



**Biodeal Laboratories Limited v Ndiritu (Civil Appeal E340 of 2023)  
[2025] KEHC 2168 (KLR) (Civ) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2168 (KLR)

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

**CIVIL**

**CIVIL APPEAL E340 OF 2023**

**RC RUTTO, J**

**FEBRUARY 14, 2025**

**BETWEEN**

**BIODEAL LABORATORIES LIMITED ..... APPELLANT**

**AND**

**ANTHONY GITHINJI NDIRITU ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Small Claims Court of Kenya at Nairobi delivered by the Hon. Resident Magistrate Geoffrey M. Mookua, on the 4th December, 2023 in Nairobi SCC COMM NO E4831 OF 2023)*

**JUDGMENT**

1. This is an appeal against the Ruling of the Small Claims Court Commercial NO. E4831 of 2023 delivered in Nairobi. In that claim, the respondent filed a Preliminary Objection (PO) on grounds that; the adjudicator did not have jurisdiction to hear the claim as it related to surcharge which is an employment dispute; the parties were already before court in MCELRC E040 of 2023, Anthony Githinju Ndiritu v Biodeal Laboratories Limited which was still ongoing; the claim offends section 12 of the Small Claims Act and, lastly that the suit has been brought to court in clear disregard of the above statutory provisions and is an abuse of the due process of this court.
2. Upon hearing the respective parties' submissions, the adjudicator upheld the PO on grounds that the dispute arose from within the employer -employee relationship that existed between the claimant and the respondent. That this was a matter falling squarely on the Employment and Labour Relations Court, thus the trial court did not have jurisdiction under section 12 as read together with section 13 of the Small Claims Act.
3. The Appellant aggrieved by the entire Ruling, lodged this appeal on 18<sup>th</sup> December, 2023 setting out the following grounds of appeal, that the Learned Magistrate erred in both law and in fact: in



delivering a contradictory ruling occasioning an injustice; in ignoring that the Respondent's Statement of Defence consisted of disputed facts not in the nature and character of a preliminary objection; in failing to appreciate that the Appellant's claim was in relation to a contract relating to goods supplied, delivered and collected which involved third parties; in failing to apply the pre-dominant purpose test in arriving at his decision thereby rendering an erroneous decision; in failing to recognize that only 4 documents were required in determining a preliminary objection, that is, the Constitution, the impugned law, the statement of claim and preliminary objection; in failing to appreciate that the claim never raised any constitutional issues in the context of an employer-employee dispute to warrant invoking the jurisdiction of the Employment and Labour Relations Court; in failing to appreciate that the employment relationship is secondary and the dispute was a contract relating to goods supplied, delivered and collected and Section 87 (3) of the Employment Act No. 1 of 2007 oust the jurisdiction of the Employment and Labour Relations Court in such an instance; in failing to appreciate that the issues were commercial issues relating to a contract of goods supplied, delivered and collected, therefore not within the jurisdiction of the Employment and Labour Relations Court; in ignoring that the Appellant was a stranger to suit No. MCELRC/E040/2023 as no evidence of service of the alleged suit was adduced; and in failing to appreciate the pleadings and the submissions by the Appellant and thereby arriving at a grossly unfair decision.

4. The Appellant prayed that the Ruling delivered be set aside and the appeal be allowed with costs of both the appeal and in small claims court. Also that, the Appellant Statement of Claim be assigned to another Judicial Officer at the Small Claims Court other than the Judicial Officer of the trial court and be heard expeditiously.
5. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 20<sup>th</sup> August 2024. As at the time of writing of this judgment, the Respondent had not filed its submissions.

#### **Appellant's submissions**

6. The Appellant identified three issues for determination. First, whether the adjudicator erred by ignoring the fact that the Respondent's Statement of Defence consisted of disputed facts which is not the nature and character of a preliminary Objection. Second, is whether the adjudicator erred in failing to apply the pre-dominant purpose test in arriving at his decision thereby rendering an erroneous decision and thirdly, whether the Applicant is entitled to the orders sought.
7. On the first issue, the Appellant submitted that the Preliminary Objection was inviting the court to deal with disputed facts which should not be the character and nature of a Preliminary Objection. They submitted that since the Respondent disputed being liable of the sum of Kshs 567, 926. 80 owed to it, the matter should have proceeded for hearing. To buttress this argument, it relied on the cases of *Silvester K. Kaitany v Nyayo Tea Zones Development Corporation* and another; *National Land Commissions & Another (Interested Parties) [2020] eKLR* and *Oraro v Mbeja [2005] eKLR*.
8. It was further submitted that the Preliminary Objection offends Article 159 of the Constitution, and is an afterthought, an outright abuse of the court process since the Respondent before filing the same submitted to the jurisdiction of the court and fully participated in the processes which culminated to the matter being certified ready for hearing.
9. On the second issue the Appellant relied on the case of *Elias Maundu Makau v I&M Bank Limited [2021] eKLR* to emphasise on the importance of the application of the pre-dominant purpose test. It further submitted that the case in the lower case involved transactional and commercial issues relating to a contract of goods supplied, delivered and collected involving the Appellant's customers; money held and received which was within the jurisdiction of the Small Claims Court as per Section 12 (1) (a)



and (b) of the *Small Claims Court Act* No. 2 of 2016 and not the *Employment and Labour Relations Court Act*.

10. On the final issue, whether the Appellant is entitled to the orders sought. The Appellant submitted that the balance of convenience tilts towards it and thus entitled to the orders sought. It urged the court to allow the appeal as prayed.

### **Analysis and Determination**

11. This court has considered the grounds of appeal, the proceedings of the lower court, and the submissions filed by the Appellant. To begin with, the duty of this court as the appellate court exercising jurisdiction under the Small Claims Court squarely falls under Section 38 of the *Small Claims Court Act*. This section limits the jurisdiction of the High Court on appeals from the Small Claims Court to matters of law only.
12. What constitutes, points of law, has been settled in the case of Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, where the Court of Appeal stated as follows: -

“ [I]t is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”
13. Having gone through the Memorandum of Appeal and the grounds set out there under, I note that the Appellant raises issues of both law and fact. All the ground of appeal are premised on the grounds that the learned adjudicator erred in both law and fact. The submissions also have been crafted to support both the issues of fact and law. Thus, based on the above authority, and on the definition, of what constitutes issues of law, this court will limit itself from delving into the issues of facts and address the only issue of law arising which is: whether the adjudicator erred in dismissing the claim on the basis of the Respondent Preliminary Objection.
14. In *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, [2015] eKLR, the Court observed as follows: -

“ Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
15. In *Jamii Bora Kenya Limited v Esther Wairimu Mbugua & another* [2019] eKLR, the Court, quoting previous decisions on the subject, said this of preliminary objections: -

“ A preliminary objection” correctly understood, is now well defined as, and declared to be, a 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, 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. Where a court needs to investigate facts,



a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....”

16. From the above cases, it is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. The net effect of this position is that preliminary objections are not a suitable device in cases where facts are contested or are to be ascertained by evidence.
17. What then is the pure point of law raised in the preliminary objection before me in this matter? Are the facts in issue settled? To establish these the court will proceed to look into the pleadings that set out the background of the matter.
18. In the Appellant’s statement of claim dated 21<sup>st</sup> June 2023, the Appellant claimed Kshs 567, 926/= on the basis that it supplied goods to customers which the Respondent delivered to the claimant’s customers. Further, that the Respondent collected the goods from the Claimant’s customer but never delivered to the claimant’s office. In response to the claim, the Respondent denied the amount claimed and urged the court to dismiss the claim and further, filed a preliminary objection on the ground that the trial court does not have jurisdiction to hear and determine the claim as it related to surcharge which is an employment dispute.
19. Upon hearing the parties on the preliminary objection, the Adjudicator stated that: -

“The claim herein relates to a dispute of loss of property or money that came into the possession of the Respondent to deliver to and or from the customers of the claimant and in the course of the Respondent’s employment by the Claimant and in the subsistence of the said employment and labour relations between the parties herein”
20. I have considered and reviewed the record of appeal, and the issue that was before the adjudicator for determination pertains to a claim that the appellant asserts is a breach of contract. On the other hand, the respondent contends that it involves a surcharge arising from an employer-employee agreement which relate to a claim already pending determination before the Employment Court in MCELRC/E040/2023 Anthony Githinji Ndiritu versus Biodeal Laboratories Limited.
21. This Court finds that the issue of an employer-employee relationship, from which the alleged surcharged arises, has been raised and is contested by the appellant. These matters require clarification through presentation of evidence and a full trial as they are not clearly established in the pleadings.
22. Also, this Court notes that the assertion that there exists a suit filed in the Employment Court, that is, MCELRC/E040/2023, has been contested. As it stands, these issues remain contested and need to be determined through a trial process as they cannot be ascertained and clarified at the pleadings stage. It is therefore only proper that the matter proceeds for hearing for the court to be able to make a determination on whether such a relationship actually exists and or whether the cause of action is purely within the Small Claims Court jurisdiction specifically Section 12 (1) (a) and (b) of the [Small Claims Court Act](#).
23. With the foregoing, I find that the Learned Adjudicator erred in upholding the Preliminary Objection and I allow the appeal as follows: -
  - a. The Ruling delivered on 4/12/2023 is set aside.
  - b. The Appellant’s claim be heard before another adjudicator at the Milimani Small Claims Court.



c. Each party shall bear the cost of this appeal.

Orders accordingly

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 14<sup>TH</sup> DAY OF FEBRUARY 2025**

For Appellant:

For Respondent:

Court Assistant:

