



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT KISUMU**

**MISCELLANEOUS APPLICATION NO. E066 OF 2025**

FRED BOGE & 12  
OTHERS.....**APPLICANTS**

**VERSUS**

MIWANI SUGAR COMPANY (1989) LTD  
(IN RECIEVERSHIP).....**1<sup>ST</sup>**

**RESPONDENT**

CROSSLEY HOLDINGS LIMITED.....**2<sup>ND</sup>**

**RESPONDENT**

**RULING**

1. The Respondent raised an objection through a Notice of Preliminary Objection dated 7<sup>th</sup> October 2025, the 2<sup>nd</sup> Respondent contends that this suit is incompetent and

should be struck out for want of jurisdiction on the ground that no employer-employee relationship exists between itself and the Applicants. It further maintains that there is no privity of contract between it and the Applicants, asserting that it is not a party to the contract between the Applicants and the 1<sup>st</sup> Respondent.

2. On 22<sup>nd</sup> October 2025 the Court directed that the Preliminary Objection be canvassed by way of written submissions. Both parties filed their submissions.

### 2<sup>nd</sup> Respondent's Submissions

3. The 2<sup>nd</sup> Respondent reiterates that no employment relationship exists between itself and the Applicants. It points to the Applicants' application dated 23<sup>rd</sup> September 2025, where the Applicants expressly described themselves as employees of the 1<sup>st</sup> Respondent. It submits that, under Article 162 of the Constitution, read together with section 12 of the Employment and Labour Relations Court Act, this Court only has jurisdiction to hear disputes arising from employer-employee relationships. In support, it relies on

**Republic v Karisa Chengo & 2 others SC Petition No. 5**

**of 2015 [2017] eKLR**, where the Supreme Court observed:

*“Pursuant to Article 162(3) of the Constitution, Parliament enacted the Environmental and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts with suis generis jurisdiction, is provided for. We therefore entirely concur with the court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165 (5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”*

4. The 2<sup>nd</sup> Respondent emphasises that a court's jurisdiction only flows from the Constitution or legislation or both and the court cannot arrogate itself jurisdiction exceeding that provided in law. Additionally, it asserts that lack of jurisdiction is not a mere procedural technicality but goes to the root of the matter, citing **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others [2012] eKLR**. It also cites **In the Matter of Interim Independent Electoral Commissions, Constitutional Application No. 2 of 2011 [2011] eKLR**, where the Court held that where the Constitution exhaustively sets out a court's jurisdiction, the court must operate strictly within those constitutional limits and cannot expand its mandate through judicial innovation; nor can Parliament confer jurisdiction beyond the Constitution. The 2<sup>nd</sup> Respondent contends that since the Applicants' grievances against it revolve around alleged violations of their fundamental rights, the proper avenue for redress would have been a constitutional petition. It therefore urges the Court to find

that it lacks jurisdiction and to strike out the suit against it with costs.

### Applicants' Submissions

5. The Applicants submit that the issues surrounding the 2<sup>nd</sup> Respondent's takeover of the 1<sup>st</sup> Respondent as well as their employment status are factual in nature and cannot be determined by a Preliminary Objection. They draw attention to the fact that their status remains uncertain as their contracts with the 1<sup>st</sup> Respondent have not been terminated, yet the 2<sup>nd</sup> Respondent has denied them access to their workstations. They further submit that the 2<sup>nd</sup> Respondent has not demonstrated that their application dated 23<sup>rd</sup> September 2025 is incompetent or misconceived. For this reason, they assert that the 2<sup>nd</sup> Respondent has not met the threshold for striking out pleadings under Order 2 Rule 15 of the Civil Procedure Rules, which requires clear evidence of abuse of process. They rely on the case of **DT Dobie Company (Kenya) Ltd v Muchina [1982] KLR**, where the Court held that:

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is incurably bad. As long as a suit raises some semblance of a cause of action, it ought to be allowed to proceed to hearing.”*

6. In conclusion they urge the court to dismiss the Preliminary Objection with costs.

#### Disposition

7. The objection will either fall or stand on the basis of **Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd. [1969] EA 696** the *locus classicus* on preliminary objection. Chiefly, the basis for a preliminary objection is that it must be on a point of law that arises clearly from the pleadings. It cannot be raised where facts that require evidence, for instance where documents or oral testimony are needed, are in contention. A preliminary objection is raised on the assumption that the facts presented by the opposing side are correct. A preliminary objection should be able to dispose of the suit in its entirety and cannot be raised

if there is a requirement for the court to exercise its discretion.

8. The objection raised herein is, plainly put, that there exists no employer-employee relationship between the 2<sup>nd</sup> Respondent and the Applicants. That is a question of fact. Evidence would have to be led to prove or disprove that hypothesis. Such an issue cannot be determined *in limine*. On that score alone, the preliminary objection fails as the Court has to ascertain facts. The objector was cognisant of this when raising the preliminary objection. Preliminary objection is therefore dismissed with costs to the Applicants. There will be directions on the disposal of the Miscellaneous Application before me immediately after this Ruling.

Orders accordingly.

**Dated and delivered at Kisumu this 27<sup>th</sup> day of**

**November 2025**

**Nzioki wa Makau, MCI Arb.  
JUDGE**