



**Mukabwa v Better Stream Care Limited (Cause E012 of 2025)  
[2025] KEELRC 2648 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2648 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E012 OF 2025  
NZIOKI WA MAKAU, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**DEUDEDIT LUSEKA MUKABWA ..... CLAIMANT**

**AND**

**BETTER STREAM CARE LIMITED ..... RESPONDENT**

**RULING**

1. The matter before the Court is a Preliminary Objection dated 16<sup>th</sup> June 2025, in which the Respondent contends that this Court lacks jurisdiction to entertain the suit. It argues that the cause of action does not emanate from an employer-employee relationship but rather from a collaboration or joint venture agreement. The Respondent therefore asserts that the claim offends section 12 of the *Employment and Labour Relations Court Act* as well as other enabling provisions of the law, and urges the Court to dismiss it with costs.
2. On 17<sup>th</sup> June 2025, the Court issued directions that the Preliminary Objection be disposed of by way of written submissions. Both parties filed their submissions on 28<sup>th</sup> July 2025.

**Respondent's Submissions**

3. In support of the Preliminary Objection, the Respondent identified three issues for determination, namely:
  - a. Whether this court has jurisdiction to hear this suit;
  - b. Whether the Preliminary Objection is merited; and
  - c. Who should bear costs.
4. On jurisdiction, the Respondent submitted that by dint of Article 162(2) (a) of the *Constitution* as read with section 12(1) and (2) of the *Employment and Labour Relations Court Act*, this court is only



empowered to determine disputes arising between an employer and an employee, an employer and a trade union, and an employers' organisation and a trade union organisation. Flowing from the above, the Respondent contended that this Court lacks jurisdiction to determine disputes arising from a collaboration agreement, which is in the nature of a contract for service as opposed to a contract of service. Relying on *Black's Law Dictionary*, 10<sup>th</sup> Edition, the Respondent drew a distinction between the two, noting that a contract of service is one between an employer and an employee setting out terms and conditions of employment, whereas a contract for service refers to work undertaken by an independent contractor. It submitted that the collaboration agreement herein lacks the ingredients of an employment contract as contemplated under section 10 of the *Employment Act*, but instead contains conditions for mutual co-operation and benefit in exchange of finances, expertise and opportunities. Consequently, the Respondent urged that the matter falls within the jurisdiction of the High Court.

5. To buttress the lack of jurisdiction, the Respondent relied on the case of *Owners of Motor Vessel "Lilian s" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where it was held that jurisdiction is everything, and without it a court has no power to make one more step. Further reliance was placed on *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* SC Application No. 2 of 2011 [2012] eKLR, which emphasised that jurisdiction can only be conferred by the *Constitution* or statute, not by judicial craft or consent of the parties. On the merits of the Preliminary Objection, the Respondent submitted that it was properly raised on a pure point of law, as envisaged in the case of *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* [1969] E.A 696 as well as in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR and *Mary Wambui Munene v Peter Gichuki Kingara & 6 others* [2014] eKLR. Finally on costs, the Respondent submitted that the court should exercise its discretion in its favour on the basis of section 27(1) of the *Civil Procedure Act*.

### Claimant's Submissions

6. On his part, the Claimant distilled two issues for determination, namely:
  - a. Whether the Preliminary Objection meets the threshold of a pure point of law; and
  - b. Who should bear costs.
7. On the first issue the Claimant submitted that it would require adduction of facts and evidence to determine the nature of his relationship with the Respondent. He asserted that this was inimical to the holding in the case of *Mukisa Biscuits Manufacturing Company v West End Distributors* [1969] E.A 696 and *Mubu Holdings Limited v James Mubu Kangari* [2017] eKLR, which limits Preliminary Objections to pure points of law, not to be raised if ascertainment of facts is needed. In support of his position, he relied on the case of *John Kamau Mburu v Program for Appropriate Technology in Health (Path) & another* [2015] KEELRC 484 (KLR), which in citing the case of *Ontario Ltd v Sagaz Industries Inc.* 2001 SCC 59, held that determining the existence of an employment relationship requires total examination of the relationship between the parties. He also cited the decision in the case of *Salome Maina v Chief Officer Department of Education, Laikipia County Government* [2018] KEELRC 1829 (KLR), which in dealing with a Preliminary Objection on employment relationship held:

“In a nutshell, the issues in contention require the calling of evidence whether documentary or viva voce to prove or disprove the facets of employment being asserted by either side.



The Respondent therefore jumped the gun as there are no legal issues that emerge from the pleadings to base the preliminary objection upon.”

8. In view of the foregoing, the Claimant submitted that since the Court must interrogate disputed facts to determine the relationship between the parties, the Preliminary Objection does not meet the required threshold. He further urged the Court to deprecate the practice of improperly raising Preliminary Objections, echoing the caution in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd (supra)* in the following terms:

“The improper raising of points by way of preliminary objection does nothing but to unnecessarily increase costs and on occasion, to confuse the issues. This improper practice should stop.”

9. On costs the Claimant urged the court to exercise its discretion in his favour based on section 27 of the *Civil Procedure Act* and the case of *Cecilia Karuru v Barclays Bank of Kenya & another* [2016] eKLR where the Judge held:

Considering the entire chain of events from filing this suit up to the time the parties left the issue to the court to determine, the numerous court attendances cited above I find no reason to deny the second defendant costs and in exercise of my discretion in a manner that meets the interests of justice for both parties in the circumstances of this case, and guided by the law and relevant authorities.

10. The Court has considered the rival submissions and positions taken. A preliminary objection can be taken on the grounds set out in the case of *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd (supra)* where the Court (per Newbold P.) held that

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop”

11. The point raised is on the nature of the contract between the parties with the Respondent arguing that it is a contract for service which in their view takes the matter out of the purview of this Court as the court is to adjudicate between, inter alia, employers and employees. It argued that the relationship of employer-employee does not exist between it and the Claimant.

12. As noted in the above case, a preliminary objection cannot be raised if facts have to be ascertained. In order to determine whether the contract was one for service or a contract of service, the Court has to ascertain the elements of the contract which are the relationship between the parties; the control test – who controls how, when and where the work is performed; whether the work is integral to the business operations of the Respondent, what remuneration the Claimant gets as well as what benefits the Claimant received from the Respondent such as leave pay, leave days and the like so as to ascertain whether there is basis to infer an employee-employer relationship. In my considered view, there is a factual position that must be ascertained and therefore I find the preliminary objection misplaced and entirely premature. As such the objection is dismissed with costs being in the cause. Directions on the disposal of the suit to follow this Ruling.

Orders accordingly.



**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2025**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

