



Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E185 OF 2023
DKN MAGARE, J
JULY 31, 2023**

BETWEEN

BIOSYSTEMS CONSULTANTS APPLICANT

AND

NYALI LINKS ARCADE RESPONDENT

The 60 days required for the Small Claims Court to determine a dispute were aspirational as the Small Claims Court Act did not provide any penal consequences for the breach of the 60 days

The instant application revolved around the jurisdiction of the Small Claims Court determining matters before it after lapse of the statutory 60 days for it to make a determination. The court held that balancing the expeditious disposal of the disputes while at the same time respecting the right to be heard may result to overshooting the 60 days. The court stated that the 60 days were aspirational. In order to give effect to the Small Claims Court and facilitate the disposal of the cases, the court gave guidelines as formal practice directions were awaited.

Reported by Kakai Toili

Jurisdiction - jurisdiction of the Small Claims Court - jurisdiction to determine a matter before it after lapse of the statutory sixty (60) days for the determination of a matter before it - whether the Small Claims Court had the jurisdiction to determine a matter before it after lapse of the statutory sixty (60) days for the determination of a matter before it - what were the guidelines to give effect to the Small Claims Court and facilitate the disposal of the cases - Constitution of Kenya, 2010, article 159; Small Claims Court Act, No 2 of 2016, sections 12, 30 and 34.

Jurisdiction - jurisdiction of the High Court vis-à-vis the Small Claims Court - jurisdiction in determining preliminary objections - what was the nature of a preliminary objection and whether both the High Court and the Small Claims Court had the same jurisdiction in determining a preliminary objection.

Brief facts

The instant application dated July 6, 2023 sought the transfer of Mombasa SCCC No E195 of 2023 – *Biosystems Consultants v Nyali Links Arcade Limited* to the Chief Magistrate’s Court for hearing and disposal. The applicant submitted that the jurisdiction of the Small Claims Court ended after 60 days. That was due to a decision of the High Court in *Kartar Singh Dhupar & Company Limited v ARM Cement PLC* (In



Liquidation) (Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR) (Commercial and Tax) (23 March 2023) (Judgment)(*Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation)*). The High Court in that matter stated that the judgment delivered by Small Claims Court in that matter was done outside the statutory timelines set under section 34 of the Small Claims Court Act and hence made without jurisdiction. That court therefore held that the judgment was a nullity, bereft of any force or effect in law.

The applicant argued that since the small claims case was filed on April 14, 2023 and as such 60 days had lapsed. The applicant was apprehensive that any judgment would be rendered nugatory, if delivered in such circumstances. The respondent was of the view that the court did not have jurisdiction and therefore the matter could not be transferred. They relied on the decision of the High Court in *Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation)* and stated that the matter stood dismissed beyond 60 days. There was a mention granted and the respondent had filed an application dated July 7, 2023 to strike out the suit.

Issues

- i. Whether the Small Claims Court had the jurisdiction to determine a matter before it after lapse of the statutory sixty (60) days for the determination of a matter before it.
- ii. What were the guidelines to give effect to the Small Claims Court and facilitate the disposal of the cases?
- iii. What was the nature of a preliminary objection and whether both the High Court and the Small Claims Court had the same jurisdiction in determining a preliminary objection.

Relevant provisions of the Law

Small Claims Court Act, No 2 of 2016

Section 3 - Guiding principles

(1) In exercise of its jurisdiction under this Act, the Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of the Constitution.

(2) The parties and their duly authorized representatives, as the case may be, shall assist the Court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of that Court.

(3) Without prejudice to the generality of subsection (1) the Court shall adopt such procedures as the Court deems appropriate to ensure—

- (a) the timely disposal of all proceedings before the Court using the least expensive method;*
- (b) equal opportunity to access judicial services under this Act;*
- (c) fairness of process; and*
- (d) simplicity of procedure.*

Held

1. The claim was not a tax issue. It was for damages caused by the respondent's alleged fraud. Tax matters had the respondent as the Kenya Revenue Authority. That was governed under the Tax Procedures Act, No 29 of 2015. The court would not delve into the same as it was much ado about nothing. That was also because the court below was also actively proceeding with the matter.
2. The so-called preliminary objection was not an objection but a response disguised as a preliminary point. The court was not involved in the finding of fact as the suit was heard on a preliminary objection. In hearing a preliminary objection, the court and the court below had the same jurisdiction. They proceeded on an understanding that what was pleaded in the plaint was true. It was what the English common law used to call a *demurrer*.
3. A preliminary objection must be based on current law, and be factual in its constitution. It could not be based on disputed facts or facts requiring further enquiry. When determining a preliminary objection only 3 documents were required in addition to the Constitution; the impugned law, the plaint and



- preliminary objection. If one had to refer to the defence, then the preliminary objection was untenable. The court below had jurisdiction to deal with the wrongful payments. The case in the court was not about taxable services rendered.
4. The guiding principles objective of the Small Claims Court Act was as set out in section 3 of the Act. The jurisdiction of the Small Claims Court was set out in section 12 of the Act. Under section 13 of the Act, there were certain exclusions to the jurisdiction of the Small Claims Court. It also provided for transfer of claims by a higher court to the Small Claims Court subject to section 12(3), that was the limit of pecuniary jurisdiction for not more than Kshs 1,000,000. The procedure for the court was also exclusive. In section 17 of the Act, the law required that the court exercised its own procedure, having regard to principles of natural justice. The Civil Procedure Act and Rules did not apply to the Small Claims Court. Indeed, even the application of the Evidence Act was severely restricted by section 32 of the Act.
 5. An application had been filed in the Small Claims Court. The instant court had called for and perused the file. The proceedings had not been to the best of the requirements of the Small Claims Court. The respondent had placed road blocks everywhere. It was never envisaged that the Small Claims Court could be inundated with applications. That was because the time lines in the Small Claims Court were punishing.
 6. The court was unable to agree with the conclusion of the court in *Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation)*. The matters that were relied on turned on their own facts. That court relied on the decision of the Court of Appeal which overturned the judgement of the High Court in *Parliamentary Service Commission v Public Procurement Administrative Review Board; Arprim Consultants (Interested Party)* [2021] eKLR. Section 175 of the Public Procurement and Asset Disposal Act was self-executing and set forth consequences for noncompliance. The imposed the deadline of 45 days on the court and not the parties.
 7. The court in *Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation)* reviewed *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others* [2019] eKLR. In that decision, the Supreme Court reviewed the petition rules pursuant to the Constitution. The same gave a constitutional imperative. Those were election related matters where the time was cast in stone. There were other matters where time was cast in stone. Those were for example limitation of action in contract and recovery of land. In tort, though cast in stone, there was room for extension within strict strictures of the Limitation of Actions Act.
 8. The case turned on its own facts. There were several Court of Appeal decisions binding on the court that could be seen in three aspects: -
 1. Timelines relating to the procedural aspects.
 2. Timelines touching on the substance
 3. Constitutional timelines
 9. The constitutional timelines were cast in stone. The decisions over time had crystalized that. The matter was mainly in election matters. The Supreme Court and Court of Appeal had dealt with various constitutional timelines and for good measure found their inflexibility. In effect, due to the special nature of election disputes, they were removed from the system within 6 months. Those timelines were strict.
 10. Given the fused nature of the Constitution, it provided both for strict timelines and protection under article 159. Under the substantive law, timelines went into the merit as they created rights. Under article 40 of the Constitution, rights including prescriptive rights were protected. Therefore, time bound limitations of such timelines entailed creation of a right. That was why adverse possession in the realm of land law was not anathema to property rights. The rights related to limitations were strict. The same applied to the procurement law. That was because at the end of the period, a tender would have property or not.



11. Procedural timelines were borne by their mother, article 159 and fathered by article 50 of the Constitution. Article 159(2)(a), (b) and (d) appeared to be antagonistic. Sometimes, when delaying justice occurred, it was in order to do justice to all. Other times was to avoid procedure inadequacies that may result in having justice administered with undue regard to procedural technicalities. The Court of Appeal had settled the aspect of whether it was fatal to have a decision beyond 60 days required under the Civil Procedure Rules. In two occasions the court had found in undue delay including up to 5 years to be proper judgement in the circumstances. The provisions should be looked at purposively. The timelines did not create proprietary rights.
12. The legislative intent of section 34 of the Small Claims Court Act was not to impose unnecessary bottlenecks. Even tax statutes had timelines for paying or declaring taxes. It was never that non-payment made those taxes void. There should be consequences. In the Income Tax Act, the non-compliance with deadlines did not vitiate the taxes. It attracted known penalties. What were the consequences under section 34 of the small claims court?
13. A court was not entitled to impose a penalty that was not hitherto anticipated. The parties must know, *a priori*, the consequences of their actions. Any act, especially one promoting certain aspects of the Constitution could not be read mechanically. A purposive interpretation should be given to statutes so as to reveal the intention of the statute. The purpose of the Small Claims Court Act was to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result was that balancing the two may result at times to overshooting the 60 days. The 60 days did not have penal consequences for good reason. They were aspirational. That was part of having access to justice over amounts that needed not be in the normal system. Allowing the application would open floodgates that would eventually defeat the purpose of the Act.
14. The non-compliance went to the court's performance and was answerable internally. It could not affect parties who were in court and ready to be heard. Defendants used various gimmicks to have matters adjourned and thereafter turned around to say, 60 days were over. The parties had wasted a full month arguing in the court and with preliminary objections that were much ado about nothing.
15. In order to give effect to the Small Claims Court and facilitate the disposal of the cases, the instant court gave guidelines as formal practice directions were awaited.
 1. Before filing a small claim suit, the parties should ensure that they have all requisite details for service and effect service forthwith.
 2. The court shall proceed forthwith to hear the matter.
 3. The Civil Procedure Rules did not apply to the Small Claims Court. Consequently, there would only be one mention, the first mention. If service was done, the parties shall proceed forthwith.
 4. Given the facts that rules of evidence were relaxed, the court could have parties who were ready to testify instead of waiting for an absent claimant.
 5. There shall be no mention to file submissions. The court tested that aspect in the instant matter. On July 25, 2023, the court gave the date for ruling for July 31, 2023. Parties wished to file submissions and the court directed that they could file the same if they so wished. Two days later the court had comprehensive submissions.
 6. The Small Claims Court did not need to type its ruling before delivery.
 7. Parties who wished to file submissions may file them together with their pleadings but it was enough that the court acknowledged them.
 8. Whichever the case, submissions in the Small Claims Court should never exceed 3 pages of font 12 size 1.5.
 9. The court was encouraged to use provisions of section 30 of the Small Claims Court Act for matters that were past 40 days.
 10. For matters where the court had no jurisdiction strictly by dint of section 12 of the Small Claims Court Act, the court ought to strike out not dismiss the claim.



11. In respect to objections, there were no obligations to have a reasoned ruling. It was enough to have an *ex tempore* written ruling decide the application.

16. There was no basis to transfer the suit to the Chief Magistrate's Court. The case was properly before the Small Claims Court. Preliminary objection and the Application dated July 7, 2023 filed in the Small Claims Court had been the impediment to the disposal of the primary matter. The court below had jurisdiction to hear the matter therein.

Applications dismissed.

Orders

- i. *Application dated July 7, 2023 dismissed with costs of Kshs 5,000 to the applicant.*
- ii. *Application dated July 6, 2023 disallowed with no order as to costs.*
- iii. *The court would not transfer the matter from the Small Claims Court as it was properly before that court.*
- iv. *The adjudicator should proceed and hear the matter on a day to day basis and conclude the matter in the month of August. The matter shall be heard from August 2, 2023 till conclusion. The court should not entertain any application in the matter on that date. Judgement shall be within 3 days. Parties shall not file submissions.*
- v. *All pending applications and preliminary objections filed in the Small Claims Court stood dismissed.*
- vi. *60 days provided under section 34 of the Small Claims Court Act were aspirational and the courts shall strive to meet those and in case of exceeding ensure that they used every tool at their disposal including section 30 of the Small Claims Court Act to finalise the matter.*
- vii. *The practice of withdrawing cases and refiling was to be discouraged.*
- viii. *The court should give primacy to the rules of natural justice and article 159(2) of the Constitution to avoid procedural technicalities*
- ix. *The court did not envision filing of submissions in the Small Claims Court. Should parties wish to file, then the adjudicator shall allow them to file on the same day but that should not unduly delay delivery of judgment.*
- x. *The court may deliver handwritten judgement to the parties to avoid unnecessary delays while typing already available judgments.*
- xi. *The preliminary objection raised that the matter was a tax matter was dismissed with costs of Kshs 10,000 to the applicant.*
- xii. *Though the applicant's application was not allowed, it was not frivolous and as such each party would bear their own costs.*
- xiii. *The costs shall be paid within 15 days failing which execution do issue.*

Citations

Cases

1. Aramat, Lemanken v Harun Meitamei Lempaka & 2 others (Petition 5 of 2014; [2014] eKLR) — Explained
2. Chumo, Rebecca v Christina Cheptoo Chumo (Miscellaneous Application E001 of 2020; [2021] KEELC 626 (KLR)) — Mentioned
3. Jepkemei, Esther v Selly Jemutai ((2022) eKLR) — Explained
4. Joho & another v Suleiman Said Shahbal & 2 others (Petition 10 of 2013; [2014] e KLR) — Explained
5. Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (Civil Appeal 129 of 2022; [2023] KEHC 2417 (KLR)) — Distinguished
6. Karua, Martha Wangari v Independent Electoral and Boundaries Commission, Seki Lempaka, Anne Waiguru & Peter Ndambiri (Petition 3 of 2019; [2019] KESC 26 (KLR)) — Explained
7. Lewa, Mtana v Kahindi Ngala Mwangandi (Civil Appeal 56 of 2014; [2015] KECA 532 (KLR)) — Explained



8. Mbiyu, Boniface Waweru v Mary Njeri & Tai Yun Hwang (Miscellaneous Application 639 of 2005; [2005] KEHC 2392 (KLR)) — Mentioned
9. Migwambo v Ogenda (Civil Appeal E055 of 2021; [2022] KEHC 12009 (KLR)) — Explained
10. Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd ([1969] EA 696) — Explained
11. Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Petition 2B of 2014; [2014] eKLR) — Explained
12. Oraro v Mbaja (Civil Suit 85 of 1992; [2005] KEHC 731 (KLR); [2005] 1 KLR 141) — Explained
13. Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1) — Explained
14. Parliamentary Service Commission v Public Procurement Administrative Review Board; Arprim Consultants (Interested Party) (Judicial Review Application 117 of 2020; [2021] KEHC 9385 (KLR)) — Explained
15. YH Wholsalers Limited v Kenya Revenue Authority (Civil Case E190 of 2021; [2021] KEHC 4159 (KLR)) — Explained
16. Hammers Incorporation Co Ltd v The Board of Trustees of the Cashew nut Industry Development Trust Fund ([2015] TZCA 6) — Explained
17. Karata Ernest & Others v Attorney General ([2010] TZCA 30) — Explained
18. Hilton v Sultan S Team Laundry ([1946] 1 KB 61 at 81) — Explained

Statutes

1. Civil Procedure Act (cap 21) — Section 1A, 1B, 18(1)b — Interpreted
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — In general — Cited
3. Constitution of Kenya, 2010 (Const2010) — Article 40, 50, 87(1), 159(2) — Interpreted
4. Elections Act, 2011 (Act No 24 of 2011) — Section 75 — Interpreted
5. Evidence Act (cap 80) — In general — Cited
6. Income Tax Act (cap 470) — In general — Cited
7. Limitation of Actions Act (cap 22) — Section 27(1) — Interpreted
8. Public Procurement And Asset Disposal Act, 2015 (Act No 33 of 2015) — Section 175 — Interpreted
9. Small Claims Court Act, 2016 (Act No 2 of 2016) — Section 4(1),12, 13, 17, 23, 30, 32, 34 — Interpreted
10. Tax Procedures Act (Act No 29 of 2015) — In general — Cited

Advocates

Mr. Muiruri for Applicant

RULING

1. This ruling is in respect of the notice of motion dated July 6, 2023. It seeks the following substantive prayer: -
 - a. Spent
 - b. Transfer of Mombasa SCCC No E195 of 2023 – *Biosystems Consultants vNyali Links Arcade Limited* to the Chief Magistrate’s Court for hearing and disposal.
 - c. Costs be in the cause.

Applicant’s Submissions

2. I was surprised at the speed and clarity with which the parties filed submissions despite being unable to proceed in the court below. The applicant filed submissions dated July 27, 2023. The applicant



submitted that the jurisdiction of the court ended after 60 days. This was due to due to a decision of the high court, Patrica Gichohi J, in [Kartar Singh Dhupar & Company Limited v ARM Cement PLC \(In Liquidation\)](#) (Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR) (Commercial and Tax) (23 March 2023) (Judgment), The court in that matter stated as doth: -

“Guided by these authorities, this court is satisfied that the judgment delivered by Hon CA Okumu (Ms)/ Adjudicator on August 23, 2022 was done outside the statutory timelines set under section 34 of the [Small Claims Court Act](#) and hence made without jurisdiction. It is therefore a nullity, bereft of any force or effect in law.”

3. The applicant is there urging the court that since the small claims case was filed on April 14, 2023 and as such 60 days have lapsed. This is said to be the requirement of section 34 of the [small claims court](#). The reason they give for the delay on the appointed hearing date and on another date, there was a public holiday. They are apprehensive that any judgement will be rendered nugatory, if delivered in such circumstances.
4. The first question the applicant addresses is whether the court has jurisdiction to transfer the suit. They rely on section 18(1)b of the [Civil Procedure Act](#).

“Power of High Court to withdraw and transfer case instituted in subordinate court

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

5. The applicant posits that under section 4(1) the [Small Claims Court Act](#), the court is a subordinate court. The applicant invokes sections 1A, 1B of the [Civil Procedure Act](#).

Respondent’s submissions

6. The respondent is of the view that the court has no jurisdiction and therefore the matter cannot be transferred. They rely on the same decision of [Kartar Singh Dhupar & Company Limited v ARM](#)



- Cement PLC (In Liquidation) (Civil Appeal 129 of 2022) [*supra*]. They state that the matter stands dismissed beyond 60 days. There was a mention granted and they have filed an application dated July 7, 2023 to strike out the Suit. I shall address that application as it is the polar opposite of this matter.
7. They state that the court was not sitting on various dates and the court was notified of the lapse of the statutory period. To the respondent, the proceedings are a nullity after a lapse of 60 days.
 8. The respondent also relied on the cases Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR on the aspect of jurisdiction. They raise a dispute on the jurisdiction to deal with tax matters and further the issue of 60 days having lapsed.
 9. The respondent also relied on the case of Rebecca Chumo v Christina Cheptoo Chumo [2021] eKLR and Boniface Waweru Mbiyu v Mary Njeri & another [2005] eKLR. They submit that this court cannot transfer a matter where there is no jurisdiction.

Analysis

10. I am surprised that the respondent chose the application for transfer to deal with a question that has not been raised in the pleadings below. I will address the matters raised to enable the parties know their fate one way or another.
11. The issue of jurisdiction has been raised two-fold. The first one is tax issues and the second 60-days; time limitation. The claim herein is not a tax issue. It is for damages caused by the respondent's alleged fraud.
12. Tax matters have the respondent as the Kenya Revenue Authority. This is governed under the Tax Procedures Act, No 29 of 2015. I will not delve into the same as it is much ado about nothing. This is also because the court below is also actively proceeding with the matter.
13. It is my view that the so-called preliminary objection is not an objection but a response disguised as a preliminary point. The court is not involved in the finding of fact as the suit was heard on a preliminary objection. In hearing a preliminary objection, this court and the court below have the same jurisdiction. They proceed on an understanding that what is pleaded in the plaint is true. It is what the English common law used to call a demurrer. The *locus classicus* case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696, made this pertinent observation. It said: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

14. In a Tanzanian case of Hammers Incorporation Co Ltd v The Board of Trustees of the Cashewnut Industry Development Trust Fund, the Court of Appeal, (Rutakangwa, NP Kimaro and SS Kadage JJA), sitting in Dar es salaam in their decision given on 17/09/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the Mukisa Biscuit case(*Supra*) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this court in Karata Ernest & others V The Attorney General, Civil Revision No 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in



the *Mukisa Biscuit* case (*supra*). The late call appears to be falling on deaf ears as this ruling will demonstrate.”

15. 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 (supra)* 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 vs 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....”

16. A Tanzanian Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & others vs Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

17. Justice Prof JB Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro vs Mbaja* [2005] eKLR:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow



to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

18. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection only 3 documents are required in addition to the constitution. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable
19. The court below thus had jurisdiction to deal with the wrongful payments. The case in the court is not about taxable services rendered,
20. The second aspect is the 60 days limitation period. The beauty of the second objection is that its determination will determine whether there is a need to transfer the suit or not.
21. Listening to the applicant I noted the frustration they had over these kinds of matters. By no fault of their own, the matter has exceeded 60 days. The other party is happy filing an application to strike out the suit with costs. The genesis of this imbroglio is the enactment of the Small Claims Court Act. The Act was initially opposed when it barred the appearance of advocates. It was seen as a bid to erode the cakes for the advocates.
22. The long title of the Small Claims Court, no 2 of 2016 is said to be: -

“An Act of Parliament to establish a Small Claims Court; to provide for the jurisdiction and procedures of the court and for connected purposes.”
23. The guiding principles objective of the Act is as set out in section 3 of the act: -

Guiding principles

 - (1) In exercise of its jurisdiction under this Act, the court shall be guided by the principles of judicial authority prescribed under article 159(2) of the Constitution. (2) The parties and their duly authorized representatives, as the case may be, shall assist the court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the court and to comply with directions and orders of that court.
 - (3) Without prejudice to the generality of subsection (1) the court shall adopt such procedures as the court deems appropriate to ensure—
 - (a) the timely disposal of all proceedings before the court using the least expensive method;
 - (b) equal opportunity to access judicial services under this Act;
 - (c) fairness of process; and (d) simplicity of procedure.
24. The jurisdiction of that court is set out in section 12 of the Act. The same provides as doth: -

“Nature of claims and pecuniary jurisdiction (1) subject to this Act, the rules and any other law, the court has jurisdiction to determine any civil claim relating to—

 - (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;



- (d) compensation for personal injuries; and (e) set-off and counterclaim under any contract.
 - (2) Without prejudice to the generality of subsection (1), the court may exercise any other civil jurisdiction as may be conferred under any other written law.
 - (3) The pecuniary jurisdiction of the court shall be limited to one million shillings.
 - (4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the court as the Chief Justice thinks fit.
25. Under section 13 of the Act, there are certain exclusions to the jurisdiction of the Small Claims Court. It also provides for transfer of claims by a higher court to the small claims court subject to section 12(3), that is the limit of pecuniary jurisdiction for not more than 1,000,000/=.
26. The said section 13 provides as follows; -
- “ 13. Exclusion of jurisdiction
- (1) If a claim has been lodged with the court, no proceedings relating to the same course of action shall be brought before any other court except where the—
 - (a) proceedings before that other court were commenced before the claim was lodged with the Small Claims Court; or
 - (b) claim before the other court has been withdrawn.
 - (2) A claim shall not be brought before the court if proceedings relating to that claim are pending in or have been heard and determined by any other court.
 - (3) Subject to section 12(3), a higher court may transfer a claim to a Small Claims Court.
 - (4) For the purposes of this section, a claim is deemed to have been lodged with the court in any case where section 23 has been complied with.
 - (5) A claim shall not be brought before the court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations.
27. The procedure for the court is also exclusive. In section 17 of the act, the law requires that the court exercises its own procedure, having regard to principles of natural justice. The said section states as doth: -
- “Procedure of Small Claims Court Subject to this Act and Rules, the court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the court shall have regard to the principles of natural justice.
28. The effect of the foregoing is that the Civil Procedure Act and rules does not apply to the Small Claims Court. Indeed, even the application of the Evidence Act is severely restricted by section 32 of the Act which provides as doth: -
- “ Exclusion of strict rules of evidence



- (1) The court shall not be bound wholly by the rules of evidence.
- (2) Without prejudice to the generality of subsection (1), the court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other court under the law of evidence.
- (3) Evidence tendered to the court by or on behalf of a party to any proceedings may not be given on oath but that court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
- (4) The court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
- (5) All evidence and information received and ascertained by the court under subsection (3) shall be disclosed to every party.
- (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
- (7) An Adjudicator may require any written evidence given in the proceedings before the court to be verified by statutory declaration.

29. Why am I going through the entire Act when my duty is to deal with an application to transfer a suit? An application has been filed in the Small Claims Court. I have called for and perused the file. The proceedings have not been to the best of the requirements of the Small Claims Court. The Respondent has placed road blocks everywhere.

30. It was never envisaged that the Small Claims Court could be inundated with applications. This is because the time lines in the Small Claims Court are punishing. I certified this matter as not urgent and directed that the parties proceed for hearing until conclusion in the lower court. Instead of doing so, and in contempt of the order of July 11, 2023, the respondent insisted that their application be heard first. Given the circumstances, it is important that I give guidance to enable the court unlock the trials that are stalling as a result of the ruling by my sister in *Kartar Singh Dbupar & Company Limited v ARM Cement PLC (In Liquidation)* (Civil Appeal 129 of 2022) [2023] KEHC 2417 (KLR) (Commercial and Tax) (23 March 2023) (Judgment), where she stated as doth;

“Guided by these authorities, this court is satisfied that the judgment delivered by Hon CA Okumu (Ms)/ Adjudicator on August 23, 2022 was done outside the statutory timelines set under section 34 of the *Small Claims Court Act* and hence made without jurisdiction. It is therefore a nullity, bereft of any force or effect in law.”

31. She had earlier in her ruling stated something monumental and left it at that. She stated as follows: -

“Though the Respondent herein does not appear to have directly contributed to the lapse of time, it acted as though oblivious of the timelines and therefore raised no objection to the delays and adjournments, which is very unfortunate.

Considering the purpose and purport of the Small Claims Court, it sounds unfair and unjust that the appellant who violated the timelines now wishes to benefit from the violation



by citing Sec 34 of the Act in this appeal. Unfortunately, jurisdiction is everything and therefore, there is no room for sympathy and emotions in looking at a matter that is thrown out of the jurisdiction of the court by effluxion of time.”

32. I have read her decision a record 18 times, and with all due respect I am unable to agree with her conclusion. The matters that were relied on to arrive on this turned on their own facts. She relied on the decision of the Court of Appeal which overturned the judgement of Justice Nyamweya, J (as then she was) in her decision in Parliamentary Service Commission v Public Procurement Administrative Review Board; Arprim Consultants (Interested Party) [2021] eKLR.

33. In the said decision, the Court of Appeal stated as doth: -

“Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law. That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority.”

34. The impugned section 175 of the Public Procurement and Asset Disposal provides as follows: -

“Right to judicial review to procurement

- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.
- (2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in regulations.
- (3) The High Court shall determine the judicial review application within forty-five days after such application.
- (4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
- (5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.
- (6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.
- (7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.



35. Section 175 is self-executing and sets forth consequences for noncompliance. The other aspect that is to be noted is that the said Act imposes the deadline of 45 days on the court and not the parties.

36. The other decision reviewed was Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2019] eKLR. In that decision the supreme court reviewed the petition rules pursuant to the constitution. The same gave a constitutional imperative. The court noted as follows: -

On the issue whether the High Court had jurisdiction to hear and dispose of the election petition upon expiry of 6 months after the filing of the petition, counsel urged that the 6 months' period fixed by section 75 of the Elections Act as read with article 87(1) of the Constitution could not be expanded. Thus, counsel agreed with the Court of Appeal that the High Court proceedings, that occurred after the lapse of 6 months', were a nullity as was the Judgment delivered by that court.

37. These were election related matters where the time is cast in stone. There are other matters where time is cast in stone. These are for example limitation of action in contract and recovery of land. In tort, though cast in stone, there is room for extension within strict strictures of the Limitation of Actions Act.

38. In the case of YH Wholesalers Limited v Kenya Revenue Authority [2021] eKLR, the court, Justice John M Mativo as then he was, stated as doth: -

“The Applicant attributes the delay to alleged discussions with the Respondent. It claims that owing to the negotiations, it withheld court action. In support of this view, reliance was placed on Gatune v The Headmaster, Nairobi Technical High School Another in which the court allowed extension of time on grounds that the parties were negotiating. I have in several decisions stated that cases are context sensitive. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage: -

“A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ... a case is only an authority for what it actually decides...” (Emphasis added)

19. It a correct proposition of the law to state that the ratio of any decision must be understood in the background of the facts of the particular case.^[15] A case is only an authority for what it actually decides, and not what logically follows from it.^[16] A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

39. In dealing with the rigidity of the limitation of action, the good judges in the case of YH Wholesalers Limited v Kenya Revenue Authority [*supra*] stated as doth; -

“In Oadi Odhiambo v Gateway Insurance Co Ltd [23] the Court of Appeal faced with the same set of circumstances as in this case observed:

“Under section 27(1) of the Limitations Act, time to file a suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort.”



The applicants supporting affidavit tried to depict how the respondent is to blame. What is required at this stage is not a merit evaluation of the case, but the applicant must bring himself within the grounds in section 27 and to also, an explanation for the delay. Lord Green MR said it all in [Hilton v Sultan S Team Laundry](#)

“But the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights.”

40. The case therefore turned on its own facts. There are several Court of Appeal decisions binding on this court that can be seen in three aspects: -
- a. Timelines relating to the procedural aspects.
 - b. Timelines touch in on the substance
 - c. Constitutional timelines
41. The constitutional timelines are cast in stone. The decisions over time have crystalized this. The matter is mainly in election matters. The Supreme Court and Court of Appeal have dealt with various constitutional timelines and for good measure found their inflexibility.
42. In the case of [Lemanken Aramat v Harun Meitamei Lempaka & 2 others](#) [2014] eKLR, the Supreme Court stated as doth: -

We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the [Constitution](#) and the electoral law. The jurisdiction of the court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the court. This recognition is already well recorded in this court’s decisions in the Joho case and the Mary Wambui case.

As urged by counsel for the 1st respondent, we recognize that there are instances in general litigation, when jurisdiction is not affected by a party’s failure to meet the set filing requirements. For example, a court may in certain instances exercise its discretion to admit a matter for hearing when an argument regarding proper form is pending before it. The court’s authority under article 159 of the [Constitution](#) remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. However, there are instances when the [Constitution](#) links certain vital conditions to the power of the court to adjudicate a matter. This is particularly true in the context of Kenya’s special electoral dispute-resolution mechanism. By linking the settlement of electoral disputes to time, the [Constitution](#) emphasises the principles of efficiency and diligence, in the construction of vital governance agencies. This consideration addresses the historical problem of delayed electoral justice, that has plagued this country in the past. This court recognized this fact in the *Joho* case (at paragraph 51):

“Kenya today has undergone significant transformations along the paths of democracy and constitutionalism; and, necessarily, the majoritarian expression through electoral practice has had a major role, of which this court takes cognizance. Thus the [Constitution of Kenya, 2010](#) set out to streamline that electoral system. Part of that streamlining was the



clear provisions on the settlement of electoral disputes, the timelines involved and various principles running across the entire span of the *Constitution*”

43. In effect, due to the special nature of election disputes, they are removed from the system within 6 months. These timelines are strict. In the above case the supreme court posited as doth: -

“Article 87(1) grants Parliament the latitude to enact legislation to provide for ‘timely resolution of electoral disputes.’ This provision must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment. The constitutional sensitivity about ‘timelines and timeliness’, was intended to redress this aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation.”

(72) The chain of ideas and principles that underlie this court’s prioritization of timelines in electoral dispute-settlement is clearly depicted in Chief Justice Mutunga’s concurring opinion in the *Munya* case (paragraph 246):

“Kenya’s political history has been characterized by large-scale electoral injustice. Through acts of political zoning, privatization of political parties, manipulation of electoral returns, perpetration of political violence, commercialization of electoral processes, gerrymandering of electoral zones, highly compromised and incompetent electoral officials, and a host of other retrogressive scenarios, the country’s electoral experience has subjected our democracy to unbearable pain, and has scarred our body politic. As a result, free choice and fair competition, the holy grail of electoral politics, have been abrogated, and our democratic evolution, so long desired, has staggered and stumbled, indelibly stained by this unhygienic environment in which our politics is played. This is the history that our Constitution seeks to correct, through elaborate provisions, and the adoption of exemplary standards in our electoral system”

44. In the case of, *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* [2014] eKLR, the supreme court stated as doth: -

“While the principle of timely disposal of election petitions affirmed by the Court of Appeal, must be steadfastly protected by any court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount. As held by this court in *The Matter of the Principle of Gender Representation In the National Assembly and the Senate*, SC Advisory Opinion No 2 of 2012:

“A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the



development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other.”

45. Given the fused nature of our Constitution, it provides both for strict timelines and protection under article 159.

Statutory timelines- substantive

46. Under the substantive law, timelines go into the merit as they create rights. Under article 40 of the Constitution, rights including prescriptive rights are protected.

47. Therefore, time bound limitations of such timelines entail creation of a right. That is why adverse possession in the realm of land law is not anathema to property rights. In the case of Mtana Lewa v Kabindi Ngala Mwangandi [2015] eKLR, the Court of Appeal sitting in Malindi stated as doth: -

“In determining whether limitation of a guaranteed right is justifiable in an open and democratic society based on the values set out in article 24(1), it is permissible to look at the practice of other open and democratic societies. (See the decision of the South African Constitutional Court in *Richter v Minister For Home Affairs & Others* (cct03/09, Cct 09/09) [2009] Zacc 3). In the Pye Case, the Grand Chamber stated as follows on adverse possession laws in the European Union:

“It is plain from the comparative material submitted by the parties that a large number of member States possess some form of mechanism for transferring title in accordance with principles similar to adverse possession in common-law systems, and that such transfer is effected without the payment of compensation to the original owner.”

Bearing in mind the prevalence of laws on limitation of actions and adverse possession, both in commonwealth and civil law jurisdictions, though with clear variations and differences, I would find the limitation to the right to property through the doctrine of adverse possession to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

48. As stated earlier, the rights related to limitations are strict. The same applies to the procurement law. This is because at the end of the period, a tender will have property or not.

The Procedural Timelines

49. These are borne by their mother, article 159 and fathered by article 50 of the Constitution. The former of which provides as follows: -

“ 159. Judicial authority

1. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles
 - a. justice shall be done to all, irrespective of status;
 - b. justice shall not be delayed;



- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - d. justice shall be administered without undue regard to procedural technicalities; and
 - e. the purpose and principles of this Constitution shall be protected and promoted.
3. Traditional dispute resolution mechanisms shall not be used in a way that: -
- a. contravenes the Bill of Rights;
 - b. is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
 - c. is inconsistent with this Constitution or any written law.
50. Article 159(2) a, b and d appear to be antagonistic. Sometimes, when delaying justice occurs, it is in order to do justice to all. Other times is to avoid procedure inadequacies that may result in having justice administered with undue regard to procedural technicalities.
51. The Court of Appeal has settled the aspect of whether it is fatal to have a decision beyond 60 days required under the *Civil Procedure Rules*. In two occasions the court has found in undue delay including up to 5 years to be proper judgement in the circumstances.
52. In the case of *Esther Jepkemei v Selly Jemutai* [2022] eKLR, the court of appeal stated as doth: -
- “I concur with the observation made in that decision that a delayed judgment prolongs and increases the stress and anxiety of litigation and reduces public confidence in the judicial process. I am mindful, however, that the vicissitudes of judicial service and the pressures attendant thereto may in some instances conspire to cause such delay as occurred herein.
53. My take is that we look at the provisions purposively. The timelines did not create proprietary rights. In the cases referred to earlier, there are consequences given for non-compliance.
54. I don't think the legislative intent of section 34 of the *Small Claims Act* is to impose unnecessary bottlenecks. Even tax statutes have timelines for paying or declaring taxes. It is never that non-payment makes those taxes void. There should be consequences. In the *Income Tax Act*, the non-compliance with deadlines does not vitiate the taxes. It attracts known penalties. What are the consequences under section 34 of the Small Claims Court?
55. A court is not entitled to impose a penalty that was not hitherto anticipated. The parties must know, a priori, the consequences of their actions. Any act, especially one promoting certain aspects of the *constitution* cannot be read mechanically. The Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 26 of 2014 [2014] eKLR, opined



that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:

“In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

56. The purpose of the *Small Claims Court Act* is to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result is that balancing the two may result at times to overshooting the 60 days. The 60 days do not have penal consequences for good reason. They are aspirational. This is part of having access to justice over amounts that need not be in the normal system. Allowing the application will open floodgates that will eventually defeat the purpose of the Act.
57. It is my take that the non-compliance goes to the court’s performance and is answerable internally. It cannot affect parties who are in court and ready to be heard. I have seen defendants use various gimmicks to have matters adjourned and thereafter turn around to say, 60 days are over. The parties have wasted a full month arguing in this court and with preliminary objections that are much ado about nothing.
58. In order to give effect to the Small Claims Court and facilitate the disposal of these cases, I wish to give these guidelines as we await formal practice directions.
 - a. Before filing a small claim suit, the parties should ensure that they have all requisite details for service and effect service forthwith.
 - b. The court shall proceed forthwith to hear the matter.
 - c. The *Civil Procedure Rules* do not apply to the small claims court. Consequently, there will only be one mention, the first mention. If service is done, the parties shall proceed forthwith.
 - d. Given the facts that rules of evidence are relaxed, the court can have parties who are ready to testify instead of waiting for an absent claimant.
 - e. There shall be no mention to file submissions. I tested this aspect in this matter. On July 25, 2023, I gave the date for ruling for July 31, 2023. Parties wished to file submissions. I directed that they could file the same if they so wished. 2 days later I had comprehensive submissions.
 - f. The small claims court does not need to type its ruling before delivery.
 - g. Parties who wish to file submissions may file them together with their pleadings but it is enough that the court acknowledges them.



- h. Whichever the case, submissions in the small claims court should never exceed 3 pages of font 12 size 1.5.
 - i. The court is encouraged to use provisions of section 30 of the small claims court for matters that are past 40 days.
 - j. For matters where the court has no jurisdiction strictly by dint of section 12 of the Act, the court ought to strike out not dismiss the claim.
 - k. In respect to objections, there are no obligations to have a reasoned ruling. It is enough to have an ex tempore written ruling decide the Application.
59. I have said enough to show that there is no basis to transfer this suit to the Chief Magistrate's Court. The case is properly before the Small Claims Court. Preliminary objection and the application dated July 7, 2023 filed in the Small Claims Court has been the impediment to the disposal of the primary matter. I have perused the said application and hereby direct that the same stands dismissed with costs of 5,000/= to Biosystems Consultants by dint of this ruling.
60. I find and hold that the court below has jurisdiction to hear the matter herein.
61. In the circumstances I make the following orders: -
- a. I disallow the application dated July 6, 2023 with no order as to costs.
 - b. This court will not transfer the matter from the Small Claims Court as it is properly before that court.
 - c. The adjudicator should proceed forthwith and hear the matter on a day to day basis and conclude this matter in this month of August. The matter shall be heard from August 2, 2023 till conclusion. The court should not entertain any application in this matter on the said date. Judgement shall be within 3 days. Parties shall not file submissions.
 - d. All pending applications and preliminary objections filed in the Small Claims Court stand dismissed.
 - e. 60 days provided under section 34 of the Small Claims Court are aspirational and the courts shall strive to meet those and in case of exceeding ensure that they use every tool at their disposal including section 30 of the Small Claims Court Act to finalise the matter.
 - f. The practice of withdrawing cases and refiling is to be discouraged.
 - g. The court should give primacy to the rules of natural justice and article 159(2) to avoid procedural technicalities
 - h. The court does not envision filing of submissions in the Small Claims Court. Should parties wish to file, then the adjudicator shall allow them to file on the same day but that should not unduly delay delivery of judgement.
 - i. The court may deliver handwritten judgement to the parties to avoid unnecessary delays while typing already available judgments.
 - j. The preliminary objection raised that this is a tax matter is hereby dismissed with costs of 10,000/- to Biosystems Consultants.
 - k. Though the applicant's application is not allowed, it was not frivolous and as such each party will bear their own costs.



- i. The costs shall be paid within 15 days failing which execution do issue.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 31ST DAY OF JULY 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Muiruri for Applicant

No appearance for the Respondent

Court Assistant - Brian

