

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E154 OF 2024

FRANCIS NJOGU NJIHIA.....
APPELLANT

VERSUS

DIRECTLINE ASSURANCE CO. LTD.....
RESPONDENT

(Being an appeal from the ruling and orders of the Honourable J.K Tawai R.M/ Adjudicator delivered on 29th April 2024 at the Ruiru Small Claims Court Case No. E126 of 2024)

JUDGEMENT

1. The appellant lodged a statement of claim dated 6th February 2024 seeking refund for compensation for costs and loss incurred due to the failure and negligence by the Respondent to fulfil its obligations. The claim was based on the fact that the Appellant motor vehicle registration number KCM 417R, insured with the Respondent, was involved in a road traffic accident resulting in a claim for compensation by one *Wickliffe Otieno Otieno* vide **Ruiru Civil Case E553/2022**.
2. The Respondent defended the suit and was found liable to pay Kshs. 1,215,624 after the matter went through full hearing. However, the Respondent neglected and refused to pay the amount despite demand. Consequently, the Appellant's motor vehicle registration KCM 417R was attached to settle the award. Ultimately, the Respondent paid the decretal amount but failed to remit the auctioneers charges of Kshs. 350,000.00. The subject vehicle stayed in the auctioneer's yard for 27 days accruing a total of Kshs. 351,000.00 the appellant's claim was thus for refund of the total amount of Kshs. 801,000.00.

3. When the Respondent failed to enter appearance, the court entered judgment in default of appearance in favour of the appellant against the Respondent for the sum of Kshs. 807,451.00 plus costs and interests.
4. The Respondent, dissatisfied with the decision, of the court filed an application seeking to set aside the *ex parte* judgment in default. The Respondent also filed a preliminary objection challenging the jurisdiction of the trial court to determine the claim on the basis that it was an execution proceeding couched as a claim for breach of contract. The trial court noted that the amount being claimed for emanates from execution of a decree that was issued by the **Ruiru SPMC No. 53 of 2022**, thus the court lacked the jurisdiction to enforce the decree of a higher court.
5. Consequently, the trial court set aside the *ex parte* judgement and the consequent decree and subsequently struck out the claim in its entirety with costs.
6. Aggrieved and dissatisfied with the finding of the trial court, the appellant instituted the instant appeal urging the following grounds:
 - i. ***The honourable learned magistrate erred in law by failing to appreciate the appellant case was for breach of contract and not seeking to enforce the decree in Ruiru Chief Magistrate SPMC No. 553 of 2022***
 - ii. ***The honourable adjudicator wholly misunderstood the issues before her, the preliminary objection applied wrong principles of law in arriving at the decision to allow the respondent preliminary objection dated 19th April 2024.***
 - iii. ***The honourable learned magistrate erred in law by grossly misdirecting herself in ignoring the evidence in the replying affidavit and***

written submissions presented and filed by the Appellant in their entirety.

- iv. The learned adjudicator erred in law in finding that it had no jurisdiction.**
- v. The learned trial magistrate erred in law in setting aside the ex parte judgment entered on 27th February 2024 and the decree therefrom and striking the claim dated 6th February 2024 entirely with no orders as to costs.**
- vi. The honourable magistrate erred in law and in fact by failing to apply herself judicially and to adequately evaluate the appellant's evidence, submissions and authorities thereto and the applicable law thus arriving at a decision unsustainable in law.**

7. Reason wherefore the appellant prayed that the appeal be allowed and the orders of the learned adjudicator of 29th April 2024 be set aside.
8. The court directed that the appeal be canvassed through written submissions.
9. The appellant submitted that the appellant's case is a claim for the refund of the paid auctioneers' charges of Kshs. 350,000.00, legal costs for hiring advocates for Kshs. 100,000.00, loss of use of Kshs. 13,000.00, daily for 27 days plus interest and cost of the claim all totalling to Kshs. 801,000.00. Thus, it was the appellant's submission that it was not seeking to enforce a decree but a claim for breach of contract. Therefore, the learned trial magistrate wholly misunderstood the law by failing to determine that the appellant's claim was rightly lodged at the Small Claims Court.
10. The Appellant urged that the appeal be dismissed.

11. The Respondent did not file any submissions.
12. I have looked at the pleadings by the parties together with the submissions and identified the main issue for determination to be whether the claim herein is merited.
13. The claim emanates from a ruling of the court on a preliminary objection. It would be useful to determine whether the preliminary objection was merited.
14. For a party to successfully argue it, the objection should be raising pure question[s] of law capable of disposing of a dispute at once. A court seized of a preliminary objection must, therefore, ascertain that it is not caught up with factual issues that would necessitate the calling of evidence.
15. The foregoing nature of Preliminary Objections was discussed in **Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd (1969) E.A 696 pg. 700** where the Court observed as follows: -

“...so far as I am aware, a preliminary objection consists of 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 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, on occasion, confuse the issues, and this improper practice should stop.”

16. In **Civil Suit No. 85 of 1992, Oraro vs. Mbaja [2005] 1 KLR 141**, Ojwang J, [as he then was], cited with approval the position in **Mukisa Biscuit -vs- West End Distributors (supra)** and stated as follows on the operation of Preliminary Objections:

“... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

17. In **Omondi v National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177**, it was observed that a Court in determining a Preliminary Objection can look the pleadings and other relevant documents, but it must abide by the principle that it must raise pure points of law. It was held:

“...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that

the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion."

18. Upon perusing the preliminary objection, I note that the question of whether those were execution proceedings or claim based on breach of contract is a question of fact that could not be disposed of as a preliminary objection.

19. I therefore concur with the appellant's submission that the trial court misdirected itself in finding that the preliminary objection court was merited.

20. Based on the foregoing, I find that the appeal is merited and the decision of the trial court is hereby set aside.

21. Final orders:

Appeal succeeds. I hereby set aside the decision of the trial court and order that the file be returned to the trial court to be determined on its merit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH, 2026.

**HON. T. W. Ouya
JUDGE**

**For Appellant.....Mulinge
For Respondent.....Ms Nyaminwa
COURT ASSISTANT.....Brian**