



**Githongo v Hassan (Civil Appeal E010 of 2021)  
[2025] KEHC 7749 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7749 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E010 OF 2021  
JK NG'ARNG'AR, J  
JUNE 5, 2025**

**BETWEEN**

**DENNIS MBURUGA GITHONGO ..... APPELLANT**

**AND**

**PURITY MORAA HASSAN ..... RESPONDENT**

*(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kerugoya  
(Hon. E.O. Wambo, SRM.) delivered on 18th February 2021 in CMCC NO. E018 OF 2020)*

**JUDGMENT**

1. The appeal before me seeks to consider whether the exercise of discretion by the trial court was done so injudiciously or otherwise. I must state at the onset that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. [see *Mbogo v Shah* [1968] EA page 93 Kenya]
2. The background giving rise to this appeal is that the appellant filed a plaint dated 26<sup>th</sup> October 2020 on 27<sup>th</sup> October 2020 against the respondent. Contemporaneously, the appellant filed a Notice of Motion dated 26<sup>th</sup> October 2020 seeking inter alia, an order that he be allowed to collect personal items to enable him prepare for his upcoming exams and that the motor vehicle registration number KAP 379X Mitsubishi Lancer be detained at Kerugoya Police Station.
3. His claim was that they are the joint registered owners of suit vehicle. On 29<sup>th</sup> January 2020, the suit vehicle went missing. Investigations revealed that it was with the respondent. He averred that his personal belongings were in the vehicle and was unable to access it. He was apprehensive that if the respondent was allowed to retain the vehicle, it would expose him to potential liabilities. He prayed for an order that the suit vehicle be handed over to him and in return, the appellant to pay of the purchase



price at the current resale value. In the alternative, he prayed that the vehicle be sold and proceeds shared equally.

4. The respondent entered appearance and filed her replying affidavit sworn on 12<sup>th</sup> November 2020 and statement of defence dated 12<sup>th</sup> November 2020. Gathered from her pleadings, the appellant and the respondent were previously married and lived together between 2014 and 2019, when their relationship broke down. Her averment was that the vehicle was solely purchased by herself by way of a personal loan and only conceded to executing the sale agreement jointly out of love.
5. The respondent filed a Notice of Preliminary Objection dated 12<sup>th</sup> November 2020. The same sought to strike out the suit for the reasons that the trial court lacked the territorial jurisdiction to determine the subject matter; the subject matter and the respondent were both situated in Nairobi and the suit offended the provisions of sections 11, 12, 13, 14 and 15 of the Civil Procedure Rules.
6. The Notice of Preliminary Objection was directed to be canvassed by way of written submissions. Upon considering them, the learned magistrate struck out the suit with costs to the respondent as follows:

“This court has perused the plaint, dated 26<sup>th</sup> October, 2020 and it is clear that the subject matter is motor vehicle registration number KAP 379Y Mitsubishi Canter (sic) which the plaintiff contend (sic) went missing, and is now in possession, of the defendant.

It is not clear from the plaint whether at anytime the said motor vehicle was operating in Kerugoya, or whether it disappeared from here. If that was clear, then the cause of action would have started from here i.e. Kerugoya. It is also not clear, whether the plaintiff and the defendant were at any time residents of Kerugoya and the motor vehicle disappeared at that time.

The relationship between the plaintiff and the defendant is also not clear. The upshot of the above is that where the cause of action is unclear having said as such. The next ground to consider is where subject matter is and the defendant residence, which is clear is Nairobi and not Kerugoya.

This court has considered, also whether it can transfer the suit to Milimani Commercial where the defendant reside (sic) us (sic) where the cause of action arise is not clear.

The provision of section 17 of the Civil Procedure (sic) provides and I quote (sic) where a suit maybe (sic) instituted in one or two or more subordinate courts and is instituted. In (sic) one of those courts and defendant after notice to the other parties or to court of its own motion, may at the earliest possible opportunity apply to the High Court to have the suit transferred to another court and the High Court after considering the objection, if any shall determine in which of the several courts having jurisdiction the suit shall proceed.

My understanding of the above provision is that it is the High Court that has just jurisdiction and not this court which to me as when the cause of action arose isn't clear. In view of the above I have no option than to strike out the suit with costs to the defendant.

7. The appellant is aggrieved by those findings. He filed his memorandum of appeal dated 4<sup>th</sup> March 2021 that raised six grounds disputing those findings. In summary, the learned magistrate erred in striking out the suit contrary to the provision of the Magistrate's Courts Act; that the provisions of the Civil Procedure Rules are administrative in nature and should not be interpreted to oust the jurisdiction conferred by statute; in striking out the suit, the learned magistrate offended Article 159 (2) (d) of the Constitution and sections 1A and 1B of the Civil Procedure Act; and the subject matter



was decided on questions of fact that were contested. For those reasons, the appellate urged this court to allow the appeal by setting aside the impugned ruling and be substituted with an order dismissing the preliminary objection with costs.

8. The appeal was canvassed by way of written submissions. Dated 16<sup>th</sup> July 2024, the appellant submitted that the two parties cohabited as husband and wife and lived within Kerugoya before the respondent moved to Ruaraka. He argued that the trial court failed to consider the pleadings properly and thereof arrived at an erroneous decision. He prayed that the appeal be allowed. The respondent opposed the appeal. She filed written submissions dated 16<sup>th</sup> July 2024. She submitted that the trial court was right in holding that it lacked jurisdiction to entertain the suit. Since jurisdiction was not an issue of fact, it was properly established that the court lacked territorial jurisdiction. She lauded those findings praying that the appeal be dismissed with costs.

9. I have considered the rival written submissions, examined the record of appeal and analyzed the law. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 established that 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 include an objection to the jurisdiction of the court or a plea of limitation. It was further stated that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In *Oraro v Mbaja* [2005] 1KLR, the court held:

“...The principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well defined as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence.”

10. From the pleadings, the trial court discerned that it could not be established whether the vehicle was operating from Kerugoya and then moved to Nairobi or whether it was always operating from Nairobi. Indeed, it could not be determined on face value. The court appreciated that the respondent was residing in Nairobi and was with the suit vehicle; a fact that was not controverted by the appellant. However, since it did not have powers to transfer the suit to Nairobi, its only option was to strike it out.

11. Section 12 (f) of the *Civil Procedure Act* provides that:

“A suit for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.”

12. It is clear from the above provision that the suit ought to have been filed where the suit property is located or where the respondent resided. The trial magistrate was right in striking out the suit as it had no powers to transfer the suit to a court of competent jurisdiction. Since the appellant also failed to apply for a transfer of the suit, the learned magistrate did not make any misdirection. Accordingly, it is my finding that the present appeal lacks merit. It is hereby dismissed with costs to the respondent.

It is so ordered.



**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF JUNE 2025  
IN THE PRESENCE OF;**

No appearance for the Appellants

No appearance for the Respondents

Siele /Mark (Court Assistants)

.....

**J. NG'ARNG'AR**

**JUDGE**

