Jurist Enterprises Limited v Tabete Company Limited & another (Civil Appeal E070 of 2025) [2025] KEHC 12682 (KLR) (16 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E070 OF 2025

RN NYAKUNDI, J

SEPTEMBER 16, 2025

BETWEEN

JURIST ENTERPRISES LIMITED ..... APPELLANT

AND

TABETE COMPANY LIMITED ..... 1ST RESPONDENT

BENARD HINGA KIIRU ..... 2ND RESPONDENT

(Being an Appeal from the Judgement of Hon. R. Otieno Adjudicator/Resident Magistrate delivered on the 26th March 2025 arising from Eldoret SCCCC No. E357 of 2024)

JUDGMENT

1. The brief background of this appeal is that the Appellant/Claimant approached the trial court vide an Amended Statement of Claim dated 15th August 2024 seeking damages as a result of an accident that occurred on the 9th day of June 2024 involving the Appellant's motor vehicle KDD 449Z and the Respondents motor vehicle KDK O28J along Eldoret-Nakuru road.
2. Judgement was entered as against the Appellant/Claimant on 25th March 2025 wherein the trial magistrate struck out the suit for want of compliance with the law, since the Appellant/Claimant had not produced a resolution allowing the suit to be filed by the Appellant/Claimant.
3. That the Appellant being dissatisfied with the whole judgement preferred this appeal vide a Memorandum of Appeal dated 3rd April 2025 based on the following 7 grounds;
    a. That the Learned Trial Magistrate/Adjudicator erred in law in striking out the Claimant's suit on the basis that the claimant had not produced a resolution authorizing the filing of the claim.

b. That the Learned Trial Magistrate erred in law in delving on an issue that had neither been raised in the respondent's pleadings/defence nor by way of preliminary objection which would have enabled the Claimant address the issue.

c. That the Learned Trial Magistrate/Adjudicator erred in law and misdirected himself in striking out the Claimant's claim on a technicality.

d. That the Learned Trial Magistrate erred in law in making a finding on issues that was not pleaded nor canvassed before making a finding on the same.

e. That Learned Trial Magistrate erred in law in failing to take into consideration matters that he ought to have taken into consideration and taking into consideration which he ought not to have taken into consideration and thus arrived at a wrong finding.

f. That the Learned Trial Magistrate erred in law in exercising his discretion judiciously.

g. That the Learned Magistrate erred in law in failing to assess damages that he would have awarded had the claim not have been struck out.

4. The Appellant sought the following prayers from the Memorandum of Appeal;

a. That the appeal be allowed and the decision to strike out the suit be set aside.

b. That the court do find that the claimant had on a balance of probability proved the respondents 100% liable for the accident.

c. That the court finds that the claimant had on a balance of probability proved damages pleaded in the claim on account of repairs, loss of user, Assessor's fees and NTSA search.

d. That the Court awards the damages and interest from the date of filing the claim.

e. That the claimant be awarded damages of the appeal and costs before the Small Claims Court.

5. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

6. The Appellant filed its submissions dated 24th June 2025 where the Counsel on record Mr. Korir submitted on 3 issues of determination as follows: -

a. Whether the Learned Magistrate erred in failing that failure to file a resolution was fatal to the claim.

b. Whether the learned magistrate erred in law in basing his decision on an issue that had not been raised in the pleadings.

c. Whether the court should determine the claim and award the Claimant reliefs sought in the claim.

7. On the first issue, the learned Counsel for the Appellant, Mr. Korir, submitted that the learned trial magistrate erred in law by striking out the Appellant's suit for want of a company resolution authorizing the institution of the claim. Counsel argued that failure to file a resolution was not fatal, citing authorities including Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd, Spire Bank Ltd v Land Registrar & 2 Others [2019] eKLR, and Faith & Hope Properties Kenya Ltd v James Muchiri Waweru & Another [2021] eKLR, where courts held that such omission did not invalidate suits. He

contended that the Director General or authorized officer's sworn affidavit was sufficient authority and the trial court misdirected itself in dismissing the suit on a technicality.

8. On the second issue, counsel submitted that the learned magistrate erred in basing his decision on an issue not raised in the pleadings, since the Respondents had not pleaded or raised the issue of authority through their defence or by preliminary objection. In relying on a matter not pleaded, the court misdirected itself. Reliance was placed on Eye Company (K) Ltd v Erastus Rotich t/a Vision Express (Nakuru HCCA No. 25 of 2019), where the High Court emphasized that parties are bound by their pleadings. Counsel further argued that under Section 32 of the *Small Claims Court Act*, the trial court was not bound by strict rules of evidence, and its decision was contrary to the statutory purpose of expeditious and cost-effective resolution of small claims. He also cited Fidelity Insurance Co. Ltd v Korir (Civil Appeal 13 of 2023) to reinforce that the Small Claims Court must emphasize substantive justice over technicalities.

9. On the third issue, counsel submitted that this appellate court has jurisdiction under Section 78 of the *Civil Procedure Act* and Order 42 Rule 32 of the Civil Procedure Rules to re-evaluate the evidence and render the judgment that ought to have been made by the trial court. He urged the court to consider the evidence on liability and quantum. On liability, he submitted that the Respondents were 100% liable for the accident involving motor vehicle KDK 028J, as the driver admitted hitting the Appellant's vehicle from behind, corroborated by the police abstract. On quantum, the Appellant relied on an assessor's report valuing repairs at Kshs. 173,200, receipts for repair works, assessor's fees of Kshs. 5,000, NTSA search fees of Kshs. 700, and loss of user valued at Kshs. 30,000, supported by a lease agreement.

10. In conclusion, Counsel urged the court to set aside the trial court's finding, allow the appeal, and enter judgment in favour of the Appellant for Kshs. 208,000 together with interest from the date of filing suit, and costs of the suit both in the lower court and on appeal.

1st Respondent's Written Submissions

11. The 1st Respondent filed its written submissions dated 4th July 2025 where the Counsel on record Mr. Oduor 6 issues for determination as follows;

    a. Whether or not the trial magistrate erred in law in dismissing the Appellant's claim on failure to produce company's resolution.

    b. Whether or not the learned trial magistrate erred in law in delving into the issues that were not raised.

    c. Whether or not the trial magistrate erred in striking out the Appellant's claim on a technicality basis.

    d. Whether or not the trial magistrate exercised his discretion injudiciously.

    e. Whether or not the trial magistrate erred in law in failing to assess damages.

    f. Whether or not the Appellant is entitled to prayers sought.

12. The learned Counsel for the 1st Respondent, Mr. Oduor, submitted as follows: On the first issue, counsel argued that the trial magistrate did not err in dismissing the Appellant's claim for want of a company resolution. He contended that locus standi is a question of law that a court may raise suo moto, as provided under Section 36(4) of the *Small Claims Court Act*. He relied on Christopher Mutiembu Machimbo & 3 others v County Surveyor, Trans Nzoia & 4 others [2022] eKLR and the Supreme Court decision in Mwilu v Judicial Service Commission & another; Dari Ltd & another (Interested Parties) [2025], which affirmed that jurisdictional issues are fundamental and not "new

matters." Counsel emphasized the principle in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, that jurisdiction is everything, and without it a court must down its tools.

13. On whether the magistrate erred in delving into issues not pleaded, counsel maintained that jurisdictional matters, such as standing, can be considered by the court even if not raised in the pleadings. He therefore urged that the appeal was frivolous and without merit.

14. On the claim that the case was dismissed on a technicality, counsel submitted that Article 159(2)(d) of *the Constitution* was not intended to excuse non-compliance with mandatory procedural rules. He cited Raila Odinga v IEBC & 3 others [2013] eKLR and Malika v Registrar of Lands [2024] KEHC 374, where the courts held that procedural rules are essential and cannot be disregarded under the guise of substantive justice.

15. On discretion, counsel submitted that the Small Claims Court had wide discretion to determine matters suo moto where jurisdiction and locus standi were in question. He cited Sadera & 2 others v Kerema & 7 others [2025] KECA 458, where the Court of Appeal held that appellate courts should not interfere with a trial court's discretion unless exercised perversely or arbitrarily. He argued that the Appellant had not demonstrated that the magistrate exercised his discretion injudiciously.

16. On assessment of damages, Counsel argued that the Appellant's claim was one for breach of contract relating to money had and received, not negligence, and therefore the magistrate was not required to assess damages. He relied on IEBC v Stephen Mutinda Mule & 3 others [2014] eKLR and Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, which emphasized that parties are bound by their pleadings and damages can only be assessed where negligence has been properly pleaded.

17. Finally, on entitlement to reliefs, Counsel submitted that the Appellant's claim was untenable in law for failure to particularize acts of negligence. He cited Ogwari v Hersi [2023] KEHC 20111 and Kimbio & another v Nyaribo t/a Nyaribo & Co. Advocates [2024] KEHC 6120, where suits were dismissed for want of particularized negligence. Without prejudice, Counsel argued that even if liability were to be considered, contributory negligence should be apportioned equally since the Appellant's driver carelessly joined a busy road, making the accident unavoidable for the Respondent's driver. In conclusion, Counsel urged this Honourable Court to dismiss the appeal with costs to the Respondents.

2nd Respondent's Written Submissions

18. The 2nd Respondent filed his written submissions dated 28th June 2025 vide the firm of Nyairo & Co. Advocates in which he listed 4 issues for determination as follows;

    a. Whether the learned trial magistrate correctly interpreted the law and its application leading to the striking out of the Appellant's suit for want of a company resolution authorizing the institution of the claim.

    b. Whether the learned trial magistrate erred in law by striking out the suit.

    c. Whether the trial court erred in failing to assess damages that would have been awarded had the claim not been struck out

    d. Whether the appeal as presented is competent for want of compliance with Order 42 Rule 2 and Rule 13(4) that requires all documents filed before trial court be filed with the High Court.

19. Counsel submitted that as this is a first appeal, the High Court has the duty to re-evaluate the evidence and law as set out in Selle & another v Associated Motor Boat Co. Ltd [1968] EA 123. However, the appeal is fatally defective since the Appellant, a limited liability company, filed the suit and this

appeal without a company resolution authorizing the institution of proceedings or the appointment of counsel.

20. Counsel argued that compliance with Order 4 Rule 1(4) of the Civil Procedure Rules and Section 35 of the *Companies Act*, 2015 is mandatory, and not a procedural technicality under Article 159(2)(d) of *the Constitution*. He relied on O. Bayusuf & Sons Ltd v Aunashamsi Hauliers Ltd [2016] and Royal Tulia Estate Ltd v Davidson Matano [2012], which affirmed that absence of a company resolution renders proceedings void ab initio. The Appellant's own witness (CW1), an Advocate, admitted under oath that no such resolution had been filed, and the trial court correctly struck out the suit.

21. Counsel further submitted that under Order 4 Rule 1(6), the trial court was empowered to strike out the suit suo moto, since locus standi and corporate authority are matters of law that go to jurisdiction. The Appellant was alerted to this defect before trial but took no steps to rectify it, demonstrating indolence. Litigation, being party-driven, could not be rescued by the court where the claimant ignored clear statutory requirements.

22. On the issue of damages, Counsel argued that once the suit was struck out for want of capacity, there was no competent claim on which damages could be assessed. To do so would have been issuing an advisory opinion in a vacuum.

23. Counsel also raised a procedural defect in the Record of Appeal, which omitted the 2nd Respondent's submissions and the decree appealed from, contrary to Order 42 Rules 1 and 13 of the Civil Procedure Rules. He relied on Nyakonyu v Tabaa [2024] KEHC 15928, where the court stressed that a complete record is mandatory. In conclusion, Counsel submitted that both the suit and the appeal were incompetent, defective ab initio, and devoid of merit. He prayed that the appeal be dismissed with costs and the decision of the Small Claims Court be upheld in full.

Analysis and Determination

24. The primary duty of an appellate court particularly in a first appeal is to conduct a fresh and exhaustive re-evaluation of the evidence presented at the trial court and to make its own independent judgment on the case. The appellate court is not strictly bound by the trial magistrate's findings of fact and can substitute its own conclusions if it finds the trial judge erred in weighing the evidence or considering circumstances and probabilities. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another v Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial 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 is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

25. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows: -

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

26. The said duty was explained in the case of Selle & Another v. Associated Motor Board Company Ltd. [1968] EA 123, where the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

27. I have read and considered the appeal, the submissions in support and rival submissions. There are 3 issues for determination as follows;

a. Whether failure to file a company resolution authorizing the institution of a suit was fatal to the competence of the Appellant's claim.

b. Whether the trial magistrate erred in considering a matter not raised in the pleadings or by way of preliminary objection.

c. Whether notwithstanding any procedural defect this court should re-evaluate the evidence and determine the merits of the case and, if so, assess damages.

Whether failure to file a company resolution authorizing the institution of a suit was fatal to the competence of the Appellant's claim.

28. The starting point is that a company being an artificial person may ordinarily sue in its corporate name only through persons authorised to act on its behalf. The procedural rules and company law prescribe formalities intended to establish authority to institute litigation on behalf of a company. The parties have placed before court competing authorities and positions as to whether omission to file a company resolution is a fatal defect.

29. It is common ground in the submissions that the relevant provisions of the *Companies Act* and the Civil Procedure Rules require demonstration of authority where a company sues. The Respondents contend that those provisions are mandatory and that the absence of a resolution renders proceedings incompetent and liable to be struck out. The Appellant argues that the omission is not inevitably fatal, that the Director-General's or an authorised officer's affidavit can constitute sufficient proof of authority, and that the Small Claims Court, being a forum for expeditious disposal of minor claims, should not be hyper-technical.

30. From the above facts, I would like to make reference to the specific provisions of the Civil Procedure Rules. Specifically, Order 4, Rule 1(4) of the Civil Procedure Rules 2010 provides as follows; 4. Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. In the case of Mavuno Industries Limited & 2 Others Vs Keroche Industries Limited [2012] eKLR, it was held: -

> " As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated

that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents, which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences.

31. I take cognizant note that there was no evidence of any resolution to demonstrate the fact that the officer who swore the affidavit had any authority and/or had been authorized by the company under its seal to do so. This thus implies that Order 4 Rule 1(4) of the Civil Procedure Rules 2010 has succinct provisions which ought to be complied with by a corporate litigant representing a corporate entity as is the case with the Appellant herein. Bearing this in mind, I make reference to Order 4 Rule 1(5 & 6) of the Civil Procedure Rules which provides as follows;

(5) The provisions of sub-rule (3) and (4) shall apply mutatis mutandis to counterclaims.

(6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule. The implication of this provision is that it gives the court inherent and express legal authority to strike out a plaint where there is non- compliance with the rules regarding the proper institution of the suits.

32. Similarly, section 35 of the *Companies Act* 2015 provides as follows;

35. Company contracts

(1) A contract may be made –

(a) by a company, in writing; or

(b) on behalf of a company, by a person acting under its authority, express or implied.

(2) Any formalities required by law for a contract made by a natural person also apply, unless a contrary intention appears, to a contract made by or on behalf of a company.

33. This provision underscores the principle that a company, being a distinct legal entity from its directors and shareholders, can only operate through duly authorized representatives. Any person who purports to act on behalf of a company without demonstrating authority conferred under seal through a board resolution acts ultra vires, rendering such actions null and void. In the case of Royal Tulia Estate Ltd Vs Davidson Matano & 3 Others [2012] KEHC 4360 (KLR) also cited by the 2nd Respondent, it was held as follows;

> " 4. In my considered view, the objections raised are not mere technicalities but matters of substance that go to the root of the case as they challenge the authority to bring the suit and hence its validity. It was held in the Bugerere case that "when companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors` meeting and recorded in the minutes".

34. A court must balance two competing public interests: (a) ensuring that a party before the court has legal capacity and authority to bring the proceedings; and (b) securing substantive justice by resolving disputes on their merits without undue formality. The balance is struck by asking whether the defect goes to the court's jurisdiction or is merely curable by amendment or additional evidence.

35. A company resolution's primary function in litigation is to establish a clear, documented corporate decision to engage in legal proceedings, including the authority to sue or be sued and to appoint representatives like lawyers or company officers to act on the company's behalf. These resolutions serve as formal evidence of the company's position, demonstrate internal approval for litigation, define the scope of the legal action, and ensure compliance with corporate governance, making them crucial for both the company and the court.

36. The Court of Appeal in the case Arthi Highway Developers Limited v West End Butchery Limited & 6 others (2015) eKLR as held follows:

> 44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147.The court in that case held:
>
> > - "When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

37. In the instant case, the trial magistrate found that no company resolution authorizing the institution of suit had been filed and that the Appellant had not demonstrated authority to sue. The Appellant's own witness (CW1) conceded that no such resolution had been produced at the trial. That factual finding is on the record and was not challenged by any cross-examination marker in the submissions that would vitiate the trial court's conclusion. Moreover, I also take note that the Appellant failed to file or present any resolution under the seal authorizing the institution of the claim and the appointment of M/s Bundotich Korir & Company Advocates rendering the suit fatally defective.

38. Where the defect goes to the court's jurisdiction i.e., where the party before the court lacks capacity to sue the court has no power to adjudicate the merits of the dispute until the jurisdictional defect is cured. Questions of capacity and locus standi often go to jurisdiction. If jurisdiction is lacking, any decision on the merits would be a nullity or advisory. The law commonly affords courts a discretion to permit amendment or to allow the defect to be cured where justice so requires. However, where the question is whether the claimant has capacity to sue, the court must be satisfied that authority exists before proceeding. The *Small Claims Court Act* and the Rules governing small claims emphasize expedition and informality but do not relieve parties from the need to comply with mandatory provisions which underpin the court's jurisdiction to entertain a matter. Specifically, section 36(4) of the Small Claims Courts Act provides as follows: (4) Nothing in this section precludes the Court from making any order or giving any direction it thinks necessary for the achievement of the purposes of this Act.

39. I take note that the Appellant made reference to Article 159 (2) of *the Constitution* of Kenya 2010 which provides as follows:

> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

40. The requirement for a company resolution to institute a suit and engage legal counsel is deliberately anchored in statute, namely the Civil Procedure Rules 2010 and the *Companies Act*, 2015. When the law sets out such a mandatory obligation, non-compliance affects the very foundation and validity of the proceedings, rather than being a matter of mere form. Such defects go to the root of the case and cannot be remedied by reliance on Article 159(2)(d) of *the Constitution*. Statutory requirements are substantive and cannot be dismissed as mere procedural technicalities. With this, I would like to make reference to the case of O. Bayusuf & Sons Limited v Aunashamsi Hauliers Limited [2016] KEELC 392 (KLR) where the court held as follows;

> "...The Applicant also relied on the provisions of article 159 (2) (d) of *the Constitution* that states that justice shall be administered without undue regard to procedural technicalities. Would this omission be treated as a procedural technicality? I do not agree as requiring company resolution to be filed together with the plaint or counter-claim is a statutory requirement under section ..... of the *Companies Act*. There is a reason the legislators included it in statute. It is therefore improper to pass it of as a procedural technicality.
>
> 16. Secondly the rules are meant to serve a purpose. Non-compliance with certain provisions particularly those worded those in mandatory terms cannot be assumed to be a procedural technicality. The consequence of non-compliance of this specific rule is given under Order 4 rule 1 (6) i.e the Court may order to be stuck out. The Court is given a discretion in meting out the penalty. In the circumstance should the suit be struck out? The plaintiff has submitted that the error can be rectified. In the case of D. T. Dobie Kenya Ltd vs Muchina (1982) KLR 1, the Court of Appeal held that striking out should only be allowed where the error or omission cannot be cured even by amendment.

41. Accordingly, I find that the absence of any demonstrable company resolution in the record, particularly where the Appellant's witness admitted non-production, was a material defect that properly engaged the jurisdiction of the trial court. The trial magistrate faced with no evidence of authority to sue was entitled to regard the defect as fatal to the competence of the suit and to strike it out. It is thus my considered view that the trial magistrate did not error in law in dismissing the Appellant's claim on failure to produce a company's resolution.

Whether the trial magistrate erred in considering a matter not pleaded

42. The Appellant argues that the Respondents did not raise the issue by way of pleadings or preliminary objection and that the trial court therefore erred in raising the matter. The Respondents correctly point out that jurisdictional matters, including locus standi and capacity, may be raised by the court suo moto because they go to the court's power to adjudicate.

43. A court is obliged to ensure that it has jurisdiction to hear a matter and may decline to proceed where that jurisdiction is wanting. A court's power to raise jurisdictional issues is not without limit: the court must do so in a manner consistent with fair trial rights and give parties an opportunity to be heard on the jurisdictional point where there is time and it is practicable. In the case of Mwilu v Judicial

Service Commission & another; Dari Limited & another (Interested Parties) (Petition E086 of 2025) [2025] KEHC 4764 (KLR) (Constitutional and Human Rights) (10 April 2025) (Ruling), the court held that: -

13. To my mind, the raising of a challenge to jurisdiction by an interested party is not a 'new or fresh issue' or an expansion or contraction of the case by that interested party. Instead, it is an interested party requesting the court to consider and determine a question that the court itself can suo moto raise, the question of whether it has the jurisdiction to hear and determine the matter before it. There is no better encapsulation of the importance of jurisdiction that the oft quoted passage from the seminal case of the Owners of Motor Vessel "Lilian S" -v- Caltex Oil (Kenya) Ltd. [1989] KLR 1,

> "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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

44. In the present case the trial magistrate recorded the absence of a resolution and afforded the parties an opportunity to address the court on the matter. The defect was present on the face of the record and was not an afterthought. Where a court is confronted with an apparent incapacity on the part of a party to institute litigation, the court is entitled and in some instances duty bound to investigate and determine that question before having regard to the merits. In those circumstances, I do not find fault with the trial magistrate's raising and deciding the question of authority.

Whether this court should determine the merits notwithstanding the procedural defect

45. The Appellant invites this court to exercise its appellate powers under Section 78 of the *Civil Procedure Act* and Order 42 Rule 32 of the Civil Procedure Rules to re-evaluate the evidence and determine liability and quantum. That power is well-established: an appellate court, on a first appeal, is empowered to re-assess evidence and to pronounce on the merits where it is just and proper to do so.

46. However, the exercise of such power presupposes that the proceedings in the trial court were competent and that the court had jurisdiction to try the matter. Where a fundamental jurisdictional defect exists such as the absence of authority for a company to sue, application of appellate powers to decide the merits would amount to determining rights in proceedings which the lower court never had the competence to entertain. To do so risks issuing an advisory or a null determination or a judgment that may be vulnerable to collateral challenge.

47. On the material before me there is no admissible evidence establishing the Appellant's authority to sue. The Appellant placed reliance on an assessor's report, receipts and other documents to prove quantum; however, those documents are irrelevant if the court dismissed the claim for want of compliance with the law. Accordingly, I decline the invitation to determine the merits of the underlying dispute in this appeal.

48. In view of the foregoing, the following orders shall abide: -

    a. The Appeal lacks merit and the same be and is hereby dismissed.

    b. The judgement of the Small Claims Court is upheld fully.

    c. The Respondents be and are hereby awarded the costs of this appeal.

    d. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 16TH DAY OF SEPTEMBER 2025

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R. NYAKUNDI

JUDGE