

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NUMBER E331 OF 2024

JOSEPH BARAZA.....1ST APPELLANT
SOSPETER NYONGESA.....2ND APPELLANT

VERSUS

JAMES WAITHALA MWANGI..... RESPONDENT
*(Being an appeal from ruling and orders of Honourable Sylvia A. Wayodi,
Adjudicator/RM dated 31-10-2024 in Thika Small Claims Court claim
number E733 of 2024)*

JUDGMENT

The respondent filed a claim against the appellants seeking refund of Kshs 600,000.00 allegedly deposited with the appellants for onward transmission to one Chebukati Nwaporu which they failed to do. The respondent claimed that his wife and him had entered into an agreement for sale of their plot located at Juja to the said Chebukati Nwaporu but the intended buyer failed to complete and they ended up selling the plot to another person.

The appellants filed a response in which they denied that they owed the respondent any money and stated that it was the respondent who owed them Kshs 480,000.00 on account of legal services offered at the respondent's instructions. They pleaded that according to them, the client in the transaction referred to was one Jane Njeri Waithaka and that their work as advocates was discharged after they drew the agreement for sale.

Before the matter went to trial, the appellant filed a notice of preliminary objection dated 29th July 2024 which was in the following terms;

- i. The Honourable Court was not clothed with the requisite jurisdiction to hear and determine the claim as the same involved advocate/client relationship.
- ii. The claim was statute barred.
- iii. The claim was fatally defective.

The trial court overruled the objection by holding that the claim being was based on contract and therefore not time barred as the cause of action arose in 2019 and that the issue of advocate/client relationship could only be determined upon adduction of evidence and therefore did not qualify as a preliminary objection.

This is the ruling which is subject to this appeal which has the following two grounds;

1. The Honourable Adjudicator erred in law by holding that the respondent's claim was based on contract hence not statute barred hence arrived at the wrong decision.
2. The Honourable Adjudicator erred in law by holding that the court had jurisdiction to hear a dispute involving Advocate-Client relationship hence arrived at the wrong conclusion.
3. The Honourable Adjudicator erred in law by completely ignoring the appellant's written submissions hence arrived at the wrong conclusion.

The appeal was disposed of by way of written submissions. I have read the submissions of the appellants dated 18th August 2025 and those of the respondent dated 29th July 2025. The only issue for determination arising from the submissions is whether preliminary objection was merited as such.

It is well settled that a preliminary objection will only qualify as such if it is capable of disposing the whole matter and that it must be one that does not need adduction of evidence or deep or wide interrogation of pleaded facts. A preliminary objection must be based on the assumption that the pleaded facts are true and as such the court would not need to look into the details of the evidence in support of the objection or seek to establish the truth of the facts by going outside the pleadings. Honourable Justice J.M. Mativo held ***in J N & 5 others v Board of Management, St. G School Nairobi & another [2017] KEHC 9629 (KLR)*** that

‘A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence.’

The appellants have argued that the respondent was not a party to the sale agreement and as such there was no privity of contract between them and the respondent. This argument is not in my view covered by the memorandum of appeal neither can I place it in any ground in the preliminary objection. The appellants are therefore not entitled to raise it in their submissions because the position in law is that an appellant cannot argue a ground which is not raised in their memorandum of appeal or that which was not a subject in the decision being appealed. In ***Naima Khamis v Oxford University Press (E.A.) Ltd [2017] KECA 480 (KLR)*** it was held that;

‘Accordingly, a party cannot be allowed to introduce new allegations by way of submissions; more so at the appellate stage, for neither the trial Judge nor the parties had opportunity to deal with the new issues.’

Similarly, in ***Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] KEHC 13347 (KLR)***, it was held in that;

‘There is a long unbroken chain of judicial pronouncements abhorring the attempt by appellants to raise new matters which were not investigated before the trial court.’

Related to the above is the argument by the appellants that the respondent was not well suited to bring the claim making the claim fatally defective. The appellants argued that although they admitted that the respondent was husband to Jane Njeri Waithaka who was the vendor in the transaction, the respondent was not qualified to represent her in the claim because she was to a party to the claim and the appointment of the respondent as her representative was not approved by the court which was contrary to section 20 of the Small Claims Court Act. It would appear that the trial court did not in its ruling address this particular issue which I proceed to do.

The appellants have leveraged their submissions on this point on paragraph 1 of the statement of claim where the respondent stated that;

‘The money in question was withdrawn in my wife (Jane Njeri Waithaka) Equity account and all details I registered under my name including the title deeds of plots/parcels of land.’

According to the argument advanced by the appellants, the representative referred to in section 20 of the Act only applies if the claimant is mentioned as a party to the suit. I do not think that this is the correct position. The standard

claim form has space for both the claimant and the intended representative. This Section in my view was not meant to apply the same way as would in case where the claimant is represented by an advocate in which case the advocate's position is quite separate from the claimant's.

The representative referred to in the Section steps in the shoes of the person claiming with authority to bind and commit the claimant. That is why Section 20(3) provides that before the court allows a representative to proceed as such, it shall ensure that the person has sufficient knowledge of the case and sufficient authority to bind the person being represented. The representative is also required by the statutory form to attach a written authority if any. What this means is that the court should before going for trial satisfy itself that the person asking to be a representative is suitable and has sufficient authority. The issue of authority to represent is a matter for pre-trial rather than substance of the claim. If the court is not at this pre-trial stage satisfied that the person seeking to be the representative has requisite knowledge and authority, it should proceed to deny the representation and give the necessary directions.

The appellants have in their submissions stated that the respondent met all the requirements of a duly authorised representative as defined in Section 2 of the Small Claims Court Act except the aspect of permission of the court. Having gone through the proceedings of the trial court, I have formed an opinion that, the issue of representative was not properly addressed by the court but the same being a pre-trial issue, it cannot make the claim fatally defective as the court had not gone passed pre-trials. It is therefore my holding that the preliminary objection was not merited in that aspect.

The other issue raised in the appeal is whether the suit was statutory time barred. In their argument before the trial court, the appellants submitted that the

cause of action arose out of a tort and not a contract. They did not elaborate on what kind of tort was the cause of action neither have they done so in this appeal. The claim was based on money received and held by the appellant for transmission to the vendor. It was claimed that the appellants had been retained by the respondent and his wife as their advocates which if established would be a contract for provision of professional services. I therefore do not see any error made by the court in making that decision.

The final issue is whether the court had jurisdiction over the matter based on the claim that the dispute emanated from an advocate-client relationship and therefore it was a subject of taxation. I have not seen any dispute on the fees in respect of the transaction which would call for taxation of fees and costs. Not all advocate-client relationship disputes must go for taxation. Taxation only comes in where either of the parties challenges the amount payable to or charged by the advocate.

The appellant had put a counterclaim of Kshs 480,000.00 based on an alleged instructions to them to represent the respondent's son in a sexual offence case. I have not been shown any pleading by the respondent disputing the counterclaim. In that case, there was no dispute which would have been referred to taxation and in any event, there was need to establish that the respondent instructed the appellants in the said case.

The appellants also argue that the dispute between them and the respondent belonged to Advocates Disciplinary Tribunal and the respondent should have exhausted the mechanism provided in the Advocates Act before approaching the court. In my understanding of Sections 60 of the Advocates Act which deals with complaints filed against Advocates before the said Tribunal, its mandate is to look into discipline and remedy professional misconduct of Advocates and

not a debt collection tribunal. Whereas the respondent retains the right to go to the tribunal, he has no obligation to approach it in cases of this nature. I consequently hold that this argument is lacking in merits and I dismiss it.

The upshot of the above is that, I find no merits in this appeal and the same is hereby dismissed with costs to the respondent.

Dated signed and delivered at Nairobi this 17th day of **April** 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Waithira Mwangi for the appellant and Boaz Agutu for the respondent.