



REPUBLIC OF KENYA



KENYA LAW
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**Simon v Valour Cabs & Travels Limited (Civil Appeal E052 of 2024)
[2025] KEHC 6093 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E052 OF 2024
AN ONGERI, J
MAY 16, 2025**

BETWEEN

BRIQUET LOGAN NICHOLAS SIMON APPELLANT

AND

VALOUR CABS & TRAVELS LIMITED RESPONDENT

*(Being an appeal from the ruling of Hon. C. K. Kithinji (PM) in
Voi PM Civil Suit no. E223 of 2023 delivered on 3rd July 2024)*

JUDGMENT

1. The appellant raised a notice of preliminary objection (NOPO) dated 15th December 2023 in the trial court against the respondent's case and the said NOPO was dismissed.
2. The appellant has appealed against the dismissal of the NOPO on the following grounds:
 - i. That the Learned Trial Magistrate erred in law and in fact by misconstruing the Appellant's Notice of Preliminary Objections dated 15th December, 2023, the Written Submissions in support thereon and thus arrived at the wrong decision.
 - ii. That the Learned Trial Magistrate erred in law and in fact by failing to take into account germane considerations relevant to the circumstances of the Appellant's objections as were set out in the Appellant's Written Submissions thereby reaching a decision that is ex-facie manifestly devoid of any legal justification.
 - iii. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's Notice of Preliminary Objection dated 15th December, 2023 on the basis that the objections set out thereon did not meet the test of a proper preliminary objections as determined in the celebrated cases of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 and Oraro v Mbaja [2005] 1 KLR 141.



- iv. That the Learned Trial Magistrate erred in law and in fact failing to determine the issue of whether it was clothed with jurisdiction to hear and determine the suit in light of the choice of law and exclusive jurisdiction provided in the Vehicle Car Hire Agreement dated 6th November, 2023 on the basis that the Appellant had not yet filed its Defence.
 - v. That the Learned Trial Magistrate erred in law by adversely forming an opinion that the issue of service of process and the manner of commencement of the suit before it could not succeed as a proper preliminary objection while all at all material times it was clear from the record that the Respondent never sought nor obtained leave of the Court to sue and serve processes on the Appellant who is a foreigner in accordance with the mandatory provisions of section 5 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as read together with Order 5 Rule 21 of the Civil Procedure Rules, 2010. This issue was a critical jurisdictions question before the Trial Court for determination of whether there was a properly instituted suit.
 - vi. That the Learned Trial Magistrate erred in law by holding that the issue of locus standi of the Respondent could not proceed as a proper preliminary objection yet it was obvious from the pleadings that had been filed by the Respondent, the Plaintiff before it, that the said party is not a legal person and/or entity known in law and further is not the registered owner of the suit motor vehicle registration number KCR 229B Toyota Prado and therefore lacked capacity and/or locus standi to institute the suit.
3. The NOPO raised at the trial court was based on the following grounds:
- i. That the trial court lacked jurisdiction to hear and determine the suit on the account of the express provisions of clause 8 (c) of the vehicle car hire agreement dated 6th November 2023 which specifically provides that all issues flowing from the said agreement including any dispute on the validity and interpretation of the agreement and the legal relationship of the parties thereto shall be governed by the laws of the state of Connecticut and applicable United States of America Federal Law.
 - ii. That additionally and without prejudice to the foregoing, the proceedings therein are a nullity having been instituted without leave of the court as provided under Order 5 Rule 21 of the Civil Procedure Rules 2010 on account of the fact that the defendant to this suit is a foreign national, who resides and works for gain in the French Republic.
 - iii. That in any event, the plaintiff as named in the pleadings before the court is not a legal person and/or entity known in law and further is not the registered owner of the suit motor vehicle registration number KCR 229B Toyota Prado and therefore lacks capacity and/or locus to institute the proceedings.
 - iv. That the entire suit is otherwise an abuse of the court process.
4. The parties filed written submissions as follows: The appellant, a French national (Briquet Logan Nicholas Simon), submitted that he filed this appeal challenging the ruling of the Chief Magistrate's Court at Voi dismissing his preliminary objection in Civil Case No. E233 of 2023.
5. Further, that the dispute arose from a vehicle hire agreement between the appellant and the respondent, Valour Cabs & Travels Limited.
6. The respondent sued the appellant for Kshs. 3.5 million, claiming the value of the motor vehicle which was allegedly destroyed during the hire period.



7. The appellant raised three key issues in his preliminary objection: jurisdiction, improper service, and the respondent's lack of locus standi.
8. On jurisdiction, the appellant argued that Clause 8(c) of the hire agreement expressly designated the laws of Connecticut and U.S. federal law as governing any disputes, ousting the Kenyan courts' jurisdiction. Citing precedents like *Raytheon Aircraft Credit Corporation v Air Al-Faraj Limited* and *Areva T & D India Limited v Priority Electrical Engineers*, the appellant contended that parties must adhere to their contractual forum selection unless exceptional circumstances exist, which the respondent failed to demonstrate.
9. The appellant submitted that the trial magistrate erroneously dismissed this argument, suggesting the appellant should first file a defense—a position unsupported by law.
10. Regarding service, the appellant emphasized that the respondent failed to seek leave under Section 5 of the *Civil Procedure Act* and Order 5 Rule 21 of the Civil Procedure Rules to serve summons outside Kenya, rendering the suit improperly instituted. Authorities like *Misnak International (UK) Limited v 4MB Mining Limited* and *DNK v GS* affirm that courts cannot assume jurisdiction over foreign defendants without such leave.
11. The appellant submitted that the trial magistrate wrongly classified this as a mere service issue rather than a jurisdictional defect.
12. On locus standi, the appellant asserted that the respondent, as named in the pleadings, lacked legal personality and ownership of the motor vehicle (registered to a third party).
13. Further, that Cases like *Sietco (K) Limited v Fortune Commodities Limited* and *Apex Finance International Limited v Kenya Anti-Corruption Commission* underscore that suits by non-existent entities are nullities.
14. The appellant submitted that the magistrate ignored this fatal flaw.
15. The appellant urged the High Court to allow the appeal, set aside the magistrate's ruling, strike out the suit for want of jurisdiction, and award it costs.
16. The submissions emphasized strict adherence to contractual terms, procedural rules, and precedent, arguing that the magistrate's errors warranted intervention.
17. The Respondent opposed the Appellant's appeal, arguing that the trial court correctly dismissed the Appellant's preliminary objection for failing to meet the legal requirements of a proper preliminary objection.
18. The Respondent contends that the objection raised factual issues—such as the Respondent's registration status and the Appellant's physical presence at the time of the suit's filing—which required further investigation and could not be resolved as pure points of law.
19. Further, that the trial court relied on established legal principles from *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* and *Oraro v Mbaja*, which define a preliminary objection as a pure point of law that can dispose of the suit without delving into disputed facts.
20. The Respondent asserted that the trial court properly exercised its discretion in dismissing the objection, as the issues raised (including jurisdiction, service of process, and the Respondent's locus standi) were either premature or fact-dependent.



21. The respondent further submitted that the question of whether the Respondent was a legally recognized entity or the proper party to sue could not be determined without evidence.
22. The Respondent emphasized that the appeal lacks merit and only serves to delay the resolution of the main dispute, urging the court to dismiss it with costs awarded in their favor.
23. In summary, the Respondent maintained that the trial court's decision was legally sound, as the preliminary objection improperly mixed law and facts, and the appeal should be dismissed to allow the case to proceed on its merits.
24. As a first appellate court, this court is obligated to re-evaluate the evidence and submissions adduced before the trial court afresh while giving due deference to the trial court's findings.
25. This principle was established in the case of *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 and reaffirmed in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
26. The issues for determination in this appeal are as follows:
 - i. Whether the trial court was right in dismissing the Notice of Preliminary Objection.
 - ii. Whether the Respondent is a legal entity with locus standi to institute proceedings.
 - iii. Whether the appeal should be allowed.
27. On the issue as to whether the trial court had the jurisdiction to hear the suit, I find that the issue of jurisdiction is key and the same was properly raised as a preliminary objection.
28. A preliminary objection must be based on a pure point of law that, if upheld, would dispose of the suit without delving into factual disputes.
29. This principle was established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and reiterated in *Oraro v Mbaja* [2005] 1 KLR 141, where the court held as follows;

“A preliminary objection must stem from a pure point of law, not requiring any factual analysis.”
30. The Appellant's objections raised three key issues:
 - i. Jurisdiction (based on the choice of law clause in the agreement).
 - ii. Service of process (failure to obtain leave under Order 5 Rule 21 CPR).
 - iii. Locus standi (whether the Respondent is a legal entity).
31. I find that on the issue of Jurisdiction, the same is clearly stated at Clause 8(c) of the Vehicle Hire Agreement that the parties ousted Kenyan courts' jurisdiction by stipulating that disputes be governed by Connecticut and U.S. federal laws.
32. Kenyan courts have consistently upheld forum selection clauses unless there are compelling reasons to disregard them (See *Raytheon Aircraft Credit Corporation v Air Al-Faraj Limited* [2005] eKLR; *Areva T & D India Limited v Priority Electrical Engineers* [2018] eKLR).
33. However, the trial magistrate held that the issue required a full hearing, including whether the clause was binding and whether Kenyan courts should decline jurisdiction.



34. I find that jurisdiction is a threshold issue that must be determined at the earliest opportunity (Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1).
35. On the issue of service of process, the Appellant is a foreign national, and Order 5 Rule 21 of the Civil Procedure Rules requires leave of court before serving summons outside Kenya.
36. I find that failure to obtain such leave renders the suit the nullity (Misnak International (UK) Limited v 4MB Mining Limited [2020] eKLR; DNK v GS [2022] eKLR).
37. The trial magistrate therefore wrongly dismissed this as a mere procedural defect rather than a jurisdictional flaw, contrary to established precedent.
38. On the issue of Locus Standi, the Appellant contends that the Respondent is not a registered entity and lacks ownership of the motor vehicle (registered to a third party).
39. A suit by a non-existent entity is a nullity (Sietco (K) Limited v Fortune Commodities Limited [2019] eKLR; Apex Finance International Limited v Kenya Anti-Corruption Commission [2012] eKLR).
40. I find that the trial magistrate erred in holding that this required evidence, as the question of legal capacity is a pure point of law determinable from pleadings.
41. In the circumstances, I find that the trial court erred in dismissing the preliminary objection as the issues raised were pure points of law capable of disposing of the case without factual inquiry.
42. I find that the objections met the test in the Mukisa Biscuit case (supra) and should have been upheld.
43. The Appellant provided evidence that the motor vehicle (KCR 229B) is registered to a third party, not the Respondent. Further, the Respondent’s legal status was not verified.
44. A party lacking legal capacity cannot sue (Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR).
45. Since the Respondent’s existence and ownership claim were disputed, the trial court should have addressed this as a threshold issue.
46. The Civil Case No. E233 of 2023 be and is hereby struck out for lack of jurisdiction due to the exclusive forum selection clause and also for improper service (failure to obtain leave under Order 5 Rule 21 CPR) and for the Respondent’s lack of locus standi.
47. The appeal is accordingly allowed and the ruling of the Chief Magistrate’s Court at Voi dismissing the preliminary objection is set aside.
48. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT VOI THIS 16TH DAY OF MAY, 2025.

.....
A. N. ONGERI

JUDGE

In the presence of:

Court Assistants: Maina/Millicent

..... for the Appellant



..... for the Respondent

