



REPUBLIC OF KENYA



**KENYA LAW**  
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**Flodida Construction Machinery Limited v Wanyonyi (Cause  
E017 of 2025) [2025] KEELRC 3033 (KLR) (3 November 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3033 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E017 OF 2025  
JK GAKERI, J  
NOVEMBER 3, 2025**

**BETWEEN  
FLODIDA CONSTRUCTION MACHINERY LIMITED ..... CLAIMANT  
AND  
PETER WEPUKHULU WANYONYI ..... RESPONDENT**

**RULING**

1. The claimant filed the instant suit on 21<sup>st</sup> March 2025 seeking various reliefs including the sum of Kshs.28,167,721.00 the respondent is alleged to have diverted in the course of his employment, costs and such other Orders as the court deemed just and expedient to grant.
2. The respondent entered appearance and filed a response to the statement of claim on 2<sup>nd</sup> May 2025.
3. Subsequently, by a Notice of Motion dated 13<sup>th</sup> May, 2025 filed on the claimant sought vacation of a hearing slated for 15<sup>th</sup> May 2025 to enable it obtain certified Mpesa statements from Safaricom PLC and the court granted Orders vide its Ruling on 12<sup>th</sup> June 2025 and a subsequent application by the respondent's counsel was allowed on 30<sup>th</sup> July, 2025.
4. Counsel for the respondent filed the instant Notice of Preliminary Objection on 17<sup>th</sup> September 2025 that:
  1. The Employment and Labour Relations court had no jurisdiction to hear and determine the suit as it was not an employment related dispute.
  2. The claimant was seeking special damages in the form of funds allegedly stolen by the respondent as well as general damages.
  3. The claimant's suit is fatally defective for lack of jurisdiction and incompetent.
  4. The suit was an abuse of the court process and ought to be struck out.



## Respondent's submissions

5. Counsel for the respondent relied on the provisions of Article 162(2)(a) of *the Constitution* of Kenya and Section 12 of the *Employment and Labour Relations Court Act* to submit that the jurisdiction of the Employment and Labour Relations court was limited in terms of the disputes and parties who may appear before it and its jurisdiction as a specialist court is to hear and determine disputes relating to employment and labour relations under Article 162(2)(a) of *the Constitution* of Kenya.
6. According to counsel, the court's jurisdiction was limited to disputes arising from the contract of service as well as the statutory rights or obligations in employment or collective labour relations instruments.
7. Reliance was placed on Daniel N. Mugendi v Kenyatta University & 3 others [2013] eKLR to submit that the court's jurisdiction was limited.
8. Counsel submitted that the instant claim was not a labour dispute because the claimant was claiming damages, Kshs.28,167,721 allegedly stolen or misappropriated by the respondent hence it was not a dispute arising out of or relating to employment under Section 12(1)(a)- (f) of the Employment and *Labour Relations Act*.
9. Counsel submitted that the indebtedness of a former employee was not an employment dispute but a civil cause of action in debt, fraud or conversion reserved for the High Court.
10. Reliance was placed on the decision of Anne Mwaure J. in Maisha Mapya Kenya Foundation Ltd v Shikuku & another [2025] KEELRC 761 where the learned Judge upheld the Preliminary Objection against the employer's case to recover the sum of Kshs.6.3 million misappropriated by the employee to submit that the court ought to be guided by the decision.

## Claimant's submissions

10. Counsel submitted that the decision cited by the respondent's counsel was non-binding on this court and in any case Section 12(3)(vi) of the *Employment and Labour Relations Court Act* empowered the court to award damages in decisions relating to or arising out of employment.
11. That in the Maisha Mapya case, the employee stole monies from customer accounts and resigned and the theft of funds had no nexus with the contract of service, to urge that in the instant case the arose from the employment relationship. Under Section 12(1)(a) of the Employment and *Labour Relations Act* as the cause of action was anchored on the contract of employment.
12. Reliance was placed on the decision in ASA Ltd v Wekesa & another [2023] KEELRC 1225 (KLR) to urge that misappropriation allegations amounted to misconduct.
13. Counsel submitted that the claimant's suit was diversion of funds by the respondent to his mobile numbers 0720288344 and 0720486810 as opposed to KCB Account Number 1295614952 and being the Operations Manager, he had the opportunity to commit the fraud as he held himself out as the owner of the quarry to 3<sup>rd</sup> parties and between 1<sup>st</sup> August 2023 and 16<sup>th</sup> December 2024 he received the sum of Kshs.28,167,721.00 in his mobile number.
14. Counsel cited the case of one Mr. Ben Ouma who swore an affidavit of having been misled by the respondent at the quarry site to deposit cash in his Mpesa accounts and between 2<sup>nd</sup> April 2024 and 14<sup>th</sup> December 2024, one customer deposited Kshs.900,000.00 in the respondent's Mpesa account.



15. Reliance was place Article 162(2)(a) of *the Constitution* of Kenya and Section 12(1)(a) of the Employment and *Labour Relations Act* to submit that the court had jurisdiction to determine the suit.
  16. Counsel further submitted that the decision in the Maisha Mapya Case (supra) was distinguishable.
  17. Reliance was also placed on the decision in Junction Forex Bureau Ltd v Walid Mohammed Ratique [2025] KEELRC 2136 (KLR) where Keli J held that the respondent’s conversion and misappropriation of funds entitled the employer to recover the funds, to urge that an employee who failed to account for funds breaches the contract of employment and his/her fiduciary duties to the employer and the same is recoverable in the Employment and Labour Relations Court.
- ARA Counsel prayed for dismissal of the respondent’s Preliminary Objection.

## Analysis

18. It is common ground that the most cited definition of a preliminary are the renditions of Law JA and Sir Charles Newbold P in the Court of Appeal decision in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 and since the issue as to whether the respondent’s Notice of Motion qualifies as a Preliminary Objection is not contested and the notice raises the foundational question of the court’s jurisdiction to hear and determine the instant case, the court is satisfied that the notice raises a preliminary objection.
19. The only issue for determination is whether the respondent’s preliminary objection has merit.
20. It is trite law that jurisdiction is everything as held by the court of Appeal in the celebrated decision in Owners of the Motor vessel “Lilian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi JA stated:
 

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...

Jurisdiction must be acquired before judgment is given”.
21. See also in this regard Equity Bank Ltd v Bruce Mutie Mutoku t/a Diani Tours and Travel [2016] eKLR, Joseph Kamau Muthee Kamu & another v David Mwangi Gichure & another [2013] eKLR and Lemita Ole Lemein v Attorney General & 2 others.
22. As correctly submitted by the parties and as held by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 Others [2012] eKLR a court’s jurisdiction flows from *the constitution* or legislation or both and a court cannot exercise jurisdiction not conferred by law.
23. Concerning the jurisdiction of the Employment and Labour Relations court, the provisions of Article 162 of *the Constitution* of Kenya are unambiguous that:
  1. ...
  2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations and (b) the environment and the use and occupation of and title to land.
  3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).



24. Relatedly, Section 12 of the *Employment and Labour Relations Court Act* provides:
- The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including-
- Subsection 2 of the Act exemplifies the various types of disputes over which the court has jurisdiction. Significantly, however, Section 12(1) of the Employment and *Labour Relations Act* is not exhaustive. This provision identifies only ten (10) types of disputes over which the court has jurisdiction.
- Subsection 2 provides:
- An application claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer’s organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
24. The issue of jurisdiction of the Employment and Labour Relations Court has been addressed in a catena of decisions and from as early as 2012 in *United States International University (ISIU) v Attorney General* [2012] eKLR where Majanja J held:
- “... By virtue of Article 162(3), Section 12 of the Industrial Court Act 2011, has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret *the constitution* and fundamental rights and freedoms is incidental to exercise of jurisdiction over matters within its exclusive domain...”
25. The Court of Appeal cited the foregoing sentiments in *Daniel N. Mugendi v Kenyatta University & 3 others* [2013] eKLR.
26. See also *Attorney General & 2 others v Okiya Omtata & 14 others* [2020] eKLR and the Supreme Court decision in *Kenya Tea Growers Association & 2 others v National Social Security Fund & 13 others* [2023] KESC 63 (KLR).
27. The gravamen of the respondent’s case is that the court has no jurisdiction to hear and determine the instant suit because the employer’s suit relates to the recovery of special and general damages, which according to counsel are not employment related matters and cited the decision in *Maisha Mapya Kenya Foundation Ltd v Shikuku & another* (supra) where the court upheld the Preliminary Objection that the court had no jurisdiction.
28. In that case, the claimant sought special and general damages and costs of the case.
29. In the instant case, the claimant’s case is that the respondent diverted the amount claimed as its employee through misrepresentation that he owned the quarry and was therefore recoverable and cited the decision in *Junction Forex Bureau Ltd v Walid Mohammed Ratique* where the Judge allowed the claim by the claimant to recover Kshs.16,500,000.00 with interest from the former employee.
30. In that case, the court relied on the principle of utmost good faith to hold that the former employee was liable to account for the money he had not account for.
31. Under the horizontal doctrine of precedent or stare decisis a prior decision of a court of co-ordinate jurisdiction is binding but may be departed from if the court is satisfied that there are good reasons to



- do so and where there are two conflicting decisions, the court is free to adopt any or chart a new path as circumstances justify.
32. In the instant case, the court is at liberty to apply any of the two decisions or distinguish them and proceed accordingly.
  33. Although a contract of employment is not a contract of *uberimae fidei*, of the utmost good faith per se, such as the insurance contract, or partnership agreement, it has elements of the principle of utmost good faith in that an employee is required to complete employment documents honestly and as comprehensively as requested for. Honesty and truthfulness are essential elements and many employers require a medical report on the physical and mental fitness of the employee.
  34. Relatedly, essentials of utmost good faith are further pronounced by the duties and responsibilities which the employee is engaged to discharge and in particular where the employee is expected to handle monetary transactions in the course of his/her employment in which case the employee is in such circumstances required to exhibit trust, confidence and good faith and maintain proper records.
  35. The employer on the other hand depends on the honest performance of the employee but who, regrettably, may have a selfish motive for doing otherwise.
  36. In *Herbert v Lankershim* [1937] 9 Cal.201 409, 483, [71p.2d 220] the court defined a fiduciary as:

“any relationship existing between parties to a transaction where in one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent...”
  37. See also *Rickel v Shwinn Bicycle Co* [1983] 144 Cal.App 3d 648 654 [192cal.Reptr 732].
  38. A person in a fiduciary relationship is precluded from profiting or advantage from his/her dealings with 3<sup>rd</sup> parties and the person in whom confidence is reposed.
  39. Evidence on record shows that the respondent was appointed as the Operations Manager of the claimant's quarry crusher plant operations to manage and co-ordinate all aspects. He was overall in-charge and the claimant's right hand person as the team leader. It was his duty to formulate strategies to improve efficiency, training, performance, evaluation plant performance and enhance performance.
  40. Additionally, it was his duty to maintain quality standards in production, planning, maintenance, safety and cost optimization.
  41. Thus, the respondent was in charge of all aspects of the claimant's quarry crushing plant and dealt with the claimant's customers on a daily basis and in the absence of the claimant.
  42. The respondent, in the court's view stood in the same position as a fiduciary, analogous to a director, partner or trustee and thus owed the claimant the basic obligations of a fiduciary, namely, confidence, trust, honesty and good faith, including the duty to account and avoid conflict of interest.
  43. The claimant's case, as adverted to elsewhere in this ruling is that the respondent retained the claimant's money paid by 3<sup>rd</sup> parties for purchase of quarry products and because the respondent was in charge of operations, he misconducted himself by failing to render an honest account of his dealings with 3<sup>rd</sup> parties in his capacity as an employee.



44. In the court's considered view, the respondent and the claimant had a contract of service under which the respondent oversaw all aspects of the claimants quarry crashing business including payments by 3<sup>rd</sup> parties who purchased quarry materials. The respondent is sued on allegations of having diverted or misappropriated the claimant's money from 3<sup>rd</sup> parties in his capacity as an employee pursuant to the employment contract dated 1<sup>st</sup> August, 2023, which the respondent had not disowned evidentially nor has he disowned the cell-phone numbers or records availed by the claimant.
45. These are matters that require interrogation by the court through availing of evidence by the parties.
46. The claimant's case is grounded on the period the respondent served as its employee and was transacting business in the ordinary course of his duties as the claimant's Operational Manager.
47. The claimant, in the court's view has not sued for general damages, but for a specific sum which the respondent received in the course of his employment but did not hand over to the claimant.
48. The respondent's failure to hand over the cash entitled the claimant to sue its former employer for recovery of the money under an action, analogous to the common law action for money had and received.
49. The respondent, if proven to have retained the cash, unjustly enriched himself and could be held liable to reconstitute the amount retained and/or diverted or misappropriated.
50. The provisions of Section 12(1)(a) of the *Employment and Labour Relations Court Act* are clear that this court has jurisdiction to hear and determine "disputes relating or arising out of employment between an employer and an employee"
51. While the phrase "relating to" literally means connected in some way or having a relationship to, with "arising out of" denotes that something originates from or is caused by or directly connected to a particular source or situation.
52. While the phrase "relating to" appears to be restricted to the employment contract itself, the phrase 'arising out of' encompasses the contract of employment and other matters such as theft, misappropriation, diversion of funds and other nefarious activities, the employee may engage in.
53. Equally, under Section 12(2) of *Employment and Labour Relations Court Act*, the right of the employer to sue the employee is not restricted to the rights and duties under the contract of employment exclusively, such as over paid salary. It includes all matters arising out of the relationship as long as the employee acted in his/her capacity as an employee.
54. The court cannot fathom a situation whereby the employee is at liberty to sue the employer in the ELRC for everything that arises or happens in the course of his/her employment but the employer's actions based on the same relationship were enforceable by the ELRC or the High Court depending on the relief sought.
55. Section 12(3)(i) – (viii) of the *Employment and Labour Relations Court Act* provides an elaborate list of the reliefs the court may grant in exercise of its jurisdiction under the Act in the hearing and determination of disputes relating to employment and labour relations and connected purposes. In the court's view, this provision confers upon the court jurisdiction to award special and general damages in any of the circumstances contemplated by the Act or any other written law.
56. Additionally, the court has jurisdiction, has power to award compensation or "any other appropriate relief as it may deem fit to grant".



57. Finally, the provisions of Section 12 of the *Employment and Labour Relations Court Act* are emphatic that an action may be instituted “by or against an employee”, employer or other persons mentioned in Section 12(2), and it follows that the court has jurisdiction to grant appropriate Orders as by law required.
58. From the foregoing, it is discernible that the court is satisfied that it has the requisite jurisdiction to hear and determine the claimant’s case against the respondent.
59. Consequently, the respondent’s notice of Preliminary Objection dated 17<sup>th</sup> September 2025 is devoid of merit and it is dismissed with no Orders as to costs.
60. Parties have 14 days to comply in readiness for hearing of the main suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2025.**

**DR. JACOB GAKERI**

**JUDGE.**

**ORDER.**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI.**

**JUDGE**

**DRAFT**

