

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPELLATE DIVISION**  
**CIVIL APPEAL NO. E954 OF 2024**

**MAYFAIR INSURANCE CO. LTD..... APPELLANT**

**-VERSUS-**

**HANNAH WANJIKU NJERI..... RESPONDENT**

*(Being an appeal against the Ruling of the Hon. P. K. Rotich (SPM) delivered on 26<sup>th</sup> July, 2024 in Nairobi Milimani CMCC No. E061 of 2024)*

**JUDGMENT**

1. This appeal emanates from the ruling delivered on 26.07.2024 by the lower Court in **Nairobi Milimani CMCC No. E061 OF 2024** (*hereafter the lower Court suit*). The history leading to the instant appeal is that **Hannah Wanjiku Njeri**, (*hereinafter the Respondent*), the plaintiff before the lower Court, initiated suit by way of plaint as against **Mayfair Insurance Co. Ltd**, (*hereinafter the Appellant*), the defendant before the lower Court seeking *inter alia* judgment in the sum of Kshs. 994,500/- being costs of repairs, towing fees and costs for the car hire; in the alternative and without prejudice, that the amount mentioned above be apportioned between the insured and the Appellant in the ratio of the value insured to the value of the motor vehicle at the time of the accident; interest on the claim at CBK rate, or what the honorable Court finds reasonable, from the date the insured sought reimbursement of repairs from the Appellant, until payment in full; and costs of the suit plus interest thereon at Court rates.

2. The gist of the Respondent's claim was that the registered owner of **Motor Vehicle Reg. No. KDA 600F** (*hereafter the suit motor vehicle*), one Nancy Wanjiru Wanjiku (donor), vide a power of attorney dated 31.12.2020, granted her the power to act as donee on all aspects in relation to the suit motor vehicle. That the registered owner took out a comprehensive cover with the Appellant for the suit motor vehicle to run between October 2020 to October 2021. The Respondent further averred that on 16.09.2021 while driving the suit motor vehicle, she was involved in an accident along Outer Ring Road. That upon reporting the accident to her agent and police station she was issued with an abstract whereafter on advice of the agent she repaired the suit motor vehicle at a cost of Kshs. 814,500/- and further incurred costs of Kshs. 30,000/- as towing fees and Kshs. 150,000/- being costs for hiring an alternate vehicle for fifty (50) days pending repairs to the suit motor vehicle. That despite demand to the Appellant claiming the expended costs it has vehemently refused to pay for reasons that it was uneconomical to repair the vehicle and that the insured assumed risk when she rejected the writing-off of the vehicle by repairing it. That Respondent urged the Court to find that she has a right to claim indemnification by the Appellant for the loss following the accident involving the suit motor vehicle.
3. The Appellant filed a statement of defence denying the key averments in the plaint meanwhile averred that there only subsisted a policy of insurance with the donor in respect of the suit motor vehicle, to wit, there was no insurance policy at any material time between Respondent (as donee) and the Appellant in respect of the suit motor vehicle. It was further averred that the insurance policy was vitiated in toto by the donor when she failed to immediately declare to the Appellant the donee's acquisition of a

financial/equitable/insurable interest over the suit motor vehicle whilst the insurance policy was still in force.

4. Subsequently, the Appellant proceeded to file a Preliminary Objection (PO) dated 27.03.2024 to the Respondent's suit seeking to strike out the latter's claim with cost premised on the following grounds-; that though the Respondent's suit is for alleged breach of contract on the part of the Appellant, the Respondent's pleadings are explicit that there subsisted no insurance policy at any material time between the Respondent and the Appellant in respect of the suit motor vehicle; that by dint of the doctrine of privity of contract, the Respondent lacks the requisite *locus standi* to institute or maintain a suit arising from the purported breach of the terms of the insurance policy by the Appellant; and that the honorable Court is legally obligated to strike out the Respondent's suit with costs.
5. In response to the PO, the Respondent filed a replying affidavit asserting among other issues that by dint of the power of attorney she has the requisite *locus standi* to prosecute the suit, to wit, the Court ought to strike out the Appellant's PO with costs. It was further asserted that in the alternative and without prejudice to the aforestated, the Court ought to exercise its discretion to accord the Respondent leave to substitute parties therefore curing the omission rather than striking out the suit.
6. The Appellant's PO was disposed of by way of written submissions. By way of a ruling delivered on 26.07.2024, the trial Court dismissed the Appellant's Preliminary Objection. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder -:

***“1. The learned Magistrate erred in law and in fact by finding that the Appellant’s preliminary objection did not raise a pure point of law.***

***2. The learned Magistrate erred in law and in fact by finding that the Appellant’s preliminary objection was not based on uncontested facts.” (sic)***

7. Directions were taken on disposal of the appeal by way of written submissions. The parties duly complied. That said, this Court has considered the rival submissions, authorities relied on alongside the record of appeal.
8. The duty of this Court as a first appellate Court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See **Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123 and Abok, James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**
9. The Respondent’s preliminary objection dated 27.03.2024 before the trial Court was saliently premised on the twin grounds that there existed no policy of insurance between the Appellant and Respondent over the suit motor vehicle; and that by dint of the doctrine of privity of contract, the Respondent lacked the requisite *locus standi* to institute or maintain the lower Court suit. The trial Court in a terse ruling dismissed the Appellant’s preliminary objection by stating *inter alia* that:-

***“Before me is the defendant’s preliminary objection dated 27/03/2024. In the objection the defendant avers that it is explicit from the plaintiff’s pleadings that there subsisted no***

***insurance policy at any material time between the plaintiff and the defendant herein in respect of the motor vehicle registration number KDA 600F Nissan X-trail.***

***Accordingly, by the directions of the doctrine of privity of contract, the defendant stated, the plaintiff lacks locus standi to institute or maintain a suit arising from purported breach of terms of the insurance policy by the defendant.***

***On the other hand the plaintiff's counsel submitted that namely Wanjiku Wajiru the registered owner of the aforesaid motor vehicle, vide the power of attorney date 31/12/2020 granted the plaintiff the power to act on her behalf in aspects in relation to the vehicle.***

***The issue for determination by the Court in his matter is whether the preliminary objection raised by the defendant is valid.***

.....

***It is not in doubt that the preliminary objection raised herein is not a pure point of law based on uncontested facts. The preliminary objection is misconceived and bad in law and the same is dismissed with costs." (sic)***

10. As earlier captured in this judgment, the Appellant's preliminary objection was dismissed. The trial Court's rationale for dismissing the preliminary objection was solely anchored on the fact that it was not based or grounded on a pure point of law.
11. As to the nature of a preliminary objection, the same has since been long settled within our jurisdiction in the celebrated decision of **Mukisa Biscuits Manufacturing Company Ltd.** It was held therein that -;

***"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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a***

***submission that the parties are bound by the contract giving rise to the suit to refer the matter 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, or occasion, confuse the issues, and this improper practice should stop.”***

See also-; **Oraro v Mbaja [2005] KLR 141 and Kigwor Company Limited v Samedy Trading Company Limited [2021] KECA 810 (KLR)**

12. In **Mulemi v Angwenye & Another [2021] KECA 214** the same Court further distilled the definition of a preliminary objection as elucidated in **Mukisa Biscuits** (supra) by stating as follows-;

- “i) It must be a pure point of law;***
- ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;***
- iii) If argued as a pure point of law, it may dispose of the suit;***
- iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court’s discretion”.***

13. *Ex facie*, the Appellant’s preliminary objection did not cite any specific provision of statute that it was anchored on. At the risk of repetition, it took issues with Respondent’s suit on grounds that there existed no policy of insurance between the Appellant and Respondent over the suit motor vehicle therefore by dint of the

doctrine of privity of contract, the Respondent lacked the requisite *locus standi* to institute or maintain the lower Court suit.

14. The Appellant has submitted that by implication of the Respondent's and Appellant's pleadings it is one Nancy Wanjiru Wanjiku and not the Respondent who took out a policy of insurance over the suit motor vehicle, which policy, is the subject matter of the suit before the lower Court. That without having to delve into the merits of the suit, a plain reading of the Plaint, Defence and the Respondent's Replying Affidavit revealed that the Respondent's cause of action premised on breach of the terms of a Policy of Insurance – a Policy of Insurance, it is uncontested that the Respondent was not a party to the said policy of insurance. While calling to aid the decision **Mukisa Biscuits** (supra) and **Agricultural Finance Corporation v Lengetia [1982-88] 1 KAR 772**, counsel for the Appellant posited that the question concerning the Respondent's lack of privity to the policy of insurance in respect of the suit motor vehicle was a pure issue of law that would determine the Respondent's right to institute or maintain the lower Court suit. Therefore, the trial Court was in error by dismissing the Appellant's preliminary objection.
15. In riposte, the Respondent maintained that she was endowed with the requisite *locus standi* on the premise of the power of attorney dated 31.12.2020. That the Appellant's objection did not raise a pure point of law given the facts it required proof by calling evidence from either side whereafter the trial Court was to embark on fact-finding exercise. The provisions of **Order 9 Rule 2** of the **CPR** and the decision in **Loise Wanjiru Meru & 3 others v John Migui Meru [2017] eKLR** was cited in the forestated regard.

16. With the above in reserve, **Black's Law Dictionary, Tenth Edition** defines *locus standi* as: "...the right to bring an action or to be heard in a given forum." "The Court of Appeal in **James Teko Lopoyetum v Rose Kasuku Watia & 4 others [2021] eKLR** reiterated its decision in **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** where it held-:

***"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."***

17. In **Sheila Nkatha Muthee v Alphonse Mwangemi Munga & Another [2016] eKLR** it was stated that-:

***"Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent."***

18. It is well-trodden that a preliminary objection is a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Earlier, in this judgment the Court has highlighted the gist of the Appellant's objection, while the latter has solely focused on the fact that from the implication of pleadings it is not disputed that there did not exist a contract of insurance or policy of insurance as between itself and the Respondent, the Appellant appears to brush aside the Respondent's explication that she was endowed with locus to file suit by dint of a power of attorney donated by Nancy Wanjiru Wanjiku.

19. While I agree with the Appellant, that the question of *locus standi* is a pure point of law which arises by clear implication out of pleadings, and which if argued as a preliminary point, would dispose of the Respondent's suit, there are factual questions concerning the power

of attorney that as rightly posited by the Respondent would require this Court to undertake a fact-finding endeavor.

20. As pithily observed in **Mulemi v Angwenye** (supra), a preliminary objection cannot succeed "if any fact has to be ascertained; or if what is sought is the exercise of the Court's discretion" Here, while the question of contract of insurance may have arisen from implication of the pleadings, the issue concerning the power of attorney was dispute, to wit, requires of the Court to ascertain factual issues thereby ousting the Appellant's preliminary objection from the strict definition and realms as settled in the celebrated decision of **Mukisa Biscuits** (supra) and **Oraro v Mbaja** (supra).

21. I note that the trial Court did not expend much industry in offering an explanation as to how it arrived at its determination however notwithstanding the same, the final determination by the lower Court that preliminary objection is not a pure point of law cannot be faulted. Consequently, without having to belabor further on the issue it is the Court's logical conclusion that the appeal herein lacks merit and is therefore dismissed with costs to the Respondent.

22. Orders Accordingly!

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 18<sup>TH</sup> DAY OF DECEMBER 2025.**

**HON L P KASSAN  
JUDGE**

**In the presence of;**

Njoroge for Appellant

Ms Soi for Respondent

ORIGINAL