



REPUBLIC OF KENYA



**Akello & another v Mathews & another (Miscellaneous Application E074 of 2023)
[2025] KEHC 3883 (KLR) (Commercial and Tax) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E074 OF 2023

H NAMISI, J

MARCH 28, 2025

BETWEEN

GEORGE BRIAN AKELLO 1ST APPLICANT

**ANDREW MBUGUA KARUGA T/A AKELLO KARUGA & COMPANY
ADVOCATES 2ND APPLICANT**

AND

CALISTO MOWO MATHEWS 1ST RESPONDENT

**GLORIA CIYA BIWOTT & ALLAN MUKURA MUGENI T/A BIWOTT &
MUGENI ADVOCATES 2ND RESPONDENT**

RULING

1. The Applicant has filed two Applications, dated 22 April 2024 and 24 July 2024. Parties were directed to canvass the Applications together.

Chamber Summons dated 22 April 2024

2. The Application, filed under paragraph 11 (2) of the Advocates (Remuneration) Order, seeking the following orders:
 - i. That the Ruling delivered by Hon. M. Osoro (Deputy Registrar) be set aside and the 1st Respondent's Application dated 24 March 2023 be heard and determined on merit;
 - ii. That the Applicant be granted leave to file submissions in reply to the 1st Respondent's submissions on her application of 24 March 2023;
 - iii. That the costs of this Application be provided for;



- iv. Any other or further orders which this court shall deem fit to grant
3. The grounds of the Application are:
 - a. That the Honourable Deputy Registrar improperly allowed the 2nd Respondents Preliminary Objection dated 14 July 2023;
 - b. That in allowing the said Preliminary Objection, the Deputy Registrar improperly and selectively referred to and relied on evidence on record which evidence in any event required her to interrogate all other additional evidence and contested facts surrounding the issue thereby precluding the preliminary objection from proceeding or being allowed;
 - c. That the Honourable Deputy Registrar had a duty to investigate all the facts surrounding the agreement on legal fees and failure thereof and this precluded the 2nd Respondent's Preliminary Objection from proceeding or being upheld;
 - d. The 2nd Respondent's Preliminary Objection derived its foundation from factual information which stood to be supplemented and tested by and alongside all other evidence and facts on record;
 - e. The 1st Respondent never served her submissions in respect of her application dated 24 March 2023 on the Applicant and as such the Applicant has never had the opportunity to reply.
 4. The Application is supported by the Affidavit of George Brian Akello.
 5. The 1st Respondent filed a Replying Affidavit in which he averred that in January 2022, he instructed the firm of Biwott & Mugeni, the 2nd Respondent, to recover monies owed to him by Kenneth Masika. In turn, the 2nd Respondent instructed the Applicant herein on terms that were agreed upon between them. The 1st Respondent was then served with a Bill of Costs dated 6 February 2023. It is this series of events that eventually led to the filing of a Preliminary Objection by the 2nd Respondent, which is the basis of the Application herein. Affidavits and submissions were exchanged. It is the 1st Respondent's averment that the issue of service, or lack thereof, of submissions upon the Applicant was never raised each time that parties appeared before the Deputy Registrar to confirm compliance with the directions of the Court.
 6. The 2nd Respondent filed a Replying Affidavit confirming the 1st Respondent's averments.
 7. In rebuttal, the Applicant filed a Further Affidavit in which they averred that the 1st Respondent separately and independently instructed the Applicant to represent him, which is evidenced by the averments in the Verifying Affidavit.

Notice of Motion dated 24 July 2024

8. The Application seeks the following orders:
 - i. (spent)
 - ii. That the 1st Respondent's Further Affidavit sworn on 12 July 2024 be struck out for introducing fresh averments and being filed without leave;
 - iii. That the costs of this application be provided for;
 - iv. Any other or further orders which the Court may deem fit to grant



9. The Application is premised on the grounds that the 1st Respondent's Further Affidavit contains fresh and untrue averments which were never made before the Deputy Registrar and which are prejudicial and antithetical to the Applicant's Objection fixed for highlighting of submissions.
10. In the Supporting Affidavit, the Applicant averred that the averment at paragraph 5 of the 1st Respondent's Further Affidavit was a fresh averment calculated to defeat the Applicant's case and belatedly patch up the 1st Respondent's case. They further averred that the Further Affidavit was filed without leave of Court.
11. In his Replying Affidavit, the 1st Respondent averred that on 10 June 2024, when the matter was mentioned, the Honourable Deputy Registrar granted leave to all parties to file and exchange Further Affidavits or responses together with submissions and fixed the matter for mention on 15 July 2024. The Applicant's Advocate did not attend court on 15 July 2024 and the matter proceeded in their absence.
12. The 1st Respondent averred that he did not introduce fresh averments in this Further Affidavit but instead limited his reply to the averments in the Applicant's Further Affidavit of 26 June 2024.
13. Only the Applicant filed submissions in respect to this Application.

Analysis and Determination

14. I have read the two applications, the responses thereto and submissions.
15. With regard to the Application dated 22 April 2024, the Applicant submitted that the 1st Respondent was indeed their client by virtue of, inter alia, attending their chambers for a client interview for purposes of drafting pleadings as highlighted in paragraph 7(ii) of the Replying Affidavit dated 19 June 2023 and the last paragraph of our submissions dated 24 July 2023 both filed in opposition to the 1st Respondent's application dated 24 March 2023, which Application was not heard substantively as a result of the Deputy Registrar improperly allowing the 2nd Respondent's preliminary objection, and instructions to represent the 1st Respondent in the suit as affirmed by her in her verifying affidavit filed together with the Plaintiff.
16. In response, the 2nd Respondent produced correspondence between the Applicant and the 2nd Respondent, giving instructions to the Applicant to represent the 1st Applicant. The legal fees was expressly agreed, and the terms of payment clearly agreed upon.
17. In particular, the pro forma invoice issued dated 28 January 2022 issued by the Applicant to the 2nd Respondent reads as follows:

“To our legal fees for professional services rendered in receiving instructions to institute the above suit on your behalf being a claim by your client for the sum of Kshs 37,262,000/=, to receiving perusing attending executing and dispatching a demand letter before action; to receiving perusing approving executing and filing the plaint and supporting documents, to attending to you on phone in person and through correspondence and to generally handling the matter to conclusion taking into account the professional time, care and skill involved.”
18. The above suggests that services such as attending to the client, executing pleadings including affidavits were anticipated and billed. The averment by the Applicant that the Verifying and Supporting Affidavits are evidence that the 1st Respondent instructed the Applicant separately and independently, therefore, cannot hold water.



19. In her Ruling, the Deputy Registrar noted that there was an admission by the Applicant of the instruction fees and acknowledgement of full payment of the agreed sum of Ksh 255,000/=. Therefore, the only issue before the Deputy Registrar was to determine whether the Taxing Master had jurisdiction to tax a Bill of Costs where parties had agreed on the fees payable. It is on this basis that the Preliminary Objection was upheld and the Bill of Costs struck out.

20. On agreements with respect to remuneration, section 45 (1) of the *Advocates Act* provides thus:

(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) 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;

(c) 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.

21. Section 45 (6) provides as follows:

"(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48"

22. Jurisdiction is so fundamental that it can be raised at any time. Jurisdiction of a court or tribunal to act when moved has to be explicitly and unequivocally provided under the law. The question that arises herein is whether the trial court was right in upholding the Preliminary Objection on the issue of jurisdiction.

23. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarised the preliminary objection as seen from two of the judges in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, as follows:

"A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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.

At page 701 paragraph B-C Sir Charles Newbold, P added the following:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...."



24. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
25. Before making a determination on the Application dated 22 April 2024, I note there is a second application seeking to strike out the 1st Respondent's Further Affidavit. Notably, I did not make any reference to the averments made in the impugned Affidavit and will proceed to make this determination based on the Replying Affidavits filed by the Respondents.
26. In view of the foregoing, I find that the Deputy Registrar did not err in upholding the Preliminary Objection based on the provisions of section 45(6) of the *Advocates Act*.
27. The Application dated 22 April 2024 is, therefore, dismissed with costs to the Respondents.
28. The Application dated 24 July 2024 is dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF MARCH 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

.Akello.....for the Applicant

Mr. Olaha h/b Ms. Biwott for the 1st Respondent

Mitugafor the 2nd Respondent

Libertine Achieng Court Assistant

