

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. E039 OF 2025**

**CHARLES MUTUURA GAKU.....PLAINTIFF**

**VERSUS**

**CHICHANA BO'WMWANDO & ADVOCATES**

**ALIAS GICHANA BW'OMWANDO & CO. ADVOCATES.....1<sup>ST</sup> DEFENDANT**

**ONCHANGU MARTINA KEMUNTO**

**T/A ONCHANGU KEMUNTO & ASSOCIATES.....2<sup>ND</sup> DEFENDANT**

**FAKI AMBAE HASSAN.....3<sup>RD</sup> DEFENDANT**

**HASSAN AMBAE HASSAN.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed a Notice of Motion application dated 5<sup>th</sup> May 2025 under Certificate of Urgency pursuant to Article 159 (2) of the Constitution, Sections 31 (1), 33, 34 (a), (b), (f), 35, 39, 46, 47 (1), (2) of the Advocates Act, Sections 1A, 1B, 3, 3A, 63 (b) and (e) of the Civil Procedure Act, Order 40 Rules 1 (a), (b), 2

(1), (2), (3), 10 (1) and 11, and Order 52 Rule 4 (1), (b), (c) and (e) of the Civil Procedure Rules, and all other enabling provisions of the law.

2. The Plaintiff seeks a temporary injunction restraining the Defendants, their agents, servants, employees, or proxies from wasting, selling, transferring, disposing of, alienating, charging, or pledging the property known as Kwale/Wasini Island/41.
3. The Plaintiff also seeks an order compelling the 2<sup>nd</sup> Defendant to return the original completion documents currently in their custody to the Plaintiff's advocate. Additionally, the Plaintiff requests a declaration that the professional undertaking/option to sell and/or authority dated 3<sup>rd</sup> March 2025 is null and void, an order for detention, preservation, or inspection of the title and completion documents relating to the suit property, and costs of the suit.
4. The application is based on the grounds that the Plaintiff did not give the 1<sup>st</sup> or 2<sup>nd</sup> Defendant written authority to enter into a professional undertaking. The Plaintiff contends that the undertaking was disguised as an option to sell the property Kwale/Wasini Island/41, thereby allowing the 2<sup>nd</sup> Defendant to improperly assume the role of a sale agent or broker. The Plaintiff further states that he was not a party to the undertaking and did not receive independent legal advice. He alleges that the title and completion documents were obtained through undue influence, deception, and coercion, and that no sale agreement was provided to facilitate the transfer.

5. Additionally, the undertaking allegedly failed to disclose material particulars, including the identities of the advocates, and was intended to facilitate unlawful activities since both advocates allegedly lacked valid practicing certificates according to the Law Society of Kenya search engine. The Plaintiff claims that the 2<sup>nd</sup> Defendant last held a practicing certificate in 2021 and did not have one as of 3<sup>rd</sup> March 2025. Consequently, the Plaintiff fears that the 2<sup>nd</sup> Defendant may transfer, sell, or otherwise alienate the property to herself or proxies.
6. The 1<sup>st</sup> Defendant, through a Replying Affidavit sworn by Edward Micah Gichana on 27<sup>th</sup> May 2025, stated that in 2016 he was approached by the late Mohamed Mshenga to assist the 3<sup>rd</sup> and 4<sup>th</sup> Defendants whose land had allegedly been fraudulently transferred from their deceased father to the Plaintiff. Following this, the Plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants executed an agreement dated 18<sup>th</sup> March 2016. The Plaintiff allegedly surrendered the title after threats of prosecution, but no further action occurred until February 2025 when the 2<sup>nd</sup> Defendant informed the 1<sup>st</sup> Defendant that a potential purchaser wished to inspect the original title before committing to the transaction.
7. The 1<sup>st</sup> Defendant stated that after meeting the Plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, he wrote a letter dated 26<sup>th</sup> February 2025 informing the 2<sup>nd</sup> Defendant that the amount payable to the Plaintiff had been revised from Kshs. 1,000,000 to Kshs. 2,500,000. On 3<sup>rd</sup> March 2025, the 2<sup>nd</sup> Defendant executed a professional undertaking in the presence of the parties, undertaking to pay the

Plaintiff Kshs. 2,500,000 and issued a current cheque and post-dated cheques to cover the amount and the 1<sup>st</sup> Defendant's legal fees. The Plaintiff also executed bank transfer documents in favour of the 3<sup>rd</sup> or 4<sup>th</sup> Defendants or their nominee, and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants agreed to pay the 1<sup>st</sup> Defendant Kshs. 1,000,000 for retaining the title for over eight years.

8. The 1<sup>st</sup> Defendant stated that he acted for the Plaintiff while the 2<sup>nd</sup> Defendant acted for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He later learned from the Plaintiff that the cheque issued by the 2<sup>nd</sup> Defendant had been dishonoured due to insufficient funds, prompting the need for replacement or cash payment. The Plaintiff informed him that he had received Kshs. 1,000,000 but that Kshs. 1,500,000 remained unpaid.
9. The 1<sup>st</sup> Defendant denied any involvement in coercion, undue influence, or misrepresentation, stating that the issues regarding the dishonoured cheque were handled directly between the Plaintiff and the 2<sup>nd</sup> Defendant. He added that after receiving Kshs. 1,000,000 from the 2<sup>nd</sup> Defendant, the Plaintiff sent him Kshs. 10,000 as a token of appreciation and later informed him that the 2<sup>nd</sup> Defendant had allegedly been robbed or carjacked. The Plaintiff also indicated his intention to place a caution on the land to prevent any dealings with the property.
10. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a Notice of Preliminary Objection dated 27<sup>th</sup> May 2025 on the following grounds: -

- 1) *THAT this Honourable Court lacks jurisdiction to entertain this suit.*
- 2) *THAT the cause of action and substratum of the suit is a reserve of the Environment and Land Court as per the provisions of Section 13 of the Environment and Land Court Act.*
- 3) *THAT the cause of action arose within Kwale County hence the matter ought to be filed in a court within that geographical jurisdiction.*
- 4) *THAT the suit is therefore frivolous, scandalous and otherwise an abuse of the Court process and ought to be struck out with costs.*

11. The Notice of Preliminary Objection was canvassed by way of written submissions. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, in their submissions dated 17<sup>th</sup> June 2025, contended that the main issue in the application and the suit concerns the registration and title to the land parcel Kwale/Wasini Island/41, and that the professional undertaking is directly connected to the land.

12. On jurisdiction, they relied on **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd, Article 162(2)(b)** of the *Constitution* of Kenya, and **Section 13(2)(a) of the Environment and Land Court Act**, arguing that disputes relating to land fall within the jurisdiction of the Environment and Land Court of Kenya. They submitted that if the Plaintiff seeks to assert proprietary rights or obtain an inhibition order, the proper procedure is under **Section 68(1) of the Land Registration Act**, which should be addressed by the Environment and Land

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Court. They further relied on the decisions in ***Omokwe & 10 Others v Premier Bank Limited (Environment & Land Case E003 of 2023) [2024] KEELC 5619 (KLR)***, ***Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd & Another (2018) eKLR***, and ***Peter Mathenge Gitonga t/a Mathenge Gitonga & Co. Advocates v Njoroge Kibatia & Another (2018) eKLR***. Additionally, they argued that since the suit property is located in Kwale County and the Defendants reside there, the suit ought to have been filed in Kwale County.

13. In the submissions dated 15<sup>th</sup> July 2025, the 1<sup>st</sup> Defendant argued that the title to the property was held merely as security and did not constitute a land transaction, and therefore the court has jurisdiction to hear the suit. On the issue of whether the preliminary objection meets the required threshold, the 1<sup>st</sup> Defendant relied on ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696***, which outlines the principles governing preliminary objections.
14. The 1<sup>st</sup> Defendant further submitted that the 2<sup>nd</sup> Defendant had not filed any pleadings and therefore the preliminary objection lacked the necessary basis under the principles set out in the cited case. Additionally, the 1<sup>st</sup> Defendant stated that a notice had been served under ***Order 1 Rule 24 of the Civil Procedure Rules***, and argued that transferring the matter on the basis of a wrong forum would prejudice the 1<sup>st</sup> Defendant's claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
15. The Plaintiff in the submissions dated 21<sup>st</sup> July 2025, argued that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants failed to specify the legal provisions allegedly violated, thereby

inviting the court to investigate factual issues contrary to the principles governing preliminary objections as established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* and *Oraro v Mbaja (2005) 1 KLR 141*.

16. The Plaintiff submitted that the law governing valid professional undertakings is provided under the Advocates Act and enforced through **Order 52 Rules 4(a) - 6(2) of the Civil Procedure Rules**. According to the Plaintiff, the main relief sought in the plaint is a declaration that the professional undertaking purportedly issued as an authority or option to sell land is null and void due to lack of the Plaintiff's consent or written instructions. The Plaintiff further argued that the advocates involved lacked valid practicing certificates at the time of execution and therefore did not qualify as advocates under **Section 9 of the Advocates Act** that the remedies sought against the advocates do not fall within the jurisdiction of the Environment and Land Court of Kenya, and that **Article 162(2)(b) of the Constitution and Section 13(1) of the Environment and Land Court Act** are therefore inapplicable. Consequently, the Plaintiff argued that the present court has proper jurisdiction to hear and determine the matter.
17. This court has considered the Notice of Preliminary Objection dated 27<sup>th</sup> May 2025 and submissions by the parties. The issues for determination are: -
  - (a) *Whether the objection meets the threshold of a preliminary objection*

*(b) Whether the dispute falls within the jurisdiction of the Environment and Land Court*

*(c) Whether the suit ought to have been filed in Kwale County*

*(d) Whether the suit is frivolous and an abuse of the court process*

*(e) What orders on costs should issue*

18. On whether the objection meets the threshold of a preliminary objection, the court in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*** defined a preliminary objection as follows: -

*“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*

...

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising points by way of preliminary objection*

*does nothing but unnecessarily increases cost and, on occasion, confuse the issues. This improper practice should stop.”*

19. The present preliminary objection challenges the jurisdiction of the court. Jurisdiction is a pure point of law capable of determination at the preliminary stage.

20. It is settled law that jurisdiction is fundamental. In ***Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)*** the court famously held that: -

*“Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.”*

21. On whether the dispute falls within the jurisdiction of the Environment and Land Court, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants argue that the dispute relates to the title and registration of land parcel Kwale/Wasini Island/41, and therefore falls exclusively within the jurisdiction of the Environment and Land Court. However, the court must determine the true nature and substance of the dispute rather than merely the form of the pleadings.

22. From the pleadings and the Notice of Motion dated 5<sup>th</sup> May 2025, the Plaintiff primarily seeks for a declaration that the professional undertaking dated 3<sup>rd</sup> March

2025 is null and void, orders relating to the custody and preservation of completion documents, and injunctive orders restraining dealings with the title pending determination of the dispute.

23. The central issue raised by the Plaintiff concerns the legality and validity of a professional undertaking allegedly issued by advocates and whether the same was executed without authority or contrary to the provisions of the Advocates Act. The Plaintiff further alleges that the advocates involved lacked valid practicing certificates as required under **Section 9** of the **Advocates Act** and therefore lacked capacity to issue a professional undertaking.
24. These allegations raise questions relating to the professional obligations and conduct of advocates and the enforceability of professional undertakings under **Order 52** of the **Civil Procedure Rules**. While the dispute touches on land documents and the title to the property, the court is persuaded that the core dispute is not about ownership, occupation, use or title to land, but rather the legality and validity of the professional undertaking and the conduct of the advocates involved.
25. In the present matter, determining the legality of the professional undertaking and the authority of the advocates involved falls squarely within the jurisdiction of the civil courts exercising powers under the **Advocates Act** and the **Civil Procedure Rules**. The Environment and Land Court exercises jurisdiction over disputes

relating to the environment and the use, occupation and title to land. The issues raised in the present dispute do not fall squarely within that mandate.

26. On whether the suit ought to have been filed in Kwale County, the Defendants also argue that the matter should have been filed in Kwale County since the property is located there. Questions relating to territorial jurisdiction or the most convenient forum often involve factual considerations regarding where the cause of action arose or where parties reside. Such matters do not ordinarily dispose of the suit outright and are not properly raised as a preliminary objection seeking to strike out the entire suit.
27. On whether the suit is frivolous and an abuse of the court process, the court also notes that the Defendants seek to strike out the suit on the ground that it is frivolous and an abuse of the court process.
28. The power to strike out pleadings must be exercised sparingly. In ***DT Dobie & Company (Kenya) Ltd v Muchina (1982) KLR 1*** the Court of Appeal held that: -  
  

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

29. The pleadings before the court disclose serious allegations regarding the validity of a professional undertaking and the authority of advocates involved. These issues require interrogation through evidence and cannot be summarily dismissed at this stage.

30. Accordingly, this court makes the following orders: -

*(a) The Notice of Preliminary Objection dated 27<sup>th</sup> May 2025 is dismissed.*

*(b) The Notice of Motion application dated 5<sup>th</sup> May 2025 shall proceed to hearing and determination on its merits.*

*(c) Costs of the preliminary objection shall be in the cause.*

**Dated and delivered virtually at Mombasa this 19<sup>th</sup> day of March, 2026**

.....

**HON. F. WANGARI**

**JUDGE OF THE HIGH COURT**

*In the presence of: -*

Ms. Njuguna Advocate h/b for Mr. Mwaniki Advocate for the Plaintiff

1<sup>st</sup> Defendant present in person

N/A by 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants

Ms. Getrude, Court Assistant