



**Munyoki & another v Kaikai & another (Civil Appeal E1485 of 2024)
[2025] KEHC 13384 (KLR) (Civ) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

CIVIL APPEAL E1485 OF 2024

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

DAVID MUNYOKI 1ST APPELLANT

MICHAEL MURIUKI WAIGIRI 2ND APPELLANT

AND

LINUS KAIKAI 1ST RESPONDENT

NATIONAL MEDIA GROUP LIMITED 2ND RESPONDENT

(Being an appeal arising out of the ruling and order of Hon. H. A. Okello (Resident Magistrate) in Nairobi [Milimani] Chief Magistrate's Court Civil Case No. E11522 of 2021 delivered on 17/02/2025)

JUDGMENT

1. This is a judgment in respect of an interlocutory ruling on a Preliminary Objection dated 9th May 2024 which objection impugned the jurisdiction of the trial Court on the basis of Section 432[2] of the *Insolvency Act*, 2015. The objection was heard by way of written submissions and in a ruling rendered on 17th February 2025, the objection was dismissed with costs in cause. The instant appeal is, therefore, against the said ruling.
2. The objection was based on the following three grounds: -
 1. That the suit ought to be struck out for failure to seek leave of court to file and/or continue with these proceedings after the appointment of the Interim Liquidator for Resolution Insurance Company Limited which insured the Defendants at the time of the alleged accident.



2. That pursuant to Section 432 (2) of the *Insolvency Act*, 2015, a moratorium is placed over all legal proceedings against the company and if a party wishes to institute or continue with legal proceedings against such company under liquidation, they must obtain approval of the Insolvency Court.
3. That the suit is incurably defective and ought to be struck out with costs to the Defendants.
3. The background to this appeal is that Linus Kaikai and Nation Media Group Limited instituted Nairobi [Milimani] Chief Magistrate’s Court Civil Case No. E11522 of 2021 against David Munyoki and Michael Muriuki Waigiri [hereinafter referred to as ‘the suit’] which in essence the suit was brought under the doctrine of subrogation on behalf of the insurers Messrs. Jubilee Insurance Company Limited. The Respondents herein [then Plaintiffs] sought to recover the sum of Kshs. 253,640/= with costs and interest arising out of a road traffic accident that allegedly occurred along Mbagathi Way on 2nd October 2018 involving the Plaintiff’s motor vehicle registration number KBN 394F make Isuzu Pick-Up and the Appellants [then Defendants] motor vehicle registration number KAA 188N make Isuzu Canter.
4. Based on the above, the Appellants raised the objection which was eventually disallowed. This appeal, therefore, is intended to re-look at the objection. In doing so, this Court will, with the benefit of the parties’ written submissions filed herein, first ascertain the propriety of the objection and, if it passes the test, then venture into whether the objection is merited.
5. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter. To that end, the locus classicus decision in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd (1969) E.A 696*. At page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.

...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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

6. The Supreme Court weighed in on the issue in *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others [2015] eKLR* and stated thus: -

.... Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.
7. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit -vs- West End Distributors case (supra)* in Civil Suit No. 85 of 1992, *Oraro -vs- Mbaja [2005] 1 KLR 141* when he observed as follows: -

.... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with



factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed....

8. In *John Musakali -vs- Speaker County of Bungoma & 4 others* (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....

9. Finally, in *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

.... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion....

10. Returning to the objection, since the objection was based on Section 432[2] of the *Insolvency Act*, a look at the said provision is imperative. The provision states as follows: -

432. Consequences of liquidation order

(1)

(2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.

(3)

11. Without much ado, a casual look at the above provision affirms that there are some prerequisites which ought to be proved before the provision can be successfully invoked. For instance, evidence has to be adduced to ascertain whether a liquidation order was made or a provisional liquidator was appointed. Closely related to that will be the issue as to whether the order or appointment was challenged; among other related issues.

12. Therefore, in such instances where there are factually-unsettled issues, raising a preliminary objection is not the ideal way. Factual and contested issues ought to be raised through either formal applications, affidavits or viva-voce evidence as to accord all parties an opportunity to challenge such evidence if need be. This position was approved of by the Supreme Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR,



where the Apex Court comprehensively dealt with the different facets making up the doctrine of res judicata including its exceptions. The Court emphasized that since the plea is anchored on evidential facts, then such facts ought to be properly raised by way of an Affidavit. That is the case here. The objection, hence, suffered a false start and did not pass the propriety test to be considered on its merit.

13. The upshot is that the appeal is unmerited and the following final orders hereby issue: -
- (a) The appeal is wholly dismissed.
 - (b) The Appellants shall jointly and severally bear the costs of the appeal assessed at Kshs. 30,000/ [Kenya Shillings Thirty Thousand Only] which sum shall be paid before the Appellants are allowed to participate further in the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Mr. Odongo, Learned Counsel for the Appellant.

Michael/Amina – Court Assistants

