



REPUBLIC OF KENYA



**Makenga v Kanyeke & another (Civil Appeal E307 of 2024)
[2026] KEHC 677 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E307 OF 2024
BM MUSYOKI, J
JANUARY 30, 2026**

BETWEEN

ERIC MUTUNGA MAKENGA APPELLANT

AND

PETER KANYELE 1ST RESPONDENT

MINERAL ENTERPRISES LIMITED 2ND RESPONDENT

(Being an appeal from ruling and orders in the Small Claims Court at Ruiru (Hon. J.K. Tawai Adjudicator/SRM) dated 17th October 2024 in claim number E532 of 2024)

JUDGMENT

1. The appellant filed claim before the lower court for compensation for pain and suffering as a result of personal injuries he sustained in an accident involving motor vehicle registration number KAT 905H on 11-07-2024. The 1st respondent was the driver of the said motor vehicle which was registered to the 2nd respondent. The respondents filed a response to the claim in which they admitted the occurrence of the accident but pleaded that the accident was inevitable and denied negligence on the part of the 1st respondent.
2. When the matter came for hearing on 17-10-2024, the respondent raised a preliminary objection on the court's jurisdiction on ground that the appellant was an employee of the 2nd respondent and the injuries were sustained in the course of his duties and as such, the matter belonged to Director of Occupational Safety and Health.
3. In a short ruling delivered on the same date, the trial court stated as follows;

‘I have considered preliminary objection dated 17-10-2024 together with submissions of both counsel. I have looked at the documents filed in court. The attendance list Rext 1 clearly



shows that the claimant is a turn boy who was at work on the day of accident from 6.00 am and signed off at 10.00 pm.

4. The Dosh form Rexh 2 shows that claimant was treated under the medical cover of the 2nd respondent and he's referred to as an employee of the 2nd respondent.
5. The personal history form Rexpt 3 adduced clearly signed by claimant shows that he had an employment contract with 2nd respondent.
6. The above evidence is enough prove of existence of employer-employee relationship between claimant and 2nd respondent.
7. Consequently, this court finds that it is devoid of jurisdiction to hear and determine this claim as it falls under the *Work Injury Benefits Act*.
8. Consequently, this claim is hereby struck out with costs of Kshs 1,000/- to the respondents. Orders to apply to SCC E531/2024.'
9. What is a preliminary objection has been subject of many cases and the definition has consistently remained the same. A preliminary objection must have the ability to dispose of the entire claim without calling any evidence or requiring interrogation of any contested facts. It must be purely on a point of law and discernable from the pleadings without the necessity of the court going into the evidence of the parties.
10. Where the matter raised by the party as a preliminary objection would require the court to make enquiries outside the pleadings, it ceases to be a preliminary objection. I am in agreement with the holdings cited by the appellant in *Ongoro v China Road & Bridges Corporation Kenya & another* [2022] KEELRC 1282 (KLR) and *Republic v Attorney General [sued for and on behalf of the Ministry of Lands] & 2 others Ex parte South and Central [Thika] Investments Limited & another* [2016] KEHC 7764 (KLR).
11. I also get guidance in holding of the Supreme Court of Kenya in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] KESC 23 (KLR) 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. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.'
12. It was also held in *B v Attorney General* [2004] KEHC 2605 (KLR) that;

'A preliminary objection should be founded on pure points of law and should be truly prefatory and preparatory to the issues of substance in the claim in question. Such an objection may also touch on uncontested facts, on the basis of which a decision by the court would dispose of the whole matter coming before it in limine.'
13. I have looked at the statement of claim dated 26-08-2024, the response to the claim dated 25-09-2024 and the reply to response dated 27-09-2024. These were the pleadings in the matter. It is clear from the ruling of the Adjudicator that her decision was informed by her assessment and examination of the respondent's documents which had not even been produced in evidence. List and bundle of documents cannot be pleadings by any definition neither can any other documents filed together with the statement which are in my view evidence and can only become part of the court record once they are



formerly produced. The Court of Appeal held in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] KECA 334 (KLR) that;

‘In *Des Raj Sharma -v- Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa -v- The State* (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

14. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.’
15. The pleadings of the parties have not mentioned the nature of relationship between the parties. All that is pleaded in both parties’ pleadings is that the appellant was a lawful passenger in the 2nd respondent’s motor vehicle. It is obvious that the respondents’ counsel referred the court to their list and bundle of documents in support of their preliminary objection and it is clear to me that the court made reference to the documents which informed her decision to uphold the preliminary objection.
16. In her ruling, the Adjudicator stated that the respondents’ exhibits 1, 2 and 3 were evidence enough that the relationship between the appellant and the 2nd respondent was that of employer-employee. In my view, this was a wrong approach to take in dealing with the preliminary objection. The appellant and the respondents had on the date the objection was raised come to court ready to proceed and there was no indication that the parties had agreed or the court had directed that the matter would proceed by way of documents under Section 30 of the *Small Claims Court Act*.
17. If directions had been taken that the matter would proceed by way of documents without calling witness, the Adjudicator would have been right in resorting to reference to the documents in her ruling. What she referred in her ruling as respondent’s exhibits were not such as they had not been produced neither had they been subjected to the requisite evidential test. Venturing into analysis of documents which were neither pleadings nor produced as exhibits, the court digressed from the realm of a preliminary objection and fell into an error of law.
18. Consequently, this appeal succeeds with the result that the ruling and order of the trial court dated 17-10-2024 deserves to be set aside. In effect I hereby make the following orders;
 1. The trial court’s ruling and orders dated 17-10-2024 striking out the appellant’s claim is hereby set aside.
 2. Respondent’s preliminary objection dated 17-10-2024 is overruled and the matter is reinstated and remitted to the trial court for hearing or further directions.
 3. The appellant is awarded the costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.



Judgment delivered in absence of the appellant and in presence of Miss Kyele holding brief for Miss Njuguna for the respondent.

