



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**  
**CIVIL APPEAL NO. EO13 OF 2020**

**FELIX OTIENO OWILI.....APPELLANT**

**VERSUS**

**SHIVLING SUPERMARKET.....RESPONDENT**

**JUDGMENT**

1. On the 26<sup>th</sup> August, 2020 appellant filed a plaint dated 25<sup>th</sup> August, 2020. He was claiming damages he sustained while using the respondent's motor vehicle in the course of his employment.

2. The respondent raised a preliminary objection on 2<sup>nd</sup> November, 2020 on the issue of jurisdiction. The learned trial magistrate sustained the objection and dismissed the suit. The appellant was dissatisfied and filed this appeal through the firm of Obach & Partners Advocates. He raised the following grounds of appeal:

a. That the learned trial magistrate erred in fact and law and fact in completely misapprehending the principles governing and /or what constitutes a preliminary objection thereby arriving at an erroneous decision with regard to the preliminary objection raised by the defendant/applicant.

b. That the learned trial magistrate erred in law and fact in entertaining and/or delving into issues of facts while making a determination on the preliminary objection raised by the defendants/applicants.

c. That the learned trial magistrate erred in law in law and fact finding that pleadings had not closed when the defendant /applicant's amended statement of defence dated 11<sup>th</sup> November, 2020 was filed in court on the 13<sup>th</sup> day of November, 2020 more than 60 days after reply to defence had been filed and served.

d. That the learned trial magistrate erred in law and fact in admitting and/or relying on the defendant/applicant's amended statement of defence dated 11<sup>th</sup> November, 2020 and filed in court on the 13<sup>th</sup> day of November, 2020 after pleadings had closed.

e. That the learned trial magistrate erred in law and fact in dismissing the appellant's suit against the defendant/applicant's when he failed to cumulatively and or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him and thus arrived at an erroneous conclusion.

f. That the learned trial magistrate erred in law and fact in that he injudiciously disregarded the judicial authorities tendered by the appellant when coming to his impugned decision.

g. That the learned trial magistrate erred in law and fact by generally applying the wrong principles of law and thereby arriving at a wrong decision. Consequently, the ruling of the learned trial magistrate is unfair, unjust and sanctions illegalities and abuse of the process of the honourable court.

3. The appeal was opposed by the respondent who was represented by the firm of Ogejo, Omboto & Kijala Advocates, L.L.P.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanour. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. A preliminary objection must be on a point of law and nothing more. This was clearly stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696**. At page 700 paragraph D-F Law JA as he then was, 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.**

6. An issue of jurisdiction is a point of law. Justice Nyarangi (JA) in the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** where stated as follows:

**I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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.**

7. Section 3 of the Work Injury Benefits Act, 2007 provides:

**This Act shall apply to all employees, including employees employed by the Government, other than the armed forces, in the same way and to the same extent as if the Government were a private employer.**

While section 52 of the Act, provides:

**(1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.**

**(2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.**

8. It is clear that the appellant filed his claim in the forum which was devoid of jurisdiction. The learned trial magistrate correctly interpreted the law.

9. Order 42 Rule 13 (4) f of Civil Procedure Rules provides:

**Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—**

.....

.....

**(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

The appellant did not attached attach a copy of the impugned ruling. He therefore offended the requirements prescribed by Order 42 Rule 13 (4) f.

10. Though the respondent has argued that the appellant required leave of the trial court, this has not been demonstrated. The appeal will not therefore turn on this argument.

11. The upshot of the foregoing analysis of the evidence, I find that the appeal lacks merit and the same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**