



**Messoh v Onyango & 3 others (Civil Appeal E040 of 2024)  
[2025] KEHC 13215 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13215 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E040 OF 2024  
DK KEMEL, J  
SEPTEMBER 26, 2025**

**BETWEEN**

**BENARD APOLLO MESSOH ..... APPELLANT**

**AND**

**LUCAS ALUOCH ONYANGO ..... 1<sup>ST</sup> RESPONDENT**

**JOHN NUNDU OYUGI ..... 2<sup>ND</sup> RESPONDENT**

**TIMOTHY ODONGO OTIENO ..... 3<sup>RD</sup> RESPONDENT**

**SIMEON OPIYO OTIENO ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the Ruling and Order of Hon. L. Simiyu (S.P.M)  
delivered on 7/8/ 2024 in Siaya CM’s ELC No. E092 of 2023)*

**JUDGMENT**

1. The appeal herein arises from the ruling of Hon Simiyu (SPM) in Siaya Chief Magistrate’s Court ELC No. E092 of 2023 delivered on 7/8/2024 wherein she allowed the Respondents’ Preliminary Objection dated 4/6/2024 which sought for dismissal of the Appellant’s suit as the court lacked territorial jurisdiction to hear and determine the same and proceeded to strike out the said suit for having been filed in the wrong forum.
2. Aggrieved, the Appellant lodged his appeal vide his Memorandum of Appeal dated 6/9/2024 wherein he raised the following grounds:
  - i. That the trial magistrate erred in law and in fact by striking out the Plaintiff’s case on the basis of a Notice of Preiminary Objection dated 4<sup>th</sup> June 2024 when the said notice did not meet the threshold to be deemed a preliminary objection strictly speaking.



- ii. That the trial magistrate misdirected herself in finding and holding that Ukwala law courts was the proper forum for the determination of the case without taking into account the fact that Siaya Law courts had concurrent territorial jurisdiction with Ukwala Law courts in view of the fact that the suit property is located in Siaya County and has been the subject of previous litigation in Siaya Law courts.
- iii. That the trial magistrate misdirected herself to strike out the Appellants case when Siaya Law courts have jurisdiction on every aspect of the case including concurrent territorial jurisdiction with Ukwala law courts.
- iv. That by striking out the case vide a preliminary objection, the trial magistrate denied the Appellant the opportunity to adduce evidence of the previous litigation history between the parties herein.
- v. That the trial magistrate's decision to strike out the suit was contrary to Article 48 of the Constitution of Kenya as it summarily removed the Appellant from the seat of justice without a proper opportunity for a hearing.

The Appellant therefore prayed that the appeal be allowed and that the ruling and order of the trial court be set aside and substituted with an order dismissing the Respondents' Preliminary Objection dated 4/6/2024 with costs.

3. Being a first appeal, I have a duty to appreciate the entire evidence subjecting it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to hear or see the witnesses I must give an allowance for that. (See *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123; *Peters v. Sunday Post Ltd*(1958)EA 424; *Mary Wanjiku Gachigi v Ruth Muthoni Kamau*( Civil Appeal No. 172 of 2000.( Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000.(Okubasi, Githinji & Waki JJA).
4. A perusal of the record of the trial court indicates that the Appellant had sued the Respondents for compensation arising from injuries sustained from an alleged assault which arose around Ambira area near Ugunja town. The matter was filed at Siaya law courts. It is at that point that the Respondents raised a preliminary objection pursuant to Order 2 Rule 9 of the Civil Procedure Rules on territorial jurisdiction under section 15 of the Civil Procedure Act. The trial court agreed with the Respondents and struck out the suit with costs for being at the wrong forum. It is the said striking out of the suit which has precipitated to the instant appeal.
5. The appeal was canvassed by way of written submissions. Both parties duly complied.
6. The Appellant submitted that the preliminary objection did not contain a proper preliminary objection and that the court ought to have struck it out in limine. He pivoted his argument with the case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696, and *Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another* (2014) eKLR.
7. The Appellant further submitted that the Civil Procedure Act does not define anywhere what constitutes the local limits of the jurisdiction of the court. He went on to submit that it is the Magistrates Court Act that confers jurisdiction of Magistrates courts and not the Civil Procedure Act.
8. The Appellant finally submitted that he and the Respondents herein are currently engaged in litigation before the Ukwala law Courts over land that caused the Appellant to be assaulted by the Respondents. He further contended that the fact that those other cases are alive before Ukwala courts makes the filling of this matter in the same court very inappropriate.



9. On the other hand, the Respondents submitted that based on the fact that the instant case was for compensation for personal injuries, section 14 and 15 of the *Civil Procedure Act* should come into play. It was submitted that the Preliminary Objection raised by the Respondents met the threshold set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd* (supra). It was submitted that the Appellant in his plaint has described that the cause of action arose in Ukwala area and that he had fought with the Respondents while on land parcel number South Ugenya/Ambira/1226 situate within Ugunja Sub County and thus the suit fell within the local limits of the jurisdiction of Ukwala law courts. It was finally submitted that by filing the suit in Siaya, the Appellant went against the clear provisions of the *Civil Procedure Act* and that even a transfer would not salvage it. It was also submitted that the issue of jurisdiction as stated in the case of *Owners of Motor Vessel Lillian 's' Vs Caltex Oil Kenya Ltd* [1989] KLR barred the Appellant from filing suit in Siaya and that the trial court properly dismissed the Appellant's suit. The Respondents finally submitted on costs and placed reliance on section 27 of the *Civil Procedure Act* and sought that the costs be awarded to them.
10. I have considered the record of appeal, the rival submissions on appeal and the authorities relied on by the respective parties. I find the the issue for determination is whether the Preliminary Objection that had been raised before the trial court had merit.

### **Analysis and determination**

11. It is noted that the gist of the Preliminary Objected dated 4/6/2024 raised before the trial court was to the effect that the trial court did not have the territorial jurisdiction to determine the suit and thus the trial court was urged to strike out the entire suit. In *Mukisa Biscuits Manufacturing co. ltd vs. West end Distributors ltd* (1969) E.A 696 the court stated that:
- “...a preliminary objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings and if which argued as a preliminary point may dispose of the suit”
12. The Court of Appeal, in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, stated 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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
13. Being guided by the foregoing authorities, i find that it is necessary to consider the salient statutory provisions of the *Civil Procedure Act* and the Magistrate's Court Act so as to determine the question whether the Magistrate's court at Siaya had the jurisdiction to entertain the Appellant's suit.
14. Section 15 of the *Civil Procedure Act*, stipulates that subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—
- (a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
  - (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain,



provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

- (c) the cause of action, wholly or in part, arises
15. Section 2 of the Magistrate Courts Act, defines Resident Magistrate court to include Senior Resident Magistrate, Principal Magistrate, Senior Principal Magistrate, and Chief Magistrates Court.
  16. Section 3(2) of the Magistrate Courts Act, provides that a court presided over by a Resident Magistrate (which include all the above as defined under section 2 of the Magistrates Court Act) has jurisdiction throughout Kenya.
  17. From the above statutory provisions, there seems to be an apparent conflict between section 15 of the *Civil Procedure Act* and section 3(2) of the *Magistrates' Courts Act*. Having noted the same, I am alive to the principle of Statutory Interpretation which provides that where there is a conflict between two statutes, the statute enacted later is deemed to have amended the former. In this regard, the *Civil Procedure Act*'s commencement date is noted to be 31<sup>st</sup> January 1967, while the Magistrate Courts Act's commencement date is 1<sup>st</sup> August 1967. This therefore means that the Magistrate's Court Act is deemed to have amended section 15 of the *Civil Procedure Act*. In addition, the *Civil Procedure Act* in its long title is stipulated as "An Act of Parliament to make provision for procedure in Civil Courts. This simply connotes that it is not the legal instrument that confers jurisdiction upon the magistrate courts. On the other hand, the long title of the Magistrate Courts Act cap 10 Laws of Kenya stipulates thus: "An Act of parliament to establish Magistrate Courts to declare the jurisdiction and provide for the procedure of such courts, to provide for appeals in certain cases and for purposes connected thereto".
  18. It is clear from the long titles that it is the Magistrates Act that confers jurisdiction to the magistrate's courts.
  19. I am alive to the fact that several judges have addressed the conflict between section 15 of the *Civil Procedure Act* and section 3(2) of the Magistrate Courts Act which have added richly to our jurisprudence. They include but not limited to the following:
  20. In *Mohamed Sitaban v George Mwangi Karoki* CA No. 13 of 2002 Ringera J (as he then was) stated thus:

"Section 3 (2) of the *Magistrates' Courts Act* provides that a court of the Resident Magistrate (which is defined to include a senior Principle magistrate court has jurisdiction throughout Kenya. Such a court is not the subject of the local jurisdiction contemplated by section 15 of the *Civil Procedure Act*. In my opinion, section 15 of the *civil procedure Act* applied only to courts lower than the Resident Magistrates Courts. I am fortified in that view by the fact that the Magistrate court act was enacted in 1967, long after the *Civil Procedure Act*.

The legislature was therefore aware of the provisions of section 15 of the *civil procedure Act* and the hallowed rule of statutory construction that where two provisions in different statutes conflict, the provisions in the latter statute is deemed to amend the earlier provision must be applied. Accordingly, I find that the Bungoma court had jurisdiction to entertain the suit and the rule that a suit filed in a court without jurisdiction is a nullity and cannot be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative Districts in which the defendant resides as the cause of action but those reasons cannot oust the statutory jurisdiction."



21. Majanja J, in *Betty Nyamusi Machora vs Betty Nyanduko Makori* (2018) eKLR stated as follows concerning section 15 of the *Civil Procedure Act*:

“...In my view, section 15 of the CPA provides for convenient forums of instituting a suit. It does not divest the Magistrates courts of jurisdiction, hence a defendant who is dissatisfied with the place where a suit has been filed is entitled to invoke the High court to transfer the suit to the appropriate forum. This position still obtains repeal from the Magistrates Court Act. The Magistrate Courts Act, 2015 provides for the jurisdiction of the Magistrates court on the basis of subject matter/value, it does not limit territorial jurisdiction of the Magistrates court”.

22. Guided by the above authorities, I find that the Preliminary Objection was incompetent and that the same ought to have been struck out in limine. I find that the Appellant did not file the suit in the wrong forum. In any event, from the averments of the Appellant, the Ukwala law courts was already handling a case of affray involving the Appellant and the Respondents as well as trespass to land and that at the end of the day the said court would have been handicapped to hear the compensation suit in view of the fact that it would have already determined issues between the parties and which could then have forced the parties to file the suit in another court. I find no prejudice will be suffered by the Respondents if the suit is heard at Siaya Chief Magistrate’s Court. The finding by the trial court was therefore in error and must be interfered with.

23. In view of the foregoing observations, it is my finding that the Appellant’s appeal has merit. The same is allowed. The ruling by the learned trial magistrate dated 7/8/2024 is hereby set aside and substituted with an order dismissing the Preliminary Objection dated 4/6/2024 with no order as to costs. Each party to bear their own costs of this appeal.

Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

M/s Wanyangu.....for Appellant

N/A ES Ochieng.....for Respondent

Okumu.....Court Assistant

