



REPUBLIC OF KENYA



**Topshine Limited v Kingdom Bank Limited (Civil Case
E015 of 2021) [2025] KEHC 5563 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE E015 OF 2021
DKN MAGARE, J
MAY 5, 2025**

BETWEEN

TOPSHINE LIMITED PLAINTIFF

AND

KINGDOM BANK LIMITED DEFENDANT

RULING

1. This case was filed on 8.12.2021, wherein it averred that one Peter Macharia Wambugu (deceased) is the registered owner of LR No. Tetu/Unjiru/1303 with a four-story building with 114 rooms. The Applicant stated that the deceased was offered a Ksh. 61,000,000/= loan on 29.04.2015 and a further asset finance facility of Ksh. 5,100,000/=. The Applicant contended that the loan was repayable in 144 months at Ksh 995,472.99/= per month, including interest. The Applicant contended that the loan facility was subject to a Mortgage Protection Insurance of Ksh. 66,100,000/=.
2. The Applicant contended that by a letter of offer dated 28.03.2017, the Respondent registered a further charge dated Ksh. 6,932,160/= in addition to Ksh. 38,500,000/= previously disbursed. The Applicant further contended that under the second charge, the loan was repayable over 135 months at the rate of Ksh. 692,851.05/= secured by a Director's Personal Guarantee of Ksh. 46,541,735.36/= and that the guarantors were all directors of the Applicant company.
3. The Applicant stated that the loan facility fell into arrears, which was restructured on 16th November 2018 with installments of Ksh. 400,000/=. The Applicant then issued a demand letter dated 17th June 2020 to the directors, where the loan facility stood at Ksh. 50,755,169.47/=. The Applicant then issued a statutory notice under Section 92 (2) of the Land Act relating to the charge over Tetu/Unjiru/1303 for the outstanding loan of Ksh.51,245,283.73/=.
4. That subsequently, the Respondent instructed Maduwande Auctioneers to issue a 45-day redemption notice over the said property via a letter dated 22/09/2021. That further, the Respondent caused



- an advertisement for the sale of the property pursuant to statutory power of sale through the said auctioneers in two advertisements in the Daily Nation newspaper on 22/11/2021 and 29/11/2021.
5. The Applicant stated that the aforementioned actions by the Respondent are illegal as they are in contravention of the contractual terms between the parties. This was because the offer letter dated 20/03/2017 had an advancement of Ksh. 38,500,000/= and a top-up of Ksh. 46,541,735.36/=.
 6. The Applicant filed a Notice of Motion dated 8 December, 2021 seeking to stop the sale of the suit property via public auction. The application sought an order that a temporary injunction be issued over Tetu/Unjiru/1303 over the sale pending the hearing and determination of the application and suit.
 7. The Respondent lodged a Statement of Defence wherein it admitted paragraphs 1, 2, and 3. It admitted paragraphs 4, 5, and 6 insofar as credit facilities were advanced, but denied the rest of the contents. The Respondent stated that it did not claim payment from the Applicant, nor had it exercised its statutory power of sale regarding the charge dated 2nd June 2015.
 8. The Respondent stated that a banker-customer relationship existed between its predecessor and the Applicant. They stated that this was a term loan of Ksh. 19,000,000/=, to be repaid in 60 months of monthly instalments of Ksh. 546,591.35/=. It was their case that the term loan was secured by Tetu/Unjiru/1303 and personal guarantees by the Applicant's directors in the sum of Ksh. 19,000,000/=.
 9. The Respondent claimed that the deceased further created a second legal charge over the property in favour of the Respondent's predecessor for Ksh. 85,000,000/=. The Respondent claimed that the Applicant applied for a mortgage loan facility six months later for Ksh. 35,000,000/= from its predecessor and would advance the aforementioned sums to pay off the asset financing granted to Peter Macharia Wambugu. This was also to pay off the term loan facility, and complete the construction of apartments on Tetu/Unjiru/1303. The facility was to be repayable at Ksh. 714,692,13/=. There was a further charge over Tetu/Unjiru/1303. It was an agreement that in the event of default of any singular installment, the facility would become due and payable. It then disbursed the amounts in fulfillment of its obligation to the Applicant.
 10. The Respondent admitted the contents of paragraphs 7, 8, 9, and 10 of the Plaintiff to the extent that its predecessor granted the Applicant additional credit facilities, but denied the rest in toto. The Respondent claimed that the Applicant in March 2017 sought a top-up facility of Ksh.6,932,160/= . This was secured by a further legal charge over Tetu/Unjiru/1303. The Respondent admitted the contents of paragraph 11 insofar as the additional credit facility is concerned, but denied the rest of the contents. It stated that the Applicant in November 2018 applied for the reduction of the monthly installment on its mortgage facility, which was granted at Ksh 400,000/= per month. They stated that the Applicant failed to meet its repayment obligations and defaulted on the consolidated mortgage facility.
 11. The Respondent admitted the contents of paragraph 12 of the Plaintiff to the extent that a lawful demand notice was issued. Further the Respondent admitted the contents of paragraph 13 and 14 of the Plaintiff to the extent that statutory notices were issued but denied the rest of the contents in toto effecting the same on the legal representative of the estate of the deceased director one Mary Wanjiru Macharia who persisted in default and engaged auctioneers who issued the legal representative with Redemption Notice and Notification of sale in adherence to Rule 15 of the Auctioneers Rules 1997.
 12. The Respondent stated that it caused the property to be valued by a registered valuer. The Respondent admitted the contents of paragraph 15 of the Plaintiff to the extent that it caused advertisement in the local dailies for the intended auction but denied the rest of the contents and puts the same to strict



proof thereof. The Respondent denied in toto the contents of paragraphs 16 and 17 and puts the Applicant to strict proof.

13. The Respondent then filed a Notice of Preliminary Objection dated 17.05.2022, citing that the Applicant lacks the locus standi to present this suit.
14. The Respondent filed its submissions to the preliminary objection dated 17th May 2022. The Respondent cited the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696. The Respondent contended that the registered parcel of land, to wit Tetu/Unjiru/1303, is registered under Peter Macharia Wambugu and that the Applicant is a corporate entity separate from its directors.
15. The Respondent contended that the registered proprietor in law could seek relief against alleged infringement of rights in relation thereto. They relied on the case of Jacob Arap Ngeny vs John Kiprugut t/a Jophik Enterprises [2016] eKLR. In that case it was only the charger who could bring an action to challenge the exercise of statutory sale. They further cited the Court of Appeal authority of Agricultural Finance Corporation vs Lengetia Limited & Jack Mwangi [1985] eKLR, Nairobi Mamba Village vs National Bank of Kenya Ltd [2002] 1 EA 197, and John Katambala Nalwenge vs National Bank of Kenya Ltd [2005] eKLR

Analysis

16. The issues for determination are the merit of the preliminary objection. A preliminary objection has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations. The Court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on the understanding that what is pleaded is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

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

17. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus The Board Of Trustees of the Cashewnut Industry Development Trust Fund, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S.S. Kadage JJA), sitting in Dar es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in Kampala in the Mukisa Biscuit case (Supra) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the “improper practice” never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.”



18. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd*(supra): -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

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

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

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

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



21. It is therefore my view that a preliminary objection must be based on current facts, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection, therefore, only 3 documents are required in addition to *the constitution*. The impugned law, the plaint, and the preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.
22. It is not in doubt that a Preliminary Objection raises a 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 have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. The Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information.
23. Thus, from the Mukisa case, it must be subjected to the court's scrutiny whether the Applicant lacks the locus standi to bring an action against the Respondent. The Applicant herein, a company incorporated under the laws of Kenya, brought an action against the Respondent for sums lent to one Peter Macharia Wambugu. The Respondent contends that it is a point of law that the company was not privy to the contract between the Respondent and the borrower who had a bank-customer relationship.
24. The plaint reveals that the money was lent to Peter Macharia Wambugu, not the company. The title deed is pleaded to belong to Peter Macharia Wambugu. The amounts were secured by charging Tetu/Unjiru/1303, owned by Peter Macharia Wambugu. Whither does the plaintiff come in? The dispute herein is not relating to the guarantee but a security, being Tetu/Unjiru/1303.
25. It is a long-standing legal principle that a company is a separate person distinct from its members. The case of *Salomon v Salomon* [1897] AC 78 and also the case of *Victor Mabachi & Another v Nurturn Bates Ltd*, Civil Appeal No. 247 of 2005 [2013] eKLR in which the Court held that a company, as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents. One Peter Macharia Wambugu was advanced Ksh. 61,000,000/= and Ksh. 5,100,000/= respectively on 29th April 2015 with security being Tetu/Unjiru/1303. In the case of *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Ano* [2014] eKLR, the Court held as follows;

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd V Salomon* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities”
26. The security was an asset belonging to the deceased borrower who used it as collateral against the loan dated 29th April 2015. There is no privity of contract shown from the plaint dated 8.12.2021. The meaning, scope and tenor of the doctrine of privity of contract was highlighted and elaborated upon in the case of *Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another* (2015) eKLR where it was held as follows:

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract.



Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd* [1915] Ac 847, Lord Haldane, LC rendered the principles thus: “My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.” In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation V Lendetia Ltd* (supra), *Kenya National Capital Corporation Ltd V Albert Mario Cordeiro & Another* (supra) And *William Muthee Muthami V Bank Of Baroda*, (supra). Thus in *Agricultural Finance Corporation V Lendetia Ltd* (supra), quoting with approval from *Halsbury’s Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated: “As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

27. The plaintiff was not privy to the contract between the deceased and the defendant. However, can the case be revived or resurrected? The error in the matter is such that it is not possible to resuscitate or breathe life into the case. In the case of *Autofine Limited v Ecobank Kenya Limited & another* (Civil Case E177 of 2021) [2021] KEHC 389 (KLR) (Commercial and Tax) (16 December 2021) (Ruling, Mwita J posited as follows regarding driving a party from the seat of justice.
28. There can be no argument that the respondent’s suit pleads particulars of negligence against the applicant, although the facts in the plaint fall short of a clear cause of action against it. The principle in law is that a court should not drive a litigant away from the seat of justice merely because his suit falls short in disclosing a reasonable cause of action. However weak his case may be, the court should sustain it if it can be injected with life through amendments.
29. The long line of decisions referred above demonstrates one thing; that the court should always allow a party an opportunity to have his day in court by allowing the case to be decided on merit unless it is so hopeless that even an amendment cannot rescue it.
30. Faced with such a situation like in the present case, this court should opt for the lesser evil, not to strike out the suit but give the respondent an opportunity to amend its pleadings given that the applicant will suffer no prejudice. That is; the court should be minded of maintaining the suit rather than striking it out and as a result do justice to the parties’ case.
31. In the case of *Afroplast Industries Limited v Sanlam Insurance Co Ltd & another* [2021] eKLR, the court stated as follows:

The court has considered the material canvassed in respect of the motion and perused the pleadings on record. There is no dispute that the insurance (policy) contract upon which the Plaintiff’s suit is premised was executed between the Plaintiff and the 1st Defendant. There is therefore no privity of contract between the 2nd Defendant and the Plaintiff. As a rule of common law, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not party to it. See *Halsbury’s Law of England* 4th Edition. Vol. 9(1) Paragraph 748.



32. A contract affects only the parties and cannot be enforced by or against a person who is not a party. In the case of *Agricultural Finance Corporation V. Lengetia* (1982 -88) 1KAR 772, the Court of Appeal held that:

“As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

33. A contract cannot be enforced either by or against a third party. In the case of *Texas Alarms (K) Limited v General Cargo (Transport) Limited (Civil Appeal 10 of 2021)* [2023] KECA 1067 (KLR) (22 September 2023) (Judgment), the Court of Appeal, [P Nyamweya, JW Lessit & GV Odunga, JJA] stated as follows:

34. As the editors of *Chitty on Contracts*, Volume 1 state at paragraph 18-133, under the doctrine of privity of contract, as a general rule, a contract binds only the parties to it.’

42. In the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe_ & Another* [2015] eKLR on the issue of privity of contract, this Court held:

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus: ‘My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.’

In this jurisdiction, that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation v Lengetia Ltd* (supra), *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & Another* (supra), and *William Muthee Muthami v Bank of Baroda* (supra). Thus, in *Agricultural Finance Corporation vs. Lengetia Ltd* (supra), quoting with approval from Halsbury’s *Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated: ‘As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party in the consideration does not entitle him to sue upon the contracts.’”

43. Further, in the case of *Kenya National Capital Corporation Ltd vs. Albert Mario Cordeiro & Another* [2014] eKLR: “It is trite that the doctrine of privity of contract is a long-established part of the law of contract. Save for the exceptions brought in by recent reforms of the law in this area which allow third parties for whose benefit the contract is made to enforce it, the essence of the privity rule is that only the people who actually negotiated a contract, and are thus privy to it, are entitled to enforce its terms. That is to say, only the parties to a contract have enforceable rights and obligations under it. A third party to the contract cannot enforce any of its terms nor have any burdens from that contract enforced on them. That is the law



on the doctrine as I understand it and the Hon. Justice Visram has, in his judgment, given a splendid exposition of it.(6)Moreover the appellant not being party to the agreement of sale between the 1st and 2nd respondent there is no privity of contract between the appellant and the 1st respondent, and therefore the appellant is not bound by that agreement. Thus, there was no binding contract between the 1st respondent and the appellant upon which the order of specific performance sought by the 1st appellant could be anchored. Although this finding may be sufficient to dispose of this appeal, there is a further issue that require consideration.”

35. In the circumstances, I find that the preliminary objection is merited. It is accordingly allowed. The plaintiff has no standing to file the suit herein. The plaint and suit is accordingly struck out.

36. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

37. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

38. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,



constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

39. Costs follow the event. The defendant is accordingly awarded costs as a successful party. The costs shall be taxed by the taxing master of this court.

Determination

40. The upshot of the foregoing is that I make the following orders: -
- a. I find that the Preliminary Objection is merited. It is accordingly allowed. The plaintiff has no standing to file the suit herein. The plaint and suit is accordingly struck out.
 - b. The defendant is accordingly awarded costs which shall be taxed by the taxing master of this court.
 - c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF MAY, 2025.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by:-

No appearance for Warutere & Associates Advocates for the Plaintiff/Applicant

Mr Njoroge for Philip Muoka & Co. Advocates for the Defendant/Respondent

Court Assistant – Michael

