

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL SUIT NO. E002 OF 2026

EUNICE AWUOR BARRACK.....1ST
PLAINTIFF
BARACOM SERVICES LTD.....2ND
PLAINTIFF

VERSUS

STANBIC BANK KENYA LTD.....
....DEFENDANT

RULING

[1] In response to the plaintiffs' Notice of Motion dated 27th January 2026, the respondent filed a Notice of Preliminary Objection dated 2nd February 2026 contending that:

[a] The application is fundamentally and fatally defective, as the plaintiff had failed to file a Plaint to anchor the request for interim orders; consequently, there is no substantive suit before the Court.

[b] This Honourable Court lacks the requisite pecuniary jurisdiction to entertain this matter, as the value of the subject loan is **KES 5,500,000/=** (as admitted at paragraph 3 of the Supporting Affidavit), which falls within the exclusive jurisdiction of the Magistrate's Court pursuant to **Section 7** of the Magistrates' Courts Act.

[c] Even if this Court were seized of jurisdiction, the suit has been filed in the wrong Division as the relationship between the parties is commercial in nature and, pursuant to **Section 11** of the High Court (Organization and Administration) Act, the matter ought to have been lodged in the Commercial and Tax Division rather than the Civil Division.

[2] Accordingly, the defendant prayed that the application and by extension the entire suit be struck out with costs.

[3] In what she purported to be a response to the defendant's Preliminary Objection, the plaintiffs contended that:

[a] The Plaint was accordingly filed and served upon the defendant together with the Notice of Motion dated 27th January 2026. They further asserted that they intended to file the suit herein as a commercial suit but erroneously filed the same as a civil case; and that this error was not deliberate or intentional.

[b] That the Court is nevertheless possessed of the jurisdiction to make the necessary orders for transfer since fees have been paid. The plaintiffs therefore prayed that an order of transfer be made moving this case to the Commercial Division of the Court.

[4] The Preliminary Objection was canvassed by way of written submissions. The defendant filed written submissions dated 6th February 2026 and provided a brief summary of the case, namely,

that sometime in the year 2018, the parties entered into a commercial arrangement wherein the defendant advanced a loan of KES 5,500,000/= to the plaintiffs. The defendant pointed out that this fact is undisputed and is expressly admitted in the first two grounds of the plaintiffs' Notice of Motion dated 27th January 2026. The defendant further stated that a dispute subsequently arose regarding the loan, prompting the plaintiffs to file the present application by which they now seek to have the defendant restrained from attaching their monthly M-Pesa commissions.

[5] In the premises, the defendants proposed the following issues for determination:

[a] Whether this Court has the jurisdiction to hear and determine this matter?

[b] Whether the plaintiff's application dated 27th January 2026 is defective and ought to be struck out?

[6] The defendant submitted that this Court lacks the pecuniary jurisdiction to hear and determine this matter because the loan that was advanced by the defendant to the plaintiffs is in the sum of **KES 5,500,000/=**. The defendant pointed out that this is expressly admitted in the second ground in support of the plaintiff's Notice of Motion application dated 27th January 2026. The defendant relied on **Section 7** of the Magistrates Court Act, which provides that claims below **KES 20,000,000/=** ought to be heard and determined by the Magistrates Court.

[7] The defendant further submitted that the court lacks the jurisdiction to transfer this file to the Magistrates court on the ground that the suit is a nullity. Reliance was placed on the **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** [1989] eKLR and **Mombasa Civil Appeal E067 of 2021: Coastal Bottlers Ltd v Aqualine Distributors Ltd** in which it was held:

Since the suit was a nullity, neither the reasons advanced nor the inherent powers of the court were capable of salvaging it. In the circumstances, we find that the learned Judge was wrong in allowing Mombasa CMCC 418 of 2010 Aqualine Distributors Ltd vs Coastal Bottlers Ltd to be transferred from the Chief Magistrates’ court to the High Court for hearing and determination.”

[8] Further to the foregoing, the defendant submitted that the instant application arises from a loan facility agreement between the applicant and the respondent, a regulated financial institution; and therefore the crux of the applicant’s grievance pertains to matters banking and related financial services. In the defendant’s submission the matter falls within the definition of a commercial dispute. On that account the defendant submitted that this suit ought to have been filed in the Commercial Division. The defendant relied on **Section 11** of the High Court (Organization and Administration) Act, to support the submission.

[9] On whether the plaintiff’s application dated 27th January 2026 is defective and ought to be struck out, the defendant submitted that, since the plaintiffs did not file a substantive suit via a *Plaint*, there are no final or substantive orders sought by the plaintiff upon which the interlocutory application can be anchored.

The defendant cited **Section 19** of the Civil Procedure Act as read with **Order 3 Rule 1** which provides that every suit shall be instituted by presenting a Plaint to the Court, or in such other manner as may be prescribed. In the defendant's submission, the aforementioned provisions are mandatory, and not merely directory.

[10] The defendant relied on the decision of the **Court of Appeal in Civil Appeal No 5 of 1985: Geoffrey Ndungu Theuri v Law Society of Kenya** in which it was stated that:

"The order specifically refers to a suit which is defined under section 2 of the Civil Procedure Act in these terms: "suit" means all civil proceeding commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under order 39 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused section 3A of the Civil Procedure Act does not give the court the power to act without jurisdiction." [Our emphasis]

[11] The defendant also relied on the **Order 40 Rule 1(b)** of the Civil Procedure Rules which provides that:

Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

[12] Thus, it was the submission of the defendant that, since no suit has been properly filed before this Court, the applicant is not entitled to the orders sought for purposes of **Order 40 Rule 1** of the Civil Procedure Rules. Consequently, the defendant submitted that the instant application is fatally and incurably defective as it lacks an anchor Plaint where substantive and final orders have been prayed for.

[13] The defendant further submitted that the defect is not the kind that can be cured by **Article 159(2)(d)** of the Constitution, as the requirement to institute a suit by Plaintiff is a mandatory statutory imperative and not a mere technicality. To buttress this argument, the defendant made reference to the decision of the Court of Appeal in **Scope Telematics International Sales Limited v Stoic Company Limited & Another** [2017] eKLR in which it was held:

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.”

[14] In view of the foregoing, the defendant prayed that the Notice of Motion dated **27th January 2026** be struck out with costs.

[15] On their part, the plaintiffs proposed the following issues for determination vide their written submissions:

[a] Whether the application dated 27th January 2026 should be struck out or not?

[b] Whether the Preliminary Objection dated 4th February 2026 should be dismissed or not.

[16] The plaintiffs reiterated their posturing that the Notice of Motion dated 27th January 2026 was filed along with its

Supporting Affidavit deposed on 27th January 2026 by the 1st plaintiff, a Complaint dated 27th January 2026, a List and Bundle of documents, and list of witnesses and their statements all dated 27th January 2026. It was therefore their submission that their application dated 27th January 2026 is anchored on the Complaint dated 27th January 2026. They accordingly submitted that the Preliminary Objection is totally lacking in merit; and that instead of filing the Notice of Preliminary Objection, the respondent ought to have sought to be supplied with the Complaint.

[17] The plaintiffs relied on **Section 5** of the Civil Procedure Act, which states:

"Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred."

[18] They submitted that, in Kenya, the specialized Commercial and Tax Division of the High Court is primarily localized at the Milimani Law Courts in Nairobi, with a presence in Mombasa, focusing on business, insolvency, and tax disputes. They added that other High Court stations, Magistrates' Courts, and specialized courts, namely, the Employment & Labour Relations or Environment & Land, do not have this dedicated division and that High Court Stations outside Nairobi and Mombasa generally handle commercial and tax matters under the Civil Division. In their submission, for the defendant to insist that the instant suit

ought to have been filed in Commercial and Tax Division Court either in Nairobi or Mombasa is tantamount to denying them access to justice.

[19] The plaintiffs also submitted that their application addresses issues which are civil in nature and failure to initiate the proceedings as a commercial matter was an inadvertent mistake. They relied on **Article 159(2)** of the Constitution and **Section 26** of the High Court (Organization and Administrative) Act. The plaintiffs also adverted to the original unlimited jurisdiction of the Court as provided for in **Article 165(3)** of the Constitution.

[20] The plaintiffs submitted that the Preliminary Objection was filed with the ulterior motive of delaying the court process. They accordingly urged for its dismissal. In the alternative, the plaintiffs submitted that, should the Court find that it lacks jurisdiction to entertain the suit, the suit be transferred to the court with jurisdiction to determine the same so that the issues in dispute can be properly and finally adjudicated. They added that transfer of a suit from one court to another is essentially a procedural issue, and the defendant will not be prejudiced in anyway. They relied on **Joyce Muthoni Njoroge & 2 others v Joshua Gachie & another** 120211 KEHC 2901 (KLR) in urging for the dismissal of the Preliminary Objection with costs.

[21] What amounts to a preliminary objection was aptly defined in **Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd** [1969] E.A 696, to be:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a 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.

...

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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.”

[22] The purposes of a preliminary objection were explicated by the Supreme Court in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling)**, as follows:

“...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”

[23] The instant Preliminary Objection is on jurisdiction, and therefore, the single issue for determination is whether the Court has the requisite jurisdiction to hear and determine this suit. I also note that the defendant challenged the competence of the suit on the ground that no Plaint was filed alongside the Notice of Motion dated 27th January 2026, and therefore the suit is defective and ought to be struck out. I have no hesitation in rejecting this

ground because the court record confirms that the plaintiffs filed a Complaint dated 27th January 2026 along with a Verifying Affidavit, a List and Bundle of Documents as well as a List of Witnesses and their Statements. It may not have been filed in a conspicuous manner in the e-filing portal, but the fact is that there is a Complaint on record.

[24] It is now trite law that jurisdiction is everything and without it, a court must down its tools. In **The Owners of Motor vessel Lillian 'S' vs Caltex Kenya Limited** [1989] KLR 1 the Court held:

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

[25] Moreover, in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** [2012] eKLR, the Supreme Court pointed out that:

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

[26] The jurisdiction of the Court was challenged by the defendant from two different angles, namely, whether the suit was filed in the proper division of the Court; and whether the suit falls under the exclusive jurisdiction of the Magistrates Court.

[27] On whether the suit is defective for having been filed in the wrong division of the Court, it is indeed the case that the matter has the hallmark of a commercial dispute; and therefore would ordinarily fall within the jurisdiction of the Commercial Division of the High Court. It must be remembered however that for purposes of the provisions of the High Court (Administration and Organization) Act, this is a purely administrative arrangement and cannot be the basis for denial of access to justice. More importantly, the High Court in Homa Bay does not have a separate division specifically dedicated to hear Commercial and Tax matters. Even if there was such a division, the High Court is one entity and nothing prohibits transfer from one division to another division of the Court.

[28] The second ground on jurisdiction was that this is a suit that falls under the exclusive jurisdiction of the Magistrates Court, granted that the value of the subject matter is **KES 5,500,000/=**. In support of this argument, the respondent relied on **Section 7** of the Magistrates' Court Act. **Sub-section (1)** of that provision simply states that:

“A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—

- (a) twenty million shillings, where the court is presided over by a chief magistrate;
- (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
- (c) ten million shillings, where the court is presided over by a principal magistrate;
- (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
- (e) five million shillings, where the court is presided over by a resident magistrate.”

[29] Clearly, the provision simply prescribes and delimits the pecuniary jurisdiction of the Magistrates’ courts in civil matters. It is therefore anomalous for the respondent to argue that it gives the Magistrates’ courts exclusive jurisdiction to handle the subject matter value in sums thus prescribed. More importantly, in pitching this argument the respondent appeared to have lost sight of **Article 165(3)** of the Constitution which provides, inter alia, that:

- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;

[30] Where, as in this case, there is concurrent jurisdiction in view of the subject matter value, the solution is not to strike out the suit but to employ the provisions of **Section 18(1)** of the Civil Procedure Act and transfer the case to the Court with jurisdiction to entertain it. The provision states:

- On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—**
- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same;

[31] Consequently, and roundly considered, it is my considered finding that the defendant’s Preliminary Objection is baseless and

that it was ill-advised. It has often been held that the practice of improper raising of preliminary objections does nothing but unnecessarily increase costs and confuse issues and should stop.

[32] In the result, it is hereby ordered that:

[a] The defendant’s Preliminary Objection dated 2nd February 2026 be and is hereby dismissed with costs.

[b] This being a matter falling within the pecuniary jurisdiction of the Chief Magistrate’s Court, the suit be and is hereby transferred to the Chief Magistrate’s Court at Homa Bay for hearing and determination, pursuant to **Section 18** of the Civil Procedure Act.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY
THIS 24TH DAY OF FEBRUARY 2026**

.....

OLGA SEWE
JUDGE