



**Chege v Njoroge (Civil Appeal E003 of 2025)
[2025] KEHC 13003 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13003 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E003 OF 2025
DKN MAGARE, J
SEPTEMBER 18, 2025**

BETWEEN

FREDRICK MWANGI CHEGE APPELLANT

AND

SUSAN WANJIRU NJOROGE RESPONDENT

JUDGMENT

1. This is an appeal from the decision of Ismael S I given on 15.1.2025. The ruling dismissed a preliminary objection and entered judgment for the 1st Respondent. Parties informed the court that by a ruling dated 22.02.2024, the court on Ismael S I struck out Nyeri SCCCOMM E448 OF 2023 as it was governed by the *Sacco Societies Act*. The claim was between Fredrick Mwangi Chege, Susan Wanjiru Njoroge and Fortis Sacco over a sum of Ksh. 21,379. The current claim was between two parties. For some reasons Fortis Sacco has been introduced to the pleadings and but it is not a party in the statement of claim. Therefore, fortis Sacco Limited is struck out from the Appeal.
2. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under 38 of the *Small Claims Court Act* which provides as doth:
 - (1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.
 - (2) An appeal from any decision or order referred to in subsection (1) shall be final.
3. However, an Appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matters of law it is. An appeal on matters of law is akin to a second appeal to the Court of



Appeal. The duty of a second Appellate Court was set out in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR:

“ This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).”

4. Then what constitutes a point of law? In *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR, the court stated as doth:

“ 4. Although the phrase ‘a matter of law’ has not been defined by the *Elections Act*, it has been held in *Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 others*, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle vs Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 others*, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M’inoti & Sichale, JJA) of 23.01.2014 following *AG vs David Marakaru* (1960) EA 484.”

5. The question of entry of judgment is not subject of the memorandum of appeal. this complicates the Appeal since the process of challenging the ex parte judgment is independent of the questions in the preliminary objection. can a party, against whom judgment has been entered be entertained on a preliminary objection? the process of challenging ex parte judgment is cast in stone. without it being challenged, the court’s hands are tied in respect of preliminary issues. the court has to deal with a question of whether an ex parte judgment is or a regularly entered. this cannot thus be dealt with obliquely but as a main question. by concentrating on the preliminary objection and leaving out the default judgment and a regular one at that, the Appellant became non-suited. the difference a regular and irregular judgment came out in the Court of Appeal decision in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) stated as hereunder:

In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer, whether in the whole it is in the interest of justice to set aside the default judgement, among others.

6. Without the question of default judgment being placed on the table, the entire appeal is an academic exercise. the Appeal raises the question whether the court was right in dismissing the preliminary objection. The Appellant raised two grounds as follows:



1. That the learned trial magistrate/adjudicator erred in law and in fact, by failing to uphold the Appellant's preliminary objection, that the Honourable Court lacked jurisdiction to hear, try and determine and/or entertain the matter because, it was apparent from the pleadings, that the parties thereto, were members of Newfortis Saving and Credit Cooperative Society (SACCO) herein as the 2nd Respondent in the matter. The disputed debt claim is governed under Cooperative Tribunal under Section 76 of the Cooperative Society Act Cap 490 of Laws of Kenya.
2. That the learned trial Magistrate/Adjudicator erred in law and in fact for not noting that the Respondent was forum shopping, after the 1st claim by the same respondent that was filed on 18th December, 2023 under case No E488 of 2023 was struck-out for lack of jurisdiction.
7. Though the question of E448 of 2023 was raised, the same was not introduced into this file by way of any pleading or affidavit. The court cannot rely on a file in the registry. The appellant committed an error of cataclysmic proportions, they did not seek to strike out the pleadings. They raised a preliminary point of law, based on facts. They introduced into the pleadings the questions of being members of fortis Sacco. However, the claim as worded was for money had and received. There was no defence given to the claim. Having said so, it is not possible for the court to deal with factual matters related to membership of the Sacco as that was not in pleadings.
8. It is true that disputes between members of the society must be dealt with under the cooperative's tribunal. However, membership is a question of fact. A preliminary objection cannot be based on disputed facts. There is no pleading in the statement of claim to that effect. the claim is pleaded as money had and received. Section 76 of the *Co-Operative Societies Act* states as follows:
 - (1) If any dispute concerning the business of a co-operative society arises:
 - (a) among members, past members and persons claiming through members, past members and deceased members; or
 - (b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or
 - (c) between the society and any other co-operative Society; it shall be referred to the Tribunal.
 - (2) A dispute for the purpose of this section shall include-
 - (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
 - (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not.
 - (c) a claim by a Sacco society against a refusal to grant or a revocation of license or any other due, from the Authority.
9. It was not pleaded that the dispute relates to a dispute concerning the business of a co-operative society. Therefore, the debt, as pleaded does not fall among any of the foregoing classes from the pleadings. This was a claim for money had and received. The court cannot go beyond the pleadings to read other



files or arguments not in pleadings. The sad bit is that the appellant interdicted Fortis Sacco Limited from the blues to be able to justify its preliminary objection.

10. Consequently, none of the grounds raise matters of law. Whether, here was another matter, it ought to have been formally introduced into the suit by way of affidavits or responses and an application to strike out filed. Pendency of a matter cannot be imagined as it ought to be formally brought into a suit. A court cannot hear a matter that has been heard by another court of competent jurisdiction and a decision made. However, this must be apparent in the suit itself. The court cannot rely on conjecture, hyperbole or surmises. In the case of Attorney General & another ET vs (2012) eKLR where it was held that;

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”.

In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”.

11. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All E.R 378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

12. How then can a court find a court had previous ruled on matter on basis only of the postulations in a preliminary objection. The other matter is not pleaded in the statement of claim.
13. All the questions that were raised in this appeal are matters of fact. There are no disputes on matters of law. Unfortunately, the Appellant wants the court to be a fact finder and based their objection on facts not in any pleading. By failing to file pleadings, the Appellant took away the court’s jurisdiction regarding undefended matters. Section 27 of the [small claims court act](#) provides as follows:



- (1) If the respondent fails to respond to the claim within the prescribed period, the Court may, either on its own motion or on the claimants application enter judgment for the claimant and order the relief sought in the statement of claim.
 - (2) If a respondent fails to appear at the hearing in person or by a representative, the claimant may apply to the Court for an order to be made against the respondent.
 - (3) Upon application made by the claimant under subsection (2), the Court shall grant the claimant the order if it is satisfied that the claimant is entitled thereto.
 - (4) An order shall not be made against a respondent under this section unless the Court is satisfied that a copy of the written claim and the notice of hearing have been served on the respondent under section 25 of this Act.
14. In this case, default judgment is already entered. Up to and until it is set aside, the court is foreclosed from hearing anything else. Trying to impeach default judgment in the absence of the effort to file a defence, and the fact that Appellant made no effort to file a defence or apply to set aside. It will be an academic exercise to deal with the question of preliminary objection. Indeed, there is no appeal from the decision to enter judgment.
15. In the present case, a default judgment has already been entered. Unless and until that judgment is set aside, the court is precluded from entertaining any other proceedings on the matter. Any attempt to impeach the default judgment, in the absence of an application to set it aside or any effort by the Appellant to file a defence, amounts to a purely academic exercise. Consequently, it would serve no practical purpose to address the issue of the preliminary objection. Notably, there is no appeal against the decision to enter the default judgment. In the circumstances, given that these are questions of fact, the court has no jurisdiction. The Court of Appeal in *Mwangi v Wambugu* (1984) KLR 453, in which that court pronounced itself as follows:
- A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence.
16. In hearing a preliminary objection, this court and the court below have the same jurisdiction. They proceed on an understanding that what is pleaded in the statement of claim 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 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 page 701 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....”

18. A preliminary objection is identified as, and declared to be, a pure point of law — one that must not be conflated with factual matters which are subject to contestation and must, in any event, be established through evidentiary processes. This principle was succinctly articulated by Justice (Prof.) J.B. Ojwang, J. (as he then was), in the case of *Oraro v Mbaja*, where the Court emphasized that a preliminary objection should be based on a clear point of law which, if successfully argued, would dispose of the entire suit without the need for further proceedings. The court stated as doth:

“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.

19. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry.
20. Courts do not act in vain. A court will not disturb a finding of fact unless the finding is so outrageous that no reasonable tribunal will have reached the same. In the case of *Associated Provincial Picture Houses V Limited V. Wednesbury Corporation* [1948] 1 KB, Lord Greene M.R., stated as follows:

It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind.

21. In this appeal, the ruling cannot be stated to be such that no reasonable tribunal will have arrived at the same. The net effect of the foregoing is that the preliminary objection was raised on matters of fact that were not pleaded in the statement of claim. Further default judgment was entered pursuant to Section 27 of the *Small Claims Court Act*. The court cannot re-open that judgment without an application to do so. The net effect is that the appeal has no merit and is accordingly dismissed.

22. 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.
23. 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.

24. 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.

25. The respondent was a successful party. The Appeal is dismissed with costs of Ksh 45,000/=.

Determination

26. In the upshot, I make the following Orders:
- a. The Appeal is dismissed with costs of Ksh. 45,000/= to the first respondent.
 - b. 30 days stay of execution.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE



Represented by:

Pro se Appellant present

Nganga Munene Advocates for the Respondent

Court Assistant – Michael

