toward *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/A Chesaro & Co. Advocates* [2014] eKLR, where the High Court held that an Advocate has no right of lien over monies held for onward transmission as a stakeholder.

45. When an Advocate acts as a stakeholder, they owe a fiduciary duty to both the buyer and the seller. The funds in an escrow account are not client money in the traditional sense available for set-off; they are funds held in trust subject to the fulfillment of contractual conditions in this case, the transfer of title. Once the title was transferred, the 1st Respondent's mandate as a stakeholder was to transmit the funds to the Applicant.

46. Furthermore, as held in *Kivindyo v Nzioki Mutua & Associates* [2023] KEHC 21798, an Advocate's fee only becomes a debt after it has been ascertained through the taxation process. To allow the 1st Respondent to unilaterally retain Kshs. 29,000,000/- without a taxed Bill of Costs would be to sanction self-help, which is contrary to the rule of law.

Final Determination

47. The 1st Respondent's Preliminary Objection fails on two fronts. First, it is not a pure point of law because it relies on the factual determination of whether Clause 4 of the Sale Agreement constitutes a professional undertaking a matter that requires the interpretation of the contract's intent as per *Arthur Igeria T/A Igeria & Co Advocates v Michael Ndaiga* [2017] eKLR.

48. Second, the 1st Respondent cannot use the taxation provisions of the *Advocates Act* as a shield to withhold funds held in a stakeholder capacity. The Originating Summons procedure under Order 52 is specifically designed for this type of summary determination to prevent the predatory retention of client funds.

Disposal Orders:

- a. The 1st Respondent's Preliminary Objection dated 20/06/2025 is hereby dismissed in its entirety.
- b. The Court finds that the Originating Summons is properly before this Court and is the appropriate forum to determine the release of the stakeholder funds.
- c. Mention for directions on canvassing of the Originating Summons shall be on 23/03/2026.
- d. Costs of this Preliminary Objection are awarded to the Applicant in the Originating Summons.

DATED, SIGNED AND DELIVERED AT THIKA VIA VIDEOLINK THROUGH MICROSOFT TEAM ON THIS 18TH DAY OF MARCH 2026.

MOGENI J

JUDGE

In the presence of:

Mathenge for the Applicant



Ms. Ndanu holding brief for Ms. Wanjiru for the 1st Respondent

Mr. Ngechu for the 2nd Respondent

Melita - Court Assistant

