



Tianjin Hongfengyuan Trading Co Ltd v Hunan Shuangfeng Baoguanjin Mining Co Ltd & 2 others (Commercial Case E007 of 2025) [2025] KEHC 12022 (KLR) (15 July 2025) (Ruling)

Neutral citation: [2025] KEHC 12022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
COMMERCIAL CASE E007 OF 2025
CM KARIUKI, J
JULY 15, 2025**

BETWEEN

TIANJIN HONGFENGYUAN TRADING CO LTD PLAINTIFF

AND

HUNAN SHUANGFENG BAOGUANJIN MINING CO LTD 1ST DEFENDANT

WANG WEIBO 2ND DEFENDANT

BAO GOLD HILL KENYA LIMITED 3RD DEFENDANT

RULING

Introduction

1. This is a derivative action/suit seeking various reliefs against the defendants due to non-compliance with a share transfer agreement entered into on 5 February 2020, whereof Hunan Shuangfeng Baoguanjin Mining Co. Ltd transferred 90% of its shares in Bao Gold Hill Kenya Limited to Tianjin Hongfengyuan Trading Co. Ltd.

2. Background

3. On 5 February 2020, Hunan Shuangfeng Baoguanjin Mining Co. Ltd transferred 90% of its shares in Bao Gold Hill Kenya Limited to Tianjin Hongfengyuan Trading Co. Ltd, the Applicant, through a share transfer agreement. (Equity Transfer Agreement).
4. Under and in full compliance with the terms of the Share Transfer Agreement, Tianjin Hongfengyuan Trading Co. Ltd. made payments and capital contributions totaling over 11,200,000 Yuan, equivalent to approximately Ksh. 201 600, 000/- in the 3rd Respondent, Bao Gold Hill Kenya Limited. Despite the change in beneficial ownership of Bao Gold Hill Kenya Limited, resulting from the Applicant's acquisition of 90% of Hunan Shuangfeng Baoguanjin Mining Co. Ltd's shares, this was not brought



to the registrar's notice. As a result, the entries presently subsisting on the companies register regarding the shareholding and directors of Bao Gold Hill Kenya Limited are inaccurate.

5. Tianjin Hongfengyuan Trading Co., Ltd. does not presently have effective control or stewardship over the operations of Bao Gold Hill Kenya Limited due to several irregularities, including but not limited to inaccurate entries regarding the directors and shareholders of the Company at the Registry, and other undisclosed issues.
6. As a result of the aforesaid, the applicant/plaintiff lodged an instant suit along with an application for leave to continue with the derivative suit and for temporary injunctions.
7. The suit herein attracted a preliminary objection on a point of law filed by the defendants/respondents. The PO raised the following objections.
 - i. This Honourable Court, in its unwavering commitment to fairness, is bound to respect the jurisdictional clause in the Equity Transfer Agreement dated 5th February 2020. The parties expressly agreed that all disputes shall be submitted to and determined by the competent People's Court in the People's Republic of China. ■
 - ii. The Agreement was executed in the People's Republic of China. The Applicant is bound by the said forum selection clause, Article 10 of the Equity Transfer Agreement, and is prevented from instituting proceedings in this Court contrary to the terms of the Agreement.
 - iii. Both companies are incorporated and registered in China under Chinese law.
 - iv. The institution of this suit in the Kenyan courts is in breach of the parties' Agreement and contrary to the principle of party autonomy in contracts.
8. The Court gave directions that the PO be canvassed via submissions.

9. Defendants/respondents Submissions

10. The defendants /respondents submit that the objection satisfies the test established in the 'Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd' case, a precedent that supports the Court's lack of jurisdiction to entertain the present suit by an exclusive forum selection clause.
11. The respondents submitted on the following issues.
 - a. -The Court lacks jurisdiction because of the exclusive choice of forum and seat of dispute resolution set out in the Share Transfer Agreement. -
 - b. -The Share Transfer Agreement (STA) executed on 5 February 2020 between the Applicant (Tianjin Hongfengyuan Trading Co. Ltd) and the 1st Respondent (Hunan Shuangfeng Baoguanjin Mining Co. Ltd) contains a binding and exclusive dispute resolution clause under Article 10, which states inter alia
 - i. Any dispute arising from or in connection with this Agreement shall be submitted to and determined by the Competent People's Court of the People's Republic of China.
 - c. -This clause binds the Applicant and bars it from instituting proceedings in any other forum, including the High Court of Kenya.



- d. -Under Kenyan law, parties are free to choose the law and forum applicable to their contractual disputes, and the courts will uphold such choices.
12. 4. Authorities On Party Autonomy And Exclusive Jurisdiction Clause "The principle of party autonomy dictates that where parties to a contract have expressly agreed to submit their disputes to a particular jurisdiction, that choice must be respected and upheld by the courts unless there is sufficient cause not to do so.
13. In *The Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd (1989) KLR 1*, where the Court emphasized that.
- "Jurisdiction is everything. Without it, a court has no power to make one more step. If a court has no jurisdiction, there would be no basis for a continuation of proceedings."
14. In *Civicon Ltd v. Kivuwatt Ltd 2 Others [2015] eKLR*, the Court of Appeal upheld a Rwandan forum selection clause and struck out a Kenyan suit, holding:
- "A forum selection clause in a commercial contract is prima facie binding and must be given effect unless the party seeking to avoid it discharges the burden of showing strong cause."
15. The Applicant's suit is entirely grounded on rights flowing from the Share Transfer Agreement between it and the 1st Respondent. The allegations raised — including breach of Agreement, exclusion from management, and denial of dividends — are directly connected to the contractual obligations between the parties and fall squarely within the scope of the STA.
16. The Applicant has not pleaded, nor proved, any exceptional circumstances that would justify deviation from the parties' agreed dispute resolution forum.
17. The fact that the 3rd Respondent is incorporated in Kenya does not displace the contractual obligation of the parties to resolve their disputes in China.
18. The mere invocation of the *Companies Act* and a derivative action does not override a jurisdiction clause, particularly where the cause of action is traceable to a commercial agreement that prescribes a foreign seat.
19. The People's Republic of China has a functioning and competent legal system. There is no allegation that the Applicant would suffer prejudice or denial of due process if compelled to litigate in China. Thus defendants conclude that, The Application before the Court offends the express forum selection clause agreed upon by the parties. This Honourable Court is bound to respect the principle of party autonomy and must decline jurisdiction in deference to the agreed foreign forum. Therefore, pray that.
- i. The Respondents respectfully pray that:
 - ii. The Preliminary Objection is upheld.
 - iii. The entire application and suit be struck out with costs for want of jurisdiction.
 - iv. The Court affirms that the parties are bound by their Agreement to resolve disputes before the competent People's Court in the People's Republic of China.

20. Plaintiff /applicants' Submissions.

21. . It is contended that the 1st and 2nd Defendants, in their submissions, have quoted Article 10 of the Equity Transfer Agreement as follows: "Any dispute arising from or in connection with this agreement



- shall be submitted to and determined by the competent People's Court of the People's Republic of China.”
22. Thus, reiterated that there is no clause under Article 10 of the Equity Transfer Agreement that is worded the way the 1st and 2nd Defendants have represented it. The above quote is an invention of the 1st and 2nd Defendants.
 23. The applicants' supporting affidavit annexed thereto is the Equity Transfer Agreement, in which the verbatim content of Article 10 is reproduced in the supporting affidavit of Li Zongfeng in the plaintiff's leave application. “Article 10: The target company is a legally registered enterprise in Kenya. Its business activities shall be subject to the jurisdiction and protection of Kenyan laws and regulations. All activities must comply with Kenyan laws, regulations, and relevant provisions. The investment activities of both Party A and Party B in the target company shall be implemented by relevant Chinese laws and policies. Page 1 of 3 For matters not covered in the Agreement, Party A and Party B may sign a supplementary agreement through mutual consultation. The supplementary Agreement shall have the same legal effect as this Agreement. For any disputes arising from or related to the execution of this Agreement, both parties shall first seek to resolve them amicably through negotiation. If negotiation fails, either party may file a lawsuit with the Court that has jurisdiction at the location of the agreement signing.”
 24. It is submitted that there is a deliberate misrepresentation of provisions of Article 10 of the Equity Share Transfer agreement because the contract is clear that either party may file a lawsuit with the Court that has jurisdiction at the location of the agreement signing. The location of the signing of the Agreement is an issue of fact which has to be ascertained by way of evidence.
 25. A preliminary objection should raise a pure point of law, which is usually based 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.
 26. It is the Applicant's rejoinder that construction of the contract reveals an intention by the parties to lend themselves to the jurisdiction of both Chinese and Kenyan laws. This is evident in the recitals at clause four, where it is stated that, “Based on the above and by the principles of equality, mutual benefit, and win-win co-operation and the company law of the PRC, the Administrative Measures on Overseas Investment and relevant Kenyan laws and regulations regarding equity transfer and operation of mining companies.”
 27. The recitals and Article 10 of the Equity Transfer Agreement which have been reproduced here for full effect certainly do not lend credence the 1st and 2nd Defendants assertions that the contract intended to exclude the jurisdiction of Kenyan courts to adjudicate over a dispute related to the “target company” Bao Gold Hill Kenya Limited which is the Company to which the derivative claim accrues to herein.

28. Substantive Arguments

29. The Applicant submitted on the issues: Whether the preliminary objection is based purely on a point of law? ii. Whether the equity transfer agreement has a clause excluding the jurisdiction of this Court to determine the dispute herein.

30. Whether the preliminary objection is based purely on a point of law.

31. It is contended that the preliminary objection raised herein is not based purely on a point of law. Article 10 of the contract does not reserve the jurisdiction to determine disputes regarding the contract specifically to Chinese courts. The contract only states that, “either party may file a lawsuit with the court that has jurisdiction at the location of the agreement signing.”



32. The location of the signing of the Agreement is an issue of fact which can only be proved by way of evidence.
33. In the locus classicus of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd* [1969] EA 696, the Court stated that “...A preliminary objection raises a pure point of law, which is usually based on the assumption that all the facts pleaded by the other side are true. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
34. It is submitted that the location of the signing of the contract can only be proved by way of evidence and, as such, cannot be disposed of at this preliminary stage. ii) Whether the equity transfer agreement has a clause excluding the jurisdiction of this Court to determine the dispute herein.
35. It is submitted that no clause in the contract is intended to exclude the jurisdiction of Kenyan courts to adjudicate over a dispute related to the contract or to the “target company” Bao Gold Hill Kenya Limited, which is the Company to which the derivative claim herein accrues.
36. In several instances, which have been reproduced herein, the contract shows an intention by the parties to submit to Kenyan laws. Article 10 of the Equity Transfer Agreement must be interpreted holistically within the broader context of the target company being a Kenya-based entity. The reliance is made on the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [2021] KEHC 93 (KLR) where the Court quoted Professor A Burrows QC in the 2019 case of *Federal Republic of Nigeria v JP Morgan Chase Bank NA27* which summarized the modern approach to contract interpretation in the following terms: “The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. However, the words used by the parties are of primary importance, so one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used. One must be astute not to rewrite the contract to protect one of the parties from having entered into a bad bargain.”
37. It is submitted that a holistic interpretation of the contract reveals an intention by the parties to be bound by both Kenyan and Chinese laws.

38. Analysis And The Determination

39. In Kenya, a preliminary objection on a point of law is a legal argument raised at the start of a case, arguing that a specific point of law, if upheld, would resolve the case without needing to delve into the substantive facts. It is a way to dismiss a case early on based on a legal issue.
40. It is characterised by.
 - a. Characteristics:
 - I. Must be a point of law: The objection must be based on legal principles, not on factual disputes.
 - II. Must be capable of resolving the case: The point of law raised must be able to dispose of the entire case or a significant part of it, making further proceedings unnecessary.
 - III. Should not require evidence: Generally, a preliminary objection should not require the Court to consider evidence; it should be apparent from the pleadings.



41. A typical example is arguing that a court lacks jurisdiction over a case because the subject matter falls outside its legal authority. Another example could be raising an objection based on *res judicata* (the matter has already been decided).
42. Why it is used: To save time and resources by resolving a case quickly on a legal point. To prevent unnecessary litigation, a fundamental legal issue should be addressed up front. To challenge the Court's jurisdiction or the validity of a case from the outset.

43. Important Considerations:

44. If the objection requires the Court to investigate facts or delve into the merits of the case, it is not a proper preliminary objection. Courts are cautious about allowing preliminary objections that could prevent a full hearing of the case on the merits. Parties should ensure that the objection is truly a point of law and not a disguised factual dispute. See the case of *DJC v BKL (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR)* (27 June 2022).
45. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696*, where the Court held as follows:

“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 objections to the Court's jurisdiction, pleas of limitation, or submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. A preliminary objection is akin to what used to be a demurrer. It raises a pure point of law, which is argued 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”.

46. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR* made the following observation as relates to Preliminary Objections:“...

The proper preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. Moreover, it serves the public cause by sparing scarce judicial time, allowing it to be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

47. Given the foregoing, this Court shall seek to establish whether the grounds outlined in the Preliminary Objection herein have met the threshold set out in the cases. The first ground contends that the Court lacks jurisdiction to hear and determine this matter by a binding contractual clause in the Equity Transfer Agreement dated 5 February 2020, in which the parties expressly agreed that all disputes shall be submitted to and determined by the competent People's Court in the People's Republic of China. Article 10 sub-article 4(F) of the STA provides that “any disputes arising from or related to the execution of this Agreement, both parties shall first seek to resolve them amicably through negotiation. If negotiation fails, either party may file a lawsuit with the Court that has jurisdiction at the location of the agreement signing.”



48. The respondents submit that this clause binds the Applicant and bars it from instituting proceedings in any other forum, including the High Court of Kenya. Under Kenyan law, parties are free to choose the law and forum applicable to their contractual disputes, and the courts will uphold such choices.
49. The Applicants submit that the preliminary objection is not based purely on a point of law. Article 10 of the contract does not reserve the jurisdiction to determine disputes regarding the contract specifically to Chinese courts. The contract only states that, "either party may file a lawsuit with the court that has jurisdiction at the location of the agreement signing." The location of the signing of the Agreement is an issue of fact which can only be proved by way of evidence.
50. A casual perusal of the first page of the STA from the copy in Court indicates that the Share Transfer Agreement executed between the Applicant and the 1st Respondent was effected on 5 February 2020 in Xiangtan City, Hunan Province, China. Thus, the location of the agreement signing is in Xiangtan City, Hunan province, China. Without contesting the content aforesaid in the STA, the clause, either party may file a lawsuit with the Court that has jurisdiction at the location of the agreement signing, "is valid and unequivocally discloses the place of suing.
51. Thus, the Pos' first ground of objection satisfies the test in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696.
52. 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, 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. See *Hassan Ali Joho & Another supra*.
53. In *Civicon Ltd v. Kivuwatt Ltd 2 Others* [2015] eKLR, the Court of Appeal upheld a Rwandan forum selection clause and struck out a Kenyan suit, holding:

"A forum selection clause in a commercial contract is prima facie binding and must be given effect unless the party seeking to avoid it discharges the burden of showing strong cause."

If a court determines it lacks jurisdiction in a case, it must stop proceedings and cannot continue to deal with the matter. Jurisdiction is fundamental to a court's power to hear a case, and without it, any action taken is considered a nullity. A court cannot confer jurisdiction upon itself, even through the consent of the parties.

54. Jurisdiction is Paramount: A court's jurisdiction, or its legal authority to hear a case, is a foundational requirement that must exist at the beginning of a suit, throughout its consideration, and when a ruling is made.

Consequences of Lack of Jurisdiction:

55. If a court finds it lacks jurisdiction, it must cease further action on the case. A suit filed without jurisdiction is considered a nullity, meaning it is legally void and cannot be remedied.

Parties Cannot Confer Jurisdiction:

56. Parties to a case cannot, even by Agreement, give a court jurisdiction where it does not inherently exist.

Transferring a Nullity:

57. A court cannot transfer a case to another court if the initial case was a nullity due to lack of jurisdiction.



Preliminary Objection:

58. When a preliminary objection is raised regarding jurisdiction, the Court must address it before proceeding with the merits of the case. In the celebrated case of Owners of Motor vessel Lillian ‘S’ vs Caltex Kenya Limited (1989) KLR, Nyarangi J.A held that: -

“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 lays down its tools in respect of the matter before it, the moment

it holds the opinion that it is without jurisdiction ... Where a court takes it upon itself to exercise jurisdiction that it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

59. Conclusion

60. The Application before the Court offends the express forum selection clause agreed upon by the parties. This Court is bound to respect the principle of party autonomy and must decline jurisdiction in deference to the agreed foreign forum.

61. Thus, the Court makes the orders.

- i. The Preliminary Objection is hereby upheld.
- ii. The entire application and suit are hereby struck out and orders issued herein discharged with costs for want of jurisdiction.
- iii. The Court affirms that the parties are bound by their Agreement to resolve disputes before the competent People’s Court in the People’s Republic of China.

DATED AND DELIVERED AT NAROK THIS 15TH JULY 2025

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CHARLES KARIUKI
JUDGE

