Busienei v Lizano Limited (Civil Appeal E078 of 2021) [2025] KEHC 4483 (KLR) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E078 OF 2021

E OMINDE, J

APRIL 8, 2025

BETWEEN

RICHARD KIPRUTO BUSIENEI .... APPELLANT

AND

LIZANO LIMITED .... RESPONDENT

JUDGMENT

1. This is an appeal arising from the decision of Honourable Christine Menya (SRM) delivered on 18/07/2021 in Eldoret Chief Magistrate's Court, Civil Suit No. 704 of 2018.
2. By a Plaint dated 29/06/2018, the Respondent herein sued the Appellant seeking special damages of Kshs.1,305,000/=, an interest of 10% per day until payment in full as from 7/05/2018, costs of and incidental to this suit and any other relief that the Honourable Court may deem fit and just too grant.
3. The Appellant filed a Statement of Defence dated 26/06/2018 denying the averments by the Respondent.
4. The case then proceeded for trial and by its Judgment delivered on 18/06/2021, the Court found in favour of the Respondent and ordered for specific performance to the effect that the Appellant was ordered to pay for the value of the fertilizer he took and used from the Respondent to the tune of Kshs.1,305,000/=, the trial Court further observed that clause (e) of the said agreement provided that in case of breach, the Appellant was liable to pay the company 10% interest per day until the payment was made in full and proceeded to make a finding that there was no proof that the said clause was amended and therefore ordered that in addition to the purchase price, the Appellant do pay an additional 10% interest until payment in full as from 7/05/2018 till the said sum is complete. The trial Court also awarded the Respondents costs and interest of the suit at Court rate as from the date of the judgment until payment in full.

5. Being dissatisfied with the decision of the trial Court, the Appellant lodged the Memorandum of Appeal dated 13/07/2021 on 14/07/2021 listing the grounds of appeal as:

    1. That the trial Magistrate erred in law and fact by finding that there was a valid binding contract.
    2. That the trial Magistrate erred in law and fact by failing to observe that the Agreement dated 11/04/2018 offended the provisions of Section 3 of the *Companies Act*.
    3. That the trial Magistrate erred in law and fact by failing to observe that the Agreement dated 11/04/2018 offended the provisions of Section 35(1) and 37 (2) of the Companies.
    4. That the trial Magistrate erred in law and fact by failing to observe that the Agreement dated 11/04/2018 offended the provision of order 4 Rule 4 of the Civil Procedure Rules
    5. That the trial Magistrate erred in law and fact by failing to observe that there was no company resolutions sanctioning the commencement of the suit and appointing of the Advocate on record for the Respondent.
    6. That the trial Magistrate erred in law and fact by failing to observe that the Plaintiff had not pleaded particulars of breach as required under Order 2 Rule 4 of the Civil Procedure Rules 2010.
    7. That the trial Magistrate erred in law and fact by failing to observe that the Agreement dated 11/04/2018 offended the provisions of Section 16 and 16 A of the *Banking Act* on the issue of interest.
    8. That the trial Magistrate erred in law and fact by failing to observe that the trial Court was bereft of jurisdiction.
    9. That the trial Magistrate erred in law and fact by failing to observe that the Agreement dated 11/04/2018 offended the provision of Section 3 of the Contract Act.
    10. That the trial Magistrate erred in law and fact by failing to consider that the suit was bad in law and incurable defective.
    11. That the trial Magistrate erred in law and fact by failing to consider the Defendant's Submissions.
    12. That the trial Magistrate erred in law and fact generally.

The Submissions

6. The appeal was canvassed by way of written submissions. The Appellant filed submissions on 29/01/2025, while the Respondent filed on 27/11/2024.

The Appellant's Submissions

7. On whether the trial Magistrate erred in law and fact by finding that there was a valid and binding contract, Counsel for the Appellant submitted that for any contract to be enforceable, the party relying on the agreement must demonstrate that the essential ingredients of a valid contract exist. Counsel maintained that the party must demonstrate that there exists an offer, acceptance, consideration and that the parties had capacity to have a binding relationship. Additionally, Counsel submitted that the

essential components of a contract as was observed by Harris JA Garvey-Vs-Richards (2011)JMCA ought to ordinarily reflect the following principles:

> " It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

8. Counsel then cited Section 35 (1) and Section 37(1) of the *Companies Act* and the case of Akuisi Farmers Company Limited-Vs-Robert Ndiritu Gitonga (2019) eKLR, where the Court held that;

> " Thus, a corporation may be represented by its authorized officers which authority may be express or implied. Directors of a company are such officers. My understanding of Section 35 above is that such authority need not be in writing or even filed. It could be implied, by conduct of the parties. If that was not so, drafters would have expressly stated so".

9. Counsel contended that the Agreement dated 11/4/2018 was never executed by any Director nor by two authorized signatories in compliance with Section 37 of the *Companies Act* and hence the said agreement was not valid and it cannot be enforced.

10. On whether the suit offends the provisions of Order 4 Rule 4 of the Civil Procedure Rules, Counsel submitted that this provision requires that where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the Company duly authorized under seal of the Company to do so. Counsel urged that it therefore follows that before the Respondent instituted the suit ought to have conducted a meeting of Directors and/or shareholders where they could pass a resolution to commence the suit against the Appellant and in the process authorize Shamira Chepkemei Chelanga to swear the Verifying affidavit and also instruct the firm of Martim & Co. Advocates to institute the suit on its behalf.

11. Counsel contended that the Respondent did not have the said resolutions and that during cross-examination PW1 confirmed that they did not carry out any meeting and hence they don't have such resolutions. Counsel cited the case of East African Portland Cement Ltd -vs- Capital Markets Authority & 4 others (2014)eKLR wherein Lady Justice Mumbi Ngugi concurred with the reasoning held in Affordable Homes Africa Limited-vs- Ian Henderson & 2Others HCC No. 524 of 2004 where it was held:-

> " That as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders and that where a company's powers of management are by the Articles vested in the Board of Directors, the general meeting cannot interferes in the exercise of those powers.........the absence of a board resolution suctioning the commencement of this action by the company, the company is not before the Court at all for that reason, the preliminary objection succeeds and the action must be borne by the Advocates for the Plaintiff".

12. That in the case Bugerere Coffee Growers Ltd-Vs-Seraduka & Another (1970)EA 147 it was held that :-

> " When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors meeting and

record in the minutes, but no resolution had been passed authorizing the proceedings in this case. The Court held further that where an Advocate has brought legal proceedings without authority of the purported Plaintiff the Applicant becomes personally liable to the Defendants for the costs of the action".

13. Counsel further submitted that in the case of East African Portland Cement Ltd (supra) the court did not shy away from holding that: -

> " as an Advocate and an officer of the Court, the Counsel responsible for the filing of this Petition was fully aware, or should have been aware of the requirements of the law with regard to the filling of suits by companies, and had a duty to advice his client(s) not to file proceedings if there was no or no clear authority to do so".

14. Counsel contended that the Plaintiff did not produce any such resolution during the hearing of the case and neither was it part of the documents they were relying on a clear indication, that they did not have such authority to commence this suit, or for Shamira Chepkemei Chelanga to swear the verifying affidavit and for the firm of Martim & Co. Advocates to institute this suit on its behalf. Counsel submitted that Justice L. Njuguna in Directline Assurance Company Limited -vs- Tomson Ondimu (2019) eKLR adopted the same principal and struck out the suit with costs.

15. Counsel maintained that the reasoning that these are issues of technicalities that can be cured by relying in the provisions of Section 1A and 1B of the *Civil Procedure Act* 2010 and Article 159(2) (d) of *the constitution* of Kenya 2010. Counsel relied on the holding in the case of Raila Odinga-vs-I.E.B.C & Others (2013) eKLR where the Supreme Court said that "Article 159(2) (d) of *the Constitution* simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court". Counsel contended that the requirement for a resolution is not a mere procedure technically but it is a point of law that must be complied with before a company could institute a suit.

16. On whether the trial court was bereft of jurisdiction, Counsel submitted that a court's Jurisdiction flows from either *the constitution* or legislation or both. Counsel added that this was well stated by the supreme Court in the case of Samwel Kamau Macharia and another Vs Kenya Commercial Bank Limited & 20thers [2012]eKLR Application No. 2 of 2022 where it stated as follows:-

> " A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. Where *the Constitution* exhaustively provided for the jurisdiction of a court of law, the court must operate within the constitutional limits. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

17. Counsel further submitted that the trial Court was a Senior Resident Magistrate the same can be seen from the Judgment at page 163 of the record of Appeal under section 7(d) of the Magistrate's Court

Act 2015 the pecuniary jurisdiction of the Senior Resident Magistrate is Kshs. 7,000,000/=. Counsel maintained that the Respondent on its plaint dated 29/07/2018 sought for the following reliefs:- Kshs.1,305,000/= being the amount of sale of fertilizer, an interest of 10% per day until payment in full from 7/05/2018, Costs of and incidental to this suit and any other relief that the Honourable Court may deem fit and just to grant. Counsel further submitted that the Honourable Magistrate in her judgment stated that:-

> "I had a chance to look at the agreement and indeed in clause (e) thereof it was agreed that in case of breach, the Defendant was liable to pay the Company 10% interest per day until the payment was made in full. There is no proof that the said clause was amended and I shall therefore order that in addition to the purchase price, the defense do pay an additional 10% interest until payment in full from 7/07/2018 till the said sum is complete.

18. Counsel contended that doing a simple calculation of what the learned Magistrate ordered to be paid was beyond her pecuniary jurisdiction;

    1,305,000/=×10÷100=130,500/=per day.

    130,500/=×30=3,915,000/=per month.

    3,915,000/=×12=46,980,000/=per year.

19. Counsel further contended that as the time of the Judgment 3 years had already lapsed making the interest only at Kshs.46,980,000×=140,940,000/=exclusive of the principal amount hence the Honourable Magistrate lacked the jurisdiction to entertain the suit before her and she ought to have down her tools the moment she found out she did not have the pecuniary jurisdiction as it was stated in the case of Owners of Motor Vessel 'Lilians'Vs Caltex Oil (Kenya) Limited (1989) KLR. Counsel maintained that the judgment that was delivered by the trial Magistrate was irregular for lack of jurisdiction.

20. On whether the agreement dated 11/04/2018 offended the provisions of Section 3 of the *Law of Contract Act*, Counsel cited the said section and submitted that they have since demonstrated that the agreement dated 11/04/2018 was never signed by the Respondent representatives, it never complied with the provisions of Sections 35, 36 and 37 of the *Companies Act* which intern offends the provisions of Section 3 of the Law of Contract for want of signature and hence the suit that was filed by the Respondent was void ab initio.

The Respondent's submissions

21. On whether the trial Magistrate erred in law and fact by finding that there was a valid and binding contract, Counsel for the Appellant cited Section 3(1) of the *Sale of Goods Act* and submitted that from the definition therein, it is evident that the agreement between the parties perfectly fits the sale of goods contract as stipulated in the law of sale of goods, that his is premised on the 'Purchase Agreement' dated 11/04/2018 whereby the Appellant had agreed to purchase from the Respondent, NPS+B Fertilizer of 450 bags each of 50kg at a consideration price of Kshs.1, 305,000/= (Kshs.2, 900/= per bag). Counsel added that in regards to payment, the Appellant was to do so via two cheques, one post-dated to 20/4//2018 for Kshs. 652,500/=and another to 7/05/2018 for Kshs. 652,500/=.

22. Counsel urged that there was indeed a valid contract between the parties as the Respondent made an offer to supply the aforementioned fertilizers which was accepted by the Appellant who during cross-examination admitted to having received the aforementioned fertilizers which according to Section 36 of the *Sale of Goods Act* is considered as acceptance. In regards to the consideration, Counsel submitted

that the Appellant was to remit Kshs.1, 305,000/= in reference to the invoice dated 11/04/2018 through the two post-dated cheques which when presented to the bank on due dates returned unpaid and dishonoured by the bank forcing the Respondent to incur bank charges. Counsel urged that the three essential elements for a valid contract; offer, acceptance and consideration set out in the Court of Appeal case in Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR were met. This was accentuated in Mamta Peeush Mahajan (Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR whereby the court stated;

> " An agreement will be deemed duly formed and binding where there consideration in present and accepted having been offered."

23. In regards to the binding nature of the 'purchase agreement', Counsel cited the Supreme Court of the United Kingdom stated as follows in the case of RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production) [2010] UKSC 14,[45]:

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

24. Counsel further submitted that the Appellant during cross-examination stated that upon reading the terms and conditions of the 'Purchase Agreement' he appended his signature voluntarily which according to Euromee International Limited v Shandong Talkal Power Engineering Company Limited (Clvll Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) denotes an intention to be bound by the terms and conditions embodied in the signed document. Moreover, Counsel urged that a signature is one of the factors which prove and establish both offer and acceptance as stated in Mamta Peeush Mahajan (supra).

25. Counsel maintained that the 'Purchase Agreement' in this case is therefore valid and binding and as a result, legal obligations arise under Section 28 of the *Sale of Goods Act* which requires a seller to deliver the goods and the buyer to pay for them in accordance with the terms of the contract of sale. Counsel contended that the Appellant is seeking to repudiate the contract on the basis that Joy Wangui, an employee had no authority to enter into an agreement with him. Counsel submitted that Joy had ostensible authority to enter into contract. Counsel added that ostensible authority was expounded in Freeman and Lockyer (A firm) Vs Buckhurst Park Properties (Mangal) & Another [1964] 1 ALL E.R. 630, as follows;

> " An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority so as to render the principal liable to perform any obligations imposed on him by such contract."

26. According to Counsel, it is irrelevant whether the agent Joy had the actual authority or not in this case as long as the Respondent did not even dispute such agreement. Counsel submitted that there was even a verifying affidavit dated 29/06/2018 by Shamira Chepkemei Chelanga, a director of the Respondent

who acknowledged the agreement. Counsel contended that the issue of authority is an internal affairs matter as stated in Kibiri & 5 others v Harambee Savings and Credit Co-operative Society Limited (Environment & Land Case 4 of 2021) [2024] KEELC 1149 (KLR) (29 February 2024) (Judgment) which relied on the case of Royal British Bank v Turquand (1856) 6 E&B 327,which formulated the so-called "Indoor Management Rule", also known as "the Rule in Turquand's case", which holds that persons transacting with a Company are entitled to assume that internal Company's rules are complied with, even if they have not.

27. Counsel urged that essence of the Rule in Turquand's case is that the Company's indoor affairs are the Company's business. Counsel added that this was emphasized by the Court of Appeal in Samuel Murcithi Muriokl &another...Vs..,Kamahuha Limlted 120181 eKLR, where the Court held that:

> " We agree with the respondent's submission that whether a company has or has no complied with its internal procedures as to execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company."

28. Counsel observed that even as the appellant claims that the contract is void he went ahead to state during his examination in chief that when he learnt that the cheques were dishonoured he resorted to paying in cash. Counsel submitted that this shows that he knew that he had obligations towards the Respondent hence made-up fallacies that he made cash payment to Joy. Counsel maintained that there was never any payment made to the Respondent as there was no receipt to prove the same and it was a term in the contract that payments would be made via cheque.

29. On whether the agreement dated 11/04/2018 offended the provisions of Section 3 of the *Companies Act*, 2015, Counsel submitted that the said section is on interpretations and that the same being a generic reference, it is not in their mandate to assume what interpretation they sought to rely so as to be able to answer any such claim by the Appellant.

30. On whether the agreement dated 11/04/2018 offended the provisions of Section 35 (1) and 37 (2) of the *Companies Act*, 2010, Counsel submitted that the Appellant has sought to rely on the *Companies Act* of 2010 which is a non-existent statute and hence they are not aware of the claim by the Appellant who is required to plead with particularity.

31. On whether the agreement dated 11/04/2018 offends the provisions of Order 4 Rule 4 of the Civil Procedure Rules 2010, Counsel submitted that plaint in this case indicated the capacity in which the Respondent was suing, that this is evident in paragraph 1 of the plaint dated 29/06/2024;"The Plaintiff is a limited liability company duly-incorporated under the Company's Act Chapter 486 of the Laws of Kenya. Counsel contended that the Appellants allegations that the agreement dated 11/04/2018 offended the provisions of Order 4 rule 4 of the Civil Procedure Rules is a fabricated issue. Counsel added that the Civil Procedure Rules provides a framework on how civil suits are to be conducted and not contracts for sale of goods, the two are parallel to each other and do not in any way relate.

32. With regard to the issue that there was no company resolution sanctioning the commencement of the suit and appointing of the Advocate for the Respondent, Counsel relied on the holding in the case of Fubeco China Fushun v Naiposha Company LImited & 11 others (2014] eKLR which was persuaded by the Supreme Court of Uganda in the case Of United Assurance Co. Ltd V Attorney General: Seca No.1 Of 1998;

> " It does not require a board of directors, or even the general meeting of members, to sit and resolve to Instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the

contrary is shown, has the powers of the board to act on behalf of that Company. In the case before me, Caroline Walrimu Kimemia is a director of the Defendant Company and she duly authorized the Advocates on record to commence this Application. That fact is not denied and I am surprised the person laying the objection is the Plaintiff and not the Defendant Company. The Plaintiff has also not presented any material or affidavit from the other directors denying the authority of Caroline Wairimu Kimemia as a director in the Defendant Company. As such, I do not think the Court is in any position to dispute the authority of Caroline Wairimu Kimemia or the instructions to the advocate on record to defend the interest of the company. Therefore, in the absence of evidence to the contrary, I find the affidavits filed to be in order and the advocate herein to be properly on record for the Defendant."

33. Counsel maintained that even without the resolution to appoint an advocate, the suit is still competent as long as the company has not objected to any action taken by its agent that is the director. To support this, Counsel submitted that there was a "Verifying Affidavit' dated 29/06/2018 which shows that Shamira, the director authorized the law firm of Martim & Co. Advocates to represent them in the legal proceedings against the Appellant and furthermore, during cross-examination, Shamira admitted that the company had even allowed her to attend court, indicating that the Respondent was aware of the suit and the advocate representing them. According to Counsel it is absurd that the Appellant would raise such a concern yet the issue of resolution of appointment of advocates is a matter often raised by the company being an internal affair matter. Counsel urged that this was reiterated in the case of Moriaria vs. Kenya Batteries (1981) Ltd & 2 others (2002) 1KLR 406 where the Court stated as follows in respect to similar issues:

> "As regards the defence that the agreement was not executed properly by the company and that the borrowing was unauthorized. I am persuaded by the plaintiffs' advocate that whether a company has or has not complied with its internal procedures as to borrowing or execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company."

34. On whether the trial magistrate erred in law and fact by failure to observe that the Plaintiff had not pleaded particulars of breach as required under Order 2 rule 4 of the Civil Procedure Rules, 2010, Counsel cited the Court in Michael Mbogo Kibuti v Attorney General [2020] eKLR which cited with approval the decision of the Malawi Supreme Court of Appeal in Malawi Railays Ltd v Nyasulu [1998] MWSC 3, wherein the learned judges quoted with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal Problems, at p 174 whereof the author had stated;

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision

given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…."

35. According to Counsel, it is evident that from the Respondent's pleadings that the cause of action lies in breach of sale of goods contract, the particulars of which were specifically pleaded, that the Respondent made it clear in the pleading that the Appellant breached the contract when the two post-dated cheques issued by him returned unpaid and never made any effort to make payment for the delivery of the fertilizers.

36. On whether the agreement dated 11/04/2018 offends the provisions of Section 16 and 16A of the *Banking Act* on the issue of interest, Counsel submitted that Section 16 and 16A of the *Banking Act* is intended to regulate the business of banking as stated in Stanley Munga Githunguri v Jimba Credit Corporation Ltd [1988] eKLR. Counsel contended that the purchase agreement was neither a banking business nor financial business or business of deposit-taking, instead it was a contract for the sale of goods as envisaged under Section 3(1) of the *Sale of Goods Act*, that the 10% interest to be imposed on the Appellant was a term of the contract (clause 'e') which was to be paid in the event that the cheque issued was dishonoured and in this case the two post-dated cheques dated 20/04/2018 and 7/05/2018 when issued on the due dates were indeed dishonoured, the Respondent did incur bank charges, hence the 10% interest cost charge per day on the amount is enforceable and especially because the Appellant even admitted during cross-examination that he had read the terms of the contract and even appended his signature voluntarily hence he is bound by it. Counsel submitted that the court in Kenya Breweries Ltd v Natex Distributors Ltd (2004] eKLR, stipulated that parties to a written contract are bound by its terms and one such term was the payment of the aforementioned interest for breach of contract by the Appellant.

37. On whether the trial Court was bereft of jurisdiction, Counsel submitted that the issue of jurisdiction was raised by the Appellant in his statement of defence dated 26/07/2018. Counsel urged that Order 51,rule 4 of the Civil Procedure Rules requires that such is to be canvassed by way of notice of preliminary objection and that this requirement was accentuated in Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023)(Ruling)

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."

38. Counsel contended that it is when judgment was delivered that the Appellant seeks to raise the same issue during appeal, trying to poke holes in every slightest opportunity to evade the incidental consequences of the judgment delivered on 18t June, 2021 yet in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR

" Jurisdiction must be acquired before judgement is given"

39. Counsel submitted that this was one of the pertinent observations made in the locus classicus case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696,

" The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

40. Counsel further submitted that the trial court by virtue of the Magistrates Court Act and the *Civil Procedure Act* imposes it with the Authority to entertain the matter. The case of Republic v Magistrates Court, Mombasa; Absia Synegy Limited (Interested Party) (Judicial Review E033 of 2021) [2022]

KEHC 10 (KLR) (24 January 2022) (Judgment) pointed out that jurisdiction is determined on the basis of the pleadings. It further referred to the South African Constitutional Court In the matter between Vuyile Jackson Geaba vs Minister for Safety and Security First & Others Case CCT 64/08(2009| ZACC 26which stated that;

> " Jurisdiction is determined on the basis of the pleadings... and not the substantive merits of the case... In the event of the court's jurisdiction being challenged at the outset (in limine), the appellant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence."

41. Counsel maintained that in determining the lower court's jurisdiction, the pleadings filed in the lower court are useful. Counsel urged that when the Respondent stated in the plaint dated 29/06/2018 that the trial court had the jurisdiction to hear and determine the suit, it was not for cosmetic purposes. Counsel added that the law requires that a trial court should have its antennae hoisted high any time it reads an averment pleading that the court has jurisdiction or else the proceedings will be a nullity. Counsel urged that the trial court had pecuniary, subject matter and territorial jurisdiction which are prerequisite to the assumption of a count's jurisdiction, a sine qua non. On pecuniary jurisdiction, Counsel submitted that being a matter lodged in the Chief Magistrate court, section 7 of the Magistrates court act requires that the value of the subject matter should not exceed twenty million, which in this instance case fell within those bounds since the Respondent was claiming the cost of sale of fertilizer which was Kshs.1,305,000/=and interest on the amount as evident in the plaint. In regards to territorial jurisdiction, Counsel submitted that Section l5 of the *Civil Procedure Act*, recognizes that a suit shall be instituted where the Defendant voluntarily resides or carries on business, or personally works for gain which in this case, the Appellant indicated that he is a resident of Eldoret, Uasin Gishu County as referenced in the purchase agreement (P.O. Box 225-Eldoret. Subject matter jurisdiction being a sale of goods contract includes one of the matters that are within its jurisdiction.

42. In regard to whether the agreement dated 11/04/2018 offends the provisions of Section 3 of the Contract Act, Counsel submitted that the said section recognizes written contracts which is law is considered valid as long as the three essential elements of a contract are binding. In this instance, Counsel submitted that both parties entered in a written contract evident in the 'purchase agreement dated 11/04/2018 which was appended with the signatures of both parties.

Analysis and Determination

43. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348).

Issues for determination

44. In my view there is only one issue for determination:

    a. Whether there was a valid contract between the Appellant and the Respondent

45. On this issue, Black's Law Dictionary defines a contract as follows: -

> An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

46. In RTS Flexible Systems Ltd vs. Molkerel Alois Muller GmbH & Co, KG (UK Production) (2010) UKSC14, [45] (Supra) the Supreme Court of the United Kingdom stated that: -

> …The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

47. On implied contracts, the Court of Appeal in Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court said;

> " It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."

48. It therefore follows that a contract need not be in writing but can be inferred from the conduct of the parties. It must be noted that The elements of offer, acceptance and consideration must be proved, in implying a contract the conduct of the parties remain paramount.

49. In Charles Mwirigi Miriti versus Thananga Tea Growers Sacco Limited and Another (2014) eKLR the Court of Appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration.

50. Apparent authority also known as ostensible authority is defined Black's Law Dictionary 10Th Edition as:

> " Authority that a third party reasonably believes an agent has based on the third party's dealings with the principle even though the principal did not confer or intend to confer the authority. Apparent authority can be created by law even when no actual authority has been confirmed."

51. This Court is therefore enjoined to ascertain whether the pleadings, the evidence and the general conduct of the parties reveal any contract.

52. PW1 was Shamira Chepkemoi Chelanga, adopted her witness statement filed on 18/05/2018 as her evidence in chief. She stated that the Appellant is a client who was brought to them by an employee,

that she got into an agreement to supply fertilizer with the Appellant wherein the Appellant was to buy 450 bags at Kshs.2,900/= making a total of Kshs.1,305,000/=. She then produced a copy of the Agreement dated 11/04/2018 as (PEX1). She further stated that she supplied fertilizers to the Appellant and an invoice was issued which she produced as (PEX2). She testified that she verified to know if Appellant had signed the Agreement and attached a copy of his identity card to the agreement. She then produced the Appellant's copy of ID as (PEX3). She told the Court that the mode of payment of was by cheque and that the Appellant gave them cheques post-dated. She then produced two cheques Nos. 000152 N/C Bank of 20/04/2018 as (PEx 4a) and 000153 N/C Bank of 07/05/2018 as (PEX 4b). She stated that the cheque was presented on 21/04/2018 but the they did not present the second cheque as the first cheque bounced. She further testified that they had agreed that should payment fail, there shall be a 10% interest clearly stated in clause (d) of the Agreement. She stated that the Appellant has not paid anything at all. She further stated that she had no knowledge the cheque would bounce, the first cheque. She told the Court that she got a letter informing her that the 2nd cheque should not be banked, which letter is in court and that she also wrote a letter which was produced indicating that the said cheque had bounced. She urged that the Appellant pays all the money plus the interests.

53. In cross-examination, she stated that the Agreement is signed by Joy Wambui who is not a director in the company and that nothing gives her authority to produce it in court today but she has it, it is has a stamp but not the seal of company. She further stated that Lizano is a Ltd Company, there is no resolution to institute this Suit in Court but there was a resolution allowing her to attend Court and they did not produce documents that they allowed Maritim & Co. to institute the said (PEx2). She told the Court that payment was to be done on 11/05/2018, that payment could be done on the due date and that she first demanded payment before 11/05/2018 when the Appellant responded through a letter and he told them not to bank the second cheque, that the first one had bounced. She stated that nothing in Court shows that the cheque had bounced but she can avail it and that she did not deposit the other cheque and that the letter dated 8/05/2019 referred to is not produced, that the letter is from their advocates. She told the Court that both cheques were presented to the bank but the Appellant told them not to bank the second cheque and that there is letter to show that the cheque bounced.

54. DW1 was Richard Kipruto Busienei from Nyawa. He testified that he is a farm and that he knew the Respondent when they selling fertilizer. He told the Court that they entered into an Agreement on 11/04/2018, that he agreed with one Joy and Joseph Terer, he paid cash to Joy to give him fertilizer, this was after the cheques bounced. He stated that the agreement is in Court and he then produced the said agreement as (DEx1). He told the Court that he conducted a search to confirm the Directors, he then produced the search from the company registry as (DEx2). He stated that the there was no authority for Joy Wangui to enter into an agreement. He urged the Court to dismiss the case.

55. In cross-examination, he stated that he entered into an agreement with Lizano Ltd for buying and selling fertilizer worth Kshs.1,305,000/=. When referred to (DEX1) he stated that the signature is his and that he read the terms and conditions and signed and that he received the fertilizers. He told the Court that he was to pay via cheque and that he issued post-dated cheques and that he received information that they were dishonoured. He stated that he paid through Joy, who said there was no need of entering another agreement. He further stated that nothing shows that he paid the money. He told the Court that he not known Joy previously and that he paid her a total of Kshs. 1,305,000/=.

56. The Appellant has faulted the trial Magistrate for failing to observe that the Agreement dated 11/4/2018 offends the provision of Section 3 of the *Companies Act* No. 17 of 2015. Section 3 of the *Companies Act* is on "Interpretation of provisions of this Act". The Appellant has also faulted the trial

Magistrate for failing to observe that the Agreement dated 11/4/2018 offends the provisions of Section 35(1) and 37 (2) of the *Companies Act*.

57. Section 35 of the *Companies Act* provides as follows:

(1) A contract may be made—

(a) by a company, in writing; or

(b) on behalf of a company, by a person acting under its authority, express or implied.

(2) Any formalities required by law for a contract made by a natural person also apply, unless a contrary intention appears, to a contract made by or on behalf of a company.

58. Section 37 of the *Companies Act* on the other provides as follows;

37. Execution of documents

(1) Deleted by *Act No. 1 of 2020*, s. 30.

(2) A document is validly executed by a company if it is signed on behalf of the company—

(a) by two authorised signatories; or

(b) by a director of the company in the presence of a witness who attests the signature.

(3) A document in favour of a purchaser is effectively executed by a company if it purports to be signed in accordance with subsection (2).

(4) For purpose of subsection (3), "purchaser" means a purchaser in good faith for valuable consideration, and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

(5) If a document is to be signed by a person on behalf of more than one company, it is not effective for the purposes of this section unless the person signs it separately in each capacity.

(6) A reference in this section to a document being, or purporting to be, signed by a director or secretary is, if that office is held by a firm, to be read as a reference to its being, or purporting to be, signed by a natural person authorised by the firm to sign on its behalf.

(7) This section applies to a document that is, or purports to be, executed by a company in the name of, or on behalf of, another person (whether or not that person is also a company).

59. The Appellant further faulted the trial Magistrate for failing to observed that the Agreement dated 11/4/2018 offends the provisions of Order 4 Rule 4 of the Civil Procedure Rules 2010. Order 4 Rule 4 of the Civil Procedure Rules provides:

Capacity of parties [Order 4, rule 4]

Where the plaintiff sues in a representative capacity the plaint shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.

60. In the case of Mavuno Industries Limited & 2 Others v. Keroche Industries Limited [2012] eKLR, it was held: -

> “ As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff’s bundle of documents, which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit”.

61. Regarding there being no company resolutions sanctioning the commencement of the suit and appointing of the Advocate on record for the Respondent, in the case of Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR, (Supra) the Court observed as follows:

> “ However, I find a lot of persuasion in the thread of thinking in the Ugandan case of UNITED ASSURANCE CO. LTD v ATTORNEY GENERAL: SCCA NO.1 of 1998 where the Supreme Court of Uganda held that it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.

62. The Court of Appeal approved that decision of the High Court, that is Fubeco China (supra), in the case Arthi Highway Developers Limited v West End Butchery Limited & 6 others (2015) eKLR as follows:

    44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor(1970) 1 EA 147.The court in that case held:-

    > “When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

    45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000.

    The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998.The latter case restated the law as follows: -

> "…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."
>
> The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.

63. The Appellant contended that the trial Magistrate failed to observed that the Agreement dated 11/4/2018 offends the provisions of Order 2 Rule 4 of the Civil Procedure Rules 2010. Order 2 Rule 4 of the Civil Procedure Rules provides:

    Matters which must be specifically pleaded [Order 2, rule 4]

    (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

    (a) which he alleges makes any claim or defence of the opposite party not maintainable;

    (b) which, if not specifically pleaded, might take the opposite party by surprise; or

    (c) which raises issues of fact not arising out of the preceding pleading.

    (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

    (3) In this rule "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

64. The Appellant contended that the trial Magistrate failed to observed that the Agreement dated 11/4/2018 offends the provisions of Section 16 and 16 A of the *Banking Act* on the issue of interest and that the trial Court was bereft of jurisdiction. On both grounds, the submissions by the Counsel for the respondent are relevant

65. In light of my summation of relevant legal provisions as well as Case Law as herein above summarised and having been persuaded by the legal expositions made by Counsel for the Respondent in his submissions in response to each of the Grounds of Appeal raised by the appellant, I satisfied that the Hon Magistrate correctly applied herself in the case and did not reach an erroneous finding that there was indeed an enforceable contract between the parties which the appellant was in breach of and hence her judgement in favour of the respondent and against the appellant. In this regard, it is my finding that the Appellant's Appeal lacks merit and the same is dismissed in its entirety with costs to the respondents.

READ DATED AND SIGNED AT ELDORET ON 8TH APRIL 2025

E. OMINDE

JUDGE