



REPUBLIC OF KENYA



**Masterfound Investments Limited v Maina & another (Civil Suit
358 of 2023) [2024] KEMC 156 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEMC 156 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT 358 OF 2023
PA NDEGE, SPM
JUNE 20, 2024**

BETWEEN

MASTERFOUND INVESTMENTS LIMITED PLAINTIFF

AND

MARY MAINA 1ST DEFENDANT

JOHN RUGA T/A LAVICHA APARTMENTS 2ND DEFENDANT

RULING

1. In this suit, the plaintiff herein, Masterfound Investment Limited, is seeking payment of Kshs. 15,406/-, being outstanding arrears out of a contractual relationship between it and the defendant herein, Mary Maina & John Ruga T/a Lavicha Apartments.
2. The defendants herein filed their Statement of Defence dated 16.08.2023, and thereafter filed a Notice of Preliminary Objection dated 06/03/2024. The Preliminary Objection is based on 2 grounds: that this Honourable Court lacks pecuniary jurisdiction to hear and determine this matter as it is the preserve of the *Small Claims Court Act*, and that therefore the suit herein is bad in law and should be dismissed with costs.
3. The Plaintiff filed its Grounds of Opposition dated 25/03/2024. It opposed the preliminary objection on the following grounds: -
 - a. THAT the notice of preliminary objection is fatally defective, bad in law and an abuse of the court process.
 - b. THAT the Defendant has failed to satisfy the conditions that would warrant grant of notice of preliminary objection as prayed.
 - c. THAT this honourable court has the requisite pecuniary jurisdiction to hear and determine the suit by dint of section 7 of Magistrate's Court *Act no. 26 of 2015*.



- d. THAT this honourable court has jurisdiction and proceedings in the current civil proceedings whose value of the subject matter has not exceeded 20 million (sic).
- e. THAT the notice of preliminary objection is meant to delay expeditious disposal of the suit herein.
- f. ANY other grounds to be canvassed at the hearing hereof.

Procedural Facts.

4. This suit came up for mention for directions on 20.02.2024 to confirm the close of the pleadings, and compliance with the pre-trial provisions. It was then revealed that the defendants had not filed their defence. A further mention was held on 16.04.2024, wherein it was then decided that the Preliminary Objection raised herein be canvassed before the matter is set for the pretrial. Directions were taken that the parties herein were to file and exchange their written arguments, submissions and authorities on the preliminary objection. Submissions were confirmed closed on 28.05.2024; and hence the instant ruling.

The Law on Preliminary Objections.

5. I start off by stating that the law as to what constitutes a preliminary point of objection is relatively clear. The case of Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd [1969] EA 696 lays it out pretty well that it is a point of law of either limitation or jurisdiction argued on the basis or premise that the facts as pleaded are true. In Mukisa (supra), Law J.A defined a preliminary objection to be: -

... 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 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. In the same judgment Charles Newbold, P., Stated as follows:

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.

7. The High Court in Moses Likoye Wanjala V Bernard Wekesa Sambu [2013] eKLR defined the threshold for Preliminary Objection as follows: -

Threshold for Preliminary Objection

The legal delimitations for a preliminary objection were set a long time ago in the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A 696. The principle (preliminary objection) is not in dispute and I do not think anything novel could be said about it. It has been and continues to be quoted and reinforced by the superior courts including the Court of Appeal, and recently by the Supreme Court. I did not, therefore, understand why Mr Onsando wanted to re-invent the wheel. Nonetheless, I shall restate the principle for purposes of clarity.

As per Law J.A:



“So far as I am aware, 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.”

As per Sir Charles Newbold P:

“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.”

As per our own J.B. Ojwang J (as he then was) in a simple and clear manner in the case of Oraro v Mbajja [2005] e KLR that:

‘I think the principle is abundantly clear. A ‘preliminary objection’, correctly understood is now well identified as, and declared to be the 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 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. I am in agreement...that ...’where a court needs to investigate facts, a matter cannot be raised as a preliminary point.?’

8. In other words, what the above cited authorities and decisions are saying is that when a party says that he has a preliminary objection to take out, the court expects the matter objected to be a complete demurrer in the plain eye-sight of the court.
9. I find the issues raised in the Preliminary Objections herein, mainly that of jurisdiction, to be purely points of law and therefore proper candidate for a Preliminary Objection. There is no dispute herein that the claim herein is for performance of a contractual obligation, wherein the sum claimed herein is yet to be paid. The sum claimed herein is Kshs. 15,406/= . This claim therefore that fits those that should be filed in a Small Claims Court.
10. The High Court in Biosystems Consultants Vrs Nyali Links Arcade (CIVIL APPEAL E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) held that the guiding principles objective of the *Small Claims Court Act* was as set out in section 3 of the Act, while the jurisdiction of the Small Claims Court was set out in section 12 of the Act. The same Act also provided for transfer of claims by a higher court to the Small Claims Court subject to section 12(3), that was the limit of pecuniary jurisdiction for not more than Kshs 1,000,000. The procedure for the court was also exclusive. In section 17 of the Act, the law required that the court exercised its own procedure, having regard to principles of natural justice. And that the *Civil Procedure Act* and Rules did not apply to the Small Claims Court. Indeed, even the application of the *Evidence Act* was severely restricted by section 32 of the Act.
11. The Small Claims Courts are thus seen to be an integral part of the Judiciary’s Reform Agenda. There are two main motivations for establishing the Small Claims courts. The first is to enhance access to justice. The Small Claims Courts help not only in the expeditious determination of relevant matters, but also, importantly, in reducing the caseload in the Magistrates’ Courts thereby enabling the reduction of backlog in these courts. The second motivation is the business eye aspect; that commercial disputes were taking an inordinately long time to be resolved in the mainstream courts. From a political and economic perspective, the Government has shown its keenness to support the release of economic capital that is tied up in commercial disputes for re-investment into the economy.
12. The Small Claims Court established by the Small Claims Act is however a subordinate court presided over by an adjudicator who must be an advocate of the High Court of Kenya, with at least three years’ experience in the legal field. The idea behind the SCC is to allow for access to justice to the



- masses through a quick, inexpensive and expeditious informal process, in order to guarantee the right of access to justice under Article 48 of *the Constitution*. The courts should ideally be accessible in every sub-county (coterminous in boundary with what was previously known as a division under the old constitutional dispensation) and progressively in other decentralized units of judicial service delivery.
13. Section 12 of the Act stated that the pecuniary jurisdiction of the court is limited to Kshs. 1,000,000 and the nature of claims addressed by the court include:
 - i. A contract for sale and supply of goods or services;
 - ii. A contract relating to money held and received;
 - iii. Liability in tort in respect of loss or damage caused to any property;
 - iv. For the delivery or recovery of movable property;
 - v. Compensation for personal injuries; and
 - vi. Set-off and counterclaim under any contract.
 14. Matters before the court are to be heard and determined on the same day or on a day to day basis until final determination whereas judgments are to be delivered on the same day or not later than 3 days from the date of the hearing. Appeals from the Court may be made to the High Court with the decision being final. The Rules provide the various procedure of the Small Claims Court and provides prescribed forms to be used by parties in lodging their claims as well as the applicable court fees.
 15. The Magistrates Courts Act, 2015, at Section 7(1) also establishes magistrates courts with a pecuniary jurisdiction of not more than Kshs. 20 million, depending on the rank or grade of the presiding magistrate. Thus, both the magistrates and small claims courts could be said to have concurrent jurisdiction over this matter. The *Small Claims Court Act* and the Magistrates Courts Act, are however substantive legislations. When it comes to the initiation of a suit, recourse should be had to the procedural law, the relevant one herein being the *Civil Procedure Act* and the rules made thereunder. The *Civil Procedure Act* provides for the places of suing.
 16. Section 11 of the *Civil Procedure Act*, provides as follows: -

Court in which suit to be institute

Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that appoint of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that –

 - i. If a suit is instituted in a court other than of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and
 - ii. Nothing in this section shall limit or effect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.



17. The above provisions are further reinforced or augmented by the provisions of Order 4, rule 9 CPR, which provides as follows: -

Return of plaint

9(1) The plaint may at any stage of the suit be returned to be presented to the court in which the suit should have been instituted.

(2) On returning a plaint the judge shall endorse thereon the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it.

17. Going by the above provisions, I do find that the court with the lowest grade competent to try this small claim matter is the Small Claims Court. I do not find any point of law issue raised herein that might require a Chief Magistrate's court to try this matter when we have a Small Claims Court in the same district. Furthermore, the higher court contemplated in the Small Claims Courts Act and as interpreted in *Biosystems Consultants Vrs Nyali Links Arcade (CIVIL APPEAL E185 of 2023 [2023] KEHC 21068 (KLR) (31 July 2023)* does not necessarily mean a Superior Court. There is a distinction between a higher court and a superior court. According to me, a Magistrates Court though a subordinate court, is a higher court than a Small Claims Court. In any case, the plaintiff might have benefitted much more by filing this case at the Small Claims Court than the Chief Magistrate's Court.

18. Some of the advantages for filing such small claims in a Small Claims Court, are

i. In a Small Claims Court, claim will likely be heard much more quickly than in the regular magistrate's court, and one will receive a decision fairly quickly after the hearing. Section 34 (1) of the Small Claims Act states that all proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination. In situations where there are accumulating costs until the matter is resolved, this is a distinct advantage.

ii. Court filing fees in the Small Claims Courts are generally be lower than in the regular Magistrates court.

iii. The Small Claims Court is not tied down by the Civil Procedure Rules (2010), with the procedures in the court being touted as deliberately less formal, simple and straightforward. The *Small Claims Court Act* excludes strict application of the rules of evidence to court proceedings and may indeed admit as evidence material the Court considers credible or trustworthy.

20. The Small Claims Court is expected to speed up the delivery of justice especially in relation to debt collections (both personal and commercial), personal injury claims amongst others. I thus do hereby partially uphold the preliminary objection raised herein to the extent that I do hereby return the plaint herein to be filed at the Small Claims Court. The parties herein and the reasons for the return are as per the *raison d'être* herein. Meanwhile, this file is hereby closed and the costs hereof shall be borne by the Plaintiff.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 20TH DAY OF JUNE, 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

