



**Tudor Healthcare Limited v Libogo (Civil Appeal E374 of 2024)
[2025] KEHC 12084 (KLR) (9 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E374 OF 2024**

F WANGARI, J

JUNE 9, 2025

BETWEEN

TUDOR HEALTHCARE LIMITED APPELLANT

AND

JOHN OLUOCH LIBOGO RESPONDENT

RULING

1. The Appellant herein being dissatisfied with the Judgment of the Senior Resident Magistrate (name not indicated) in Mombasa MCELRC No. E622 of 2023 filed the Memorandum of Appeal dated 25/10/2024. The Appellant subsequently filed a Notice of Motion of application dated 26/11/2024 seeking stay of execution orders against the Judgment of the lower court. The application was withdrawn vide the Notice of Withdrawal dated 13/12/2024.
2. The Respondent herein filed a Notice of Preliminary Objection dated 18/02/2025. The Respondent stated that this court lacked the requisite jurisdiction to hear and determine this appeal as the same emanates from MCELRC Case No. E622 of 2023, *John Oluoch Libigo v Tudor Healthcare Limited*, which is an employment and labour relations which is under the jurisdiction of the Employment and Labour Relations Court. The Respondent stated that these proceedings are meant to disrepute, an embarrassment and being made mockery of. The Respondent prayed to have the appeal dismissed with costs.
3. The Appellant filed a Response to the Preliminary Objection dated 29/04/2025. The Appellant stated that the Preliminary Objection was misplaced as it sought to have the application dated 27/11/2024 dismissed yet it had been withdrawn vide the Notice of Withdrawal dated 13/12/2024.
4. It was directed that the Preliminary Objection be canvassed by way of written submissions. Both parties complied by filing the written submissions together with the supporting authorities. I note that even



though from the e-filing portal shows that the Respondent filed a document on 13/05/2025, the same cannot be downloaded as it is “no longer found”.

5. It is deemed to be the Respondent’s written submissions in compliance with the directions of this court dated 17/03/2025. Submissions cannot take the place of evidence. The Notice of Preliminary Objection having been clear, I find no prejudice shall be occasioned by proceeding to make this ruling without considering the Respondent’s written submissions.

Analysis and Determination

6. I have considered Memorandum of Appeal, the Preliminary Objection, the submissions filed, the authorities cited as well as the law and I discern the following issues for determination: -

- a. Whether the Preliminary Objection has merits.
- b. What is the order as to costs?

7. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“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.”

8. For a Preliminary Objection to succeed the following tests ought to be satisfied;
 - a. it should raise a pure point of law;
 - b. it is argued on the assumption that all the facts pleaded by the other side are correct; and
 - c. it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
9. A valid Preliminary Objection should, if successful, dispose of the suit or application. To begin with, the Appellant totally misconceived the Preliminary Objection which ground was that the appeal before this court is fatally defective due to lack of jurisdiction.
10. The Respondent instead of dealing with the issue of jurisdiction as raised chose to respond to an issue that was never raised, that is the dismissal of the application dated 27/12/2024. The submissions filed by the Respondent dated 29/04/2024 were equally misplaced as the submissions were on the dismissal of the application as stated herein above. It can be deemed that the Preliminary Objection was not opposed.
11. Nevertheless, the P.O shall be determined on its own merits. From the Memorandum of Appeal, it is clear that the appeal was from the Magistrates ELRC.
12. the [Constitution](#) of Kenya under Article 162 (2) (a) establishes the Employment and Labour Relations Court. It provides as follows;

Systems of courts



162 (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- a. employment and labour relations;
13. The jurisdiction of the court is mentioned under section 12 (1) of the *Employment and Labour Relations Court Act* provides as follows;

Jurisdiction of the court

“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the *Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —.....”

14. As stated herein above, section 12 (1) of the *Act* specifically states that the Employment and Labour Relations Court has the exclusive original and appellate jurisdiction to hear and determine employment and labour relations matters.
15. The Appellant must have been very well aware of this provision of the law, but instead of conceding defeat and withdraw the appeal, the Appellant decided to deliberately misconceive the Preliminary Objection with the intention of derailing this court from the main issue of jurisdiction, which attempts fails.
16. The issue of jurisdiction was settled in the case of “*Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR where Justice Nyarangi, JA, as then he was held as follows: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. From the provisions of the law as stated herein above, the court that has jurisdiction over this matter is the Employment and Labour Relations Court. This court has got no jurisdiction even to transfer this matter to the said court of equal status. The court has got no option but to down its tools. I find that the Preliminary Objection is merited.
18. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a party of its costs unless it can be shown that it acted unreasonably. I find no reason to deny the Respondent the costs of this appeal.
19. Having found as above, the following orders flow therefrom: -
- a. The Preliminary Objection dated 08/02/2025 is hereby upheld.
 - b. These proceedings are hereby struck out.
 - c. Costs to the Respondent

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 9TH DAY OF JUNE, 2025.



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F. WANGARI

JUDGE

In the presence of:

Mr. Odhiambo Advocate for the Applicant

Ms. Mulongo Advocate h/b for Mr. Obinju Advocate for the Respondent

Ms. Getrude, Court Assistant

