



**Pearl Dairy Farms Limited v Awadh Omar Bayusuf & Sons limited (Civil Appeal E158 of 2024) [2025] KEHC 3201 (KLR) (20 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 3201 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E158 OF 2024  
JK NG'ARNG'AR, J  
JANUARY 20, 2025**

**BETWEEN**

**PEARL DAIRY FARMS LIMITED ..... APPELLANT**

**AND**

**AWADH OMAR BAYUSUF & SONS LIMITED ..... RESPONDENT**

*(Being an appeal from the Ruling of the Chief Magistrate's Court at Mombasa delivered by Honourable Rose Ombata dated 3rd June 2024)*

**JUDGMENT**

1. The appellant seeks to overturn the decision in *CMCC No. E767 of 2024*, Mombasa rendered on 3/6/2024 by Hon. Rose Ombata on both facts and law.
2. In the said case, the respondent vide plaint dated 16/5/2024 and application dated 27/5/2024 sued the appellant based on a transportation agreement wherein it was alleged that the appellant procured transportation services from the respondent but when an invoice of USD 22,326 was raised, the appellant failed to settle same and instead procured the services of a third party as an agent who in turn procured the respondent's services over the same goods. That upon the respondent noticing that the goods belonged to the appellant, it exercised its right to carriers' lien and retained possession of the goods and filed the instant suit. The respondent thus sought a declaration that the appellant had breached the contract, special damages of USD 22,326 plus costs and interest.
3. The appellant opposed to the application *vide* preliminary objection dated 29/5/2024 seeking to have the application and suit dismissed on grounds that the trial court lacked jurisdiction to hear the application as the suit fell within the exclusive jurisdiction of the Republic of Uganda. The preliminary objection was disposed of by way of submissions and the trial court dismissed the preliminary objection vide ruling dated 3/6/2024 and gave orders authorizing the respondent to sell by action all the



perishable goods detained by the respondent and deposit the proceeds of sale in court pending the hearing and determination of the main suit.

4. The respondent was dissatisfied with that ruling and filed the instant suit *vide* memorandum of appeal dated 10/6/2024.

### **The Appeal**

5. The memorandum of appeal dated 10/6/2024 was filed on seven grounds which can be summarized as follows; the trial court erred in failing to take into account that there was an Arbitration clause in the agreement indicating that the agreement was governed by the Laws of Uganda, the trial court erred in finding that the preliminary objection was not based on any pleading as required by law as no defence was filed and further erred in finding that the objection did not raise a pure point of law, the trial court erred in re-writing the contract between the parties which provided for dispute resolution under the Laws of Uganda, the trial court erred in failing to apply laws of evidence, erred in the entire decision of 3/6/2024 and that the trial court erred in making orders depriving the appellant of its property contrary to Article 40(1) of the *Constitution*.
6. The appellant thus sought orders that the appeal be allowed and the ruling dated 3/6/2024 and consequential orders be set aside, and that the appellant be awarded costs of the appeal and for the proceedings at the trial court.
7. The appeal was disposed of by way of submissions. The appellant filed its submissions dated 13/8/2024 whereas the respondents' were dated 25/10/2024.

### **Duty of a first appellate court**

8. A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* (1958) E.A. page 424: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

9. It then follows that in a first appeal, the whole case is open for rehearing on questions of fact and law, such that the judgment of the appellate court must reflect the court's application of its mind and record findings supported by reasons on all the contentious issues. The parties thus have the right to be heard on both questions of law and fact, anything less is unjust as found in *Kurian Chackp v Varkey Ouseph* AIR 1969 Kerala 316. As provided for in Section 78 of the *Civil Procedure Act* Cap 21, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

### **Determination**

10. This Court has considered the entire record before it as well as the appellant's submissions. From the foregoing, the main issues for determination can be summarized as: -



1. Whether the trial court erred in finding that the preliminary objection was not founded on any pleading and failed to raise a pure point of law.
  2. Whether the trial court erred in failing to take into account that the agreement was governed and construed by the Laws of the Republic of Uganda
11. Both issues will be determined together.
12. On this, the appellant submitted that the preliminary objection was based on lack of jurisdiction and this raised a pure point of law. That the trial court's finding that the preliminary objection ought to be pleaded was without basis as the same ought to be raised on the basis that facts of the case are not disputed, and a preliminary objection can be raised in pleadings by didn't of Order 2 Rule 9. That though the court relied on *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to hold that preliminary objections must be strictly pleaded, the authority was not an exposition of the entire law and different facts could alter the circumstances. That the trial court thus erred in finding that the preliminary objection lacked in formality and this court was implored to set aside that finding.
13. The respondent on the other hand submitted that in choosing to file a response to the application and the preliminary objection, the appellant put itself squarely under the application of the conditions in the Mukisa Biscuits case (*Supra*). That a preliminary objection which contained factual aspects calling for proof or evidence to be adduced did not meet the ingredients in the above authority. That the preliminary objection raised by the appellant required the court to examine the Transport Agreement which was a matter of fact and would require a full trial. That the allegation that there existed an arbitration clause did not come from any pleading and there was no statement of defence filed capable of been the root of any preliminary objection thus the trial court's finding was trite.
14. This court will begin by determining the preliminary objection raised, as it is capable of disposing of the suit. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean: -
- “So far as I am aware, 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”.
15. Further Sir Charles Nebbold, JA stated that: -
- “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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.
16. A Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained



from elsewhere or if the court is called upon to exercise judicial discretion. In *Oraro v Mbaja*(2005) 1KLR 141, it was held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

17. The preliminary objection before the trial court was based on the ground that the trial court lacked jurisdiction to hear and determine the application as the transport agreement dated 1/10/2018 contained an arbitration clause. This raised a pure point of law which if argued successfully was capable of disposing of the entire suit. Indeed, in the case of *Mukisa Biscuits*, among the examples for a preliminary objection is “a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”. The preliminary objection squarely fell within the meaning of a preliminary objection and ought to have been considered on merit.
18. The trial court thus erred in finding that the preliminary objection did not raise a pure point of law on the basis that it would have had to peruse the transport agreement to establish whether there was an arbitration clause.
19. The next step is to consider whether the trial court had jurisdiction to hear and determine the application. It is trite law that a court without jurisdiction cannot proceed further. Thus, when an issue of jurisdiction has been raised, the court must first address itself to the jurisdictional challenge raised before proceeding.
20. Indeed, the High Court exercises its jurisdiction pursuant to Article 165(3) of the *Constitution* of Kenya. The said provision grants court with unlimited jurisdiction in Civil and Criminal matters. However, as rightly held in *Alison Jean Louis v Rama Homes Limited* [2020] eKLR: -

“Where parties mutually agree and contract their own forum of choice and process of dispute resolution by virtue of Article 159 COK 2020, the court downs its tools and allows parties to pursue alternative dispute resolution mechanism, in this case, arbitration.”
21. It was the appellant’s submission that the dispute ought to have been exhausted using arbitration as per clause 16 of the Agreement. That both parties were bound by its terms and conditions more so referring disputes to arbitration yet the respondent had failed to comply with the contract. It was further submitted that the dispute was to be handled according to the laws of Uganda thus it was unnecessary to file an application for stay of proceedings before the Kenyan Courts.
22. The respondent on the other side submitted that the agreement had expired and on 30/9/3029 and there was no other formal agreement before the trial court to bind the respondent. It was thus submitted that there was no valid contract between the parties thus the arbitration clause did not apply. That according to Section 6 of the *Arbitration Act* and Rule 2 of the *Arbitration Rules*, it was upon the appellant to apply for stay of proceedings through chamber summons before the trial court and proof that there was a valid and subsisting arbitration clause and the same ought to have been done not later than the time when that party entered appearance or otherwise acknowledged the claim. That having failed to comply, the trial court could not have made a determination on the issue of stay of proceedings by virtue of an arbitration clause.



23. There is no dispute that the parties herein entered into a transport agreement for the transportation of the appellant's goods. I have considered that agreement dated 1/10/2018. Clause 16 thereof provides for the Governing Law and Arbitration and states: -

“Governing Law and Arbitration

This Agreement is governed by and construed according to the laws of Uganda. Any and all disputes arising out of, or in connection to with, the interpretation, validity or execution of the present Agreement shall be referred to one arbitrator appointed in accordance with the arbitration rules of the Chartered Institute of Arbitrators of Uganda. The award issued by the arbitrator shall be final and binding on the Parties and may not be appealed thereby.”

24. According to that clause, two points arise. First, the agreement is to be governed and construed according to the laws of Uganda. This automatically ousted the jurisdiction of the trial court to hear and determine the application before it. The trial court thus failed to consider that the subject agreement was to be governed and construed according to the laws of Uganda.
25. The second point is that any dispute arising from the contract SHALL be subjected to arbitration. It is thus clear that the parties intention was that should any dispute arise, they would not rush to court but would instead attempt to have the dispute settled through arbitration. It matter not that the agreement had expired as an arbitration clause forms a separate contract and survives even after the main contract expires. The same was held in *Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission* (2006) Eklr where the court held that: -

“An arbitration clause which forms part of the contract shall be treated as an independent agreement from the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.”

26. Similarly in *Midland Finance & Securities Globetel Inc v Attorney General & Another* (2008) Eklr the court held that: -

“This means that the arbitration clause is regarded as constituting a separate and autonomous contract. It means that the validity of the arbitration clause does not depend on the validity of the contract as a whole. By surviving termination of the main contract, the clause constitutes the necessary agreement by the parties, that any dispute between them should be referred to arbitration.”

27. It then follows that parties were still bound by the arbitration clause in the transport agreement. The respondent ought to have adhered to the laid down procedure stipulated in clause 16 of the agreement before invoking any court, and in the circumstances, the proper court to be invoked is that in Uganda as the Kenyan Courts lack jurisdiction to hear and determine any dispute arising from the subject agreement.

28. In *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR, the court observed that: -

“The tenor and import of Article 159(2) (c) of the Constitution as read together with Section 6(1) of the Arbitration Act is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party seeks



to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance”

29. In this case, the issue of Section 6 of the *Arbitration Act* does not apply as the governing law was the Law of Uganda and not our Kenyan laws. The appellant was correct in filing the preliminary objection challenging the jurisdiction of the court.

### **Conclusion**

30. The upshot is that the memorandum of appeal dated 10/6/2024 partly succeeds and the following orders issue: -

1. The ruling of the trial court dated 3/6/2024 is hereby set aside.
2. The appellant is awarded costs of the appeal.

It is so decreed.

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**J.K. NG'ARNG'AR, HSC**

**JUDGE**

**DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 20<sup>TH</sup> DAY OF JANUARY, 2025**

