



Kunyiha & another v Muhereza t/a Richard Muhereza & Associates (Civil Case E192 of 2024) [2025] KEHC 11437 (KLR) (Civ) (29 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E192 OF 2024

JN MULWA, J

JULY 29, 2025

BETWEEN

LAWRENCE KIMOTHO KUNYIHA 1ST APPLICANT

ROSE WANJIRU NJOROGE 2ND APPLICANT

AND

**RICHARD MUHEREZA T/A RICHARD MUHEREZA &
ASSOCIATES RESPONDENT**

RULING

1. Before the court for determination is the Defendant's Preliminary Objection dated 31st October, 2024 to the jurisdiction of this court to entertain the suit seeking for its striking out with cost to the defendant.
2. The grounds of objection are that: -
 - a. That the Originating summons as filed supported by the Verifying and Supporting Affidavit of Rose Wanjiru Njoroge is defective for lack of a written authority authorizing her to swear the Affidavits/institute the suit on behalf of the 1st Applicant.
 - b. That there is already a pending complaint Reference number CC/PE/APR/24/107(8591) lodged by the 2nd Applicant against the Respondent pending before the Advocates Complaints Commission under section 53 of the Advocates Act whose outcome is subject of appeal to the High Court under Section 53(8) of the Advocates Act by either party.
 - c. That this suit has been instituted by the Applicants is in clear disregard to Section 3 and 6 of the Civil Procedure Act as it is a proceeding in which the matter in issue is also directly and substantially in issue before the Advocates Complaints Commission.



- d. That the entire suit herewith dated 19th September 2024 is an abuse of the process of this court and ought to be dismissed with costs.
3. Parties filed submissions on the Notice of Preliminary objection dated 31st October, 2024.

Respondent's Submissions.

4. The Respondent gave a brief background of the facts.
5. It was submitted by the Respondent that the 2nd Applicant lodged a complaint against the Respondent/Advocate before the Advocates Complaints Commission, a commission set up under the provisions of section 53 of the Advocates' Act being reference CC/PE/APR/24/107(8591) over the following issues before the court being withholding client's money and failing to provide a client with complete account of client's money upon withdrawal of instructions.
6. The Respondent submitted that the sub-judice rule is described under Section 6 of the Civil Procedure Act as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
7. The Respondent sought to rely on the provisions of Section 3 of the Civil Procedure Act which provides as follows;

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.”
8. It is the Respondent's submission that in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including the existence of the complaint before the Advocates Complaint Commission which the Applicants have failed to disclose and that the principle of sub judice is based on the interest of parties and the system of administration of justice, to prevent a multiplicity of suits and ensure proper resolution of disputes.
9. As to whether the 2nd Applicant has authority to institute the suit with the authority of the 1st Applicant, it was submitted that the 2nd Applicant had not furnished the court in the pleadings any document on support of her averment under paragraph 2 of her Affidavit to have the authority of the 1st Applicant which she has not attached or filed.

Applicants submission.

10. The Applicants submitted that the instant suit is brought under the provisions of Order 52 Rule 4 of the Civil Procedure Rules, and Section 47 of the Advocates Act, which seeks specific remedies: delivery of cash accounts by advocate, release of funds, and accountability. On the other hand, the ACC complaint concerns disciplinary allegations withholding client funds, failure to account.
11. The Respondents argue that the ACC as a quasi-Judicial body cannot ouster the jurisdiction of the High Court.



12. On the issue of authority to institute suit, the Respondent relied on the provisions of Article 159(2) (d) of the Constitution of Kenya urging that it mandates courts to administer justice without undue regard to procedural technicalities.

Issues for determination.

- a. Whether the Respondent's Preliminary Objection is merited.
 - b. Whether the preliminary objection is sustainable.
13. In *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696, Law J.A stated that:

“So far as I am aware, a preliminary objection consists of a pure 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 on the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

14. Sir Charles Newbold, P in the *Mukisa Biscuits Case*(supra) further added that: -

“A preliminary objection is in the nature of what used to be a demurer. It raises a prime 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...”

15. Section 53 of the Advocates Act establishes the Advocates Complaints Commission and provides for a dispute resolution mechanism including appeals.

Section 53(8) of the Advocates Act provides as follows:

Any party aggrieved by a decision or order of the Commission under this section may appeal to the High Court and the determination of any such appeal shall be final.

16. The Court of Appeal in the case of *Ongoche v Okoth t/a GS Okoth & Company Advocates* (Civil Appeal 44 of 2019) [2023] KECA 203 (KLR) in view of the provisions of section 53 of the Advocates Act held as follows:

“As is explicit in these provisions, the Commission receives and considers complaints made by any person regarding the conduct of any advocate, firm of advocates, or any member or employee thereof. In the matter at hand, upon receiving the complaint by the client, it invited the advocate to answer the complaint. In which event the complaint by the client was one which, in the estimation of the Commission, did not constitute a disciplinary offence and it was one it could determine (see subsection 5 (c) as read with subsection 5(d)). Clearly in receiving the complaint and inviting an answer, the Commission was acting as a quasi-judicial commission. At the core of its function is to investigate a complaint it has received and it would do so by interrogating any answer to the complaint with additional power to summon and hear witnesses on oath and require production of such documents as it may deem necessary.”

17. A perusal of the record, informs court that there exists a Complaint CC/PE/APR/24/107(8591) before the Advocates Complaints Commission.



18. The Applicants on filing its application ought to have disclosed to Court the existence of Complaint CC/PE/APR/24/107(8591) before the Advocates Complaints Commission.
19. Assuming that a party in the proceedings at the Complaints Commission was dissatisfied with outcome, the appeal lies to the High Court.
20. The Court is of the view that the issues being canvassed in this suit are substantially the same issues that are in dispute in the Complaint CC/PE/APR/24/107(8591).
21. Article 159(2)(d) of the *Constitution* mandates courts to administer justice without undue regard to procedural technicalities and that courts must prioritize substantive justice over procedural flaws.
22. In the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR the Court held that; procedural defects are curable unless incurably prejudicial.
23. Based on the above, the Court finds that the 2nd Applicant expressly has authority to institute the instant suit and the same is compounded by the Applicants' joint interest in the funds.
24. For the foregoing, the court finds merit in the Respondent's objection dated 31st October, 2024. The parties are therefore directed to conclude the proceedings in Complaint CC/PE/APR/24/107(8591) at the Advocates Complaints Commission.
25. Considering the nature of the instant suit, each party shall bear own costs.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 29TH JULY, 2025

.....
JANET MULWA.

JUDGE

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