



**Malika & another v Bidii International Company Ltd & another
(Petition 5 of 2018) [2024] KEHC 8369 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA**

PETITION 5 OF 2018

DK KEMEL, J

JULY 5, 2024

BETWEEN

CATHERINE AYUMA MALIKA 1ST PETITIONER

HEZEKIAH FRANCIS MALIKA 2ND PETITIONER

AND

BIDII INTERNATIONAL COMPANY LTD 1ST RESPONDENT

MILE HIGH ENTERPRISES LTD 2ND RESPONDENT

RULING

1. *Vide* a Notice of Preliminary Objection dated 4th September 2023, the Petitioners herein raised preliminary objection to have the Cross-Petition as filed by the Respondents herein struck out with costs. They raised the following points of law:
 - a. That the Honourable Court lacks jurisdiction to entertain and determine a claim for refund of U.S dollars 8,000 arising from transactions that were carried out within a company registered under the laws of the United States of America.
 - b. That the Cross-Petition is *res-judicata* to the judgement by US District Court case No. 2012S466 in which the Cross-Petitioners were ordered to make refunds to the 2nd Petitioner from the USA registered Bidii International Company accounts.
2. *Vide* Court directions, the Notice of Preliminary Objection was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.
3. I have considered the Petitioners’ preliminary objection and the submissions of learned counsels. The main issue for determination is whether the Preliminary Objections has merit.



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

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“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...”

5. For a preliminary objection to succeed, the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
6. The Petitioners herein have challenged the jurisdiction this Court to deliberate on the Respondents cross-petition indicating that the refund of their claim USD 8,000 is arising from transactions that were carried out within a company registered in the United States of America.
7. In sum, having asserted and maintained that the 1st Respondent does indeed carry on business in the United States of America, it was the duty of the Petitioners to prove that the companies did not have registered offices in Kenya. Upon perusal of the Court record, i have noted the presence of a Certificate of Incorporation for Bidii International Limited, the 1st Respondent herein, given by the Registrar of Companies on 7th April 2009 with the respective Memorandum of Articles of Association.
8. Contrary to the Petitioners arguments, it is certain that the 1st Respondent had registered offices in Kenya and were indeed carrying on business in compliance with the provisions of the [Companies Act, 2015](#). Hence, the Petitioners’ claim must fall on that score as it is clear that this court has the requisite jurisdiction to hear and determine the Cross- Petition.
9. On the issue of *res judicata*, it is clear that this arises from a judgement issued by a court in the State of Colorado U.S.A but this court will not venture into this substantive issue as long as there is no record of the said certified judgement from the Court of Colorado USA and that the winning party has not requested this Honourable Court to enforce the same. This piece of information has not been availed by the Petitioners. It might probably be dealt with during the hearing of the Cross - Petition. In the absence of the requisite evidence that the parties herein had litigated under the same title and which dispute was determined as between them, the Petitioner’s claim of *res judicata* must fail.
10. Having established that this court has jurisdiction to deliberate on the 1st Respondent’s Cross-Petition as its duly registered in Kenya, it is my finding that the preliminary objection dated 4.9.2023 is misdirected and is without merit. It is dismissed with costs to the Respondents. The parties are directed to set down the matter for hearing of the Cross-Petition as a matter of priority.



It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 5TH DAY
OF JULY 2024.**

D. KEMEI

JUDGE

In the presence of:

No appearance Otinga for Petitioners

Maloba for Respondents

Kizito Court Assistant

