

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

MOMBASA

ELRC CAUSE NO. E092 OF 2024

RTW SHIPPING & LOGISTICS LTDCLAIMANT

VERSUS

FRANCISCA NYANDUKURESPONDENT

RULING

Background

1. Through a Notice of preliminary objection dated 17th June, 2025, the Respondent seeks that the Claimant's suit herein be struck out on the following grounds;
 - a) . THAT this Honourable Court lacks jurisdiction to adjudicate over the Dispute between the Claimant and the Respondent.
 - b) THAT the issues in dispute between the parties are purely civil and commercial in nature, and are not

governed by nor justiciable under the provisions of the Employment Act, 2007.

- c) THAT the suit in its entirety is frivolous, vexatious and a blatant abuse of the court and legal process and should be struck with costs to the Respondent.
2. Giving directions on the preliminary objection, this Court directed that it be canvassed by way of written submissions. The parties complied. Their submissions are on record.

The Respondent's Submissions

3. The Respondent submitted that the issue raised in the preliminary objection is a jurisdictional issue, which ordinarily is taken as a pure point of law. The Respondent relied on **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, to buttress the point.
4. It was emphasised that jurisdiction is fundamental to any proceedings and that where a court must find that it does not have jurisdiction in a matter, it must decline its jurisdiction and proceed no further. To support this

submission, reliance was placed on **Owners of Motor Vessel “Lilian S” v Caltex Oil (K) Ltd [1989] KLR.**

5. It was also submitted, citing Ngengi **Muigai v George Kangethe Waruhiu & 6 others [2021] eKLR**, that jurisdiction is determined from the pleadings. In the instant case, the pleadings disclose that the subject matter herein is not an employment dispute but a purely civil and commercial one, as the provisions of the Employment Act, 2007, do not apply. To buttress the submissions, the Respondent cited **Mohamed Ali Baadi and others v Attorney General & 11 others.**
6. Regarding the competence of the claim, the Respondent submitted that the claim was fatally defective, incompetent, and an abuse of the court process. It argued that the remedies sought by the Claimant are only available to employees; the Respondent was under the provisions of Sections 49 and 50 of the Employment Act.
7. The Respondent further submitted that the preliminary objection herein, which is properly taken, aims to conserve judicial time and resources. To buttress this point, the

objection has been raised for that purpose, and that, generally, preliminary objections are meant to serve that purpose, it placed reliance on **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR.**

8. The Respondent argued that the claim was a deliberate attempt to waste judicial time, that the allegations of unlawful termination were unfounded, and that the entire suit lacked merit. The whole suit should be struck out with costs. With costs, as costs follow the event in accordance with Section 27 of the Civil Procedure Act. To support this point, the Respondent cited the case of **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287.**

The Claimant's Submissions.

9. In opposition to the Respondent's Notice of Preliminary Objection dated 17th June 2025, the Claimant contended that the objection was incompetent as it did not meet the legal threshold of a properly raised preliminary objection. A valid preliminary objection must be based on a clear point of

law capable of disposing of the matter without reference to contested facts. The Claimant relied on **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** and **Oraro v Mbaja [2005] eKLR** and highlighted that a preliminary objection cannot be founded on disputed facts or require evidentiary interrogation.

10. The Claimant argued that the Respondent's objection improperly prompted the Court to decide factual issues, including whether an employment relationship exists and the character of the dispute, which can only be settled at a full hearing.
11. On jurisdiction, the Claimant submitted that the dispute arises directly from an employment relationship and falls clearly within the purview of the Employment and Labour Relations Court under Article 162(2)(a) of the Constitution of Kenya, 2010, and Section 12 of the Employment and Labour Relations Court Act, 2011. It was argued that the claim, which includes issues of unlawful resignation, notice pay, and compensation for constructive dismissal, is governed by the Employment Act, 2007.

12. The Claimant relied on **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR** and **Republic v Karisa Chengo & 2 others [2017] eKLR** to emphasise that jurisdiction is derived from the Constitution and statute. The Employment and Labour Relations Court, as a specialised court, has exclusive authority over employment disputes, which derives both from the Constitution and Statute.
13. The Respondent's attempt to characterise the dispute as purely civil and commercial is unfounded. The cause of action arose during the existence of an employment relationship and related to statutory employment rights. Claims, even with monetary or civil aspects, such as the reimbursement sought herein of USD 228,000, remain under the jurisdiction of the Labour court, as they are incidental to the employment relationship. The Claimant cited **Menginya Salim Murgani v Kenya Revenue Authority [2008] KEHC 1568 (KLR)**, to fortify this submission.
14. In response to the assertion that the lawsuit is frivolous and constitutes an abuse of the court's process, the Claimant

contended that such assertions are not solely legal questions but also necessitate an evaluation of evidence and substantive merits, thereby rendering them unsuitable for determination at a preliminary stage.

15. In conclusion, the Claimant contended that the preliminary objection lacked merit, did not satisfy the established legal threshold, and was aimed at prematurely dismissing a claim involving substantive and triable employment issues. The Court was therefore urged to dismiss the preliminary objection with costs and allow the matter to proceed to a full hearing.

Analysis and Determination

16. It bears repeating that the Constitution of Kenya, 2010, mandated under Article 162[2][a], the establishment of the Employment and Labour Relations Court, a specialised court to deal with employment and labour relations matters. This constitutional directive was given effect under a legislative framework, the Employment and Labour Relations Court Act.

17. The preamble of the Act reads;

“An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.”

18. Under the provision of Section 12, the Act then elaborately sets out the scope of the court.
19. In my view, a financial or operational loss occasioned by an employee in the course of and arising out of his or her employment relationship with the employer constitutes an employment and labour dispute. As such, the employer's claim for recovery, compensation, or damages must be instituted and adjudicated exclusively before the Employment and Labour Relations Court, which is vested with the proper jurisdiction over such matters.
20. Accordingly, such a claim cannot be properly filed, entertained, or determined in the ordinary civil or commercial courts, as doing so would amount to a fundamental mischaracterization of the dispute and a

violation of the established jurisdictional framework governing employment relationships.

21. By reason of the foregoing premises, it is not difficult to conclude that the jurisdictional preliminary objection as raised by the Respondent lacks merit. The preliminary objection is declined.

22. Nevertheless, this Court remains cognizant of the fact that the Respondent has lodged a claim for constructive dismissal against the Claimant. Constructive dismissal, as defined, is a doctrine that cannot be invoked by an employer against an employee. The claim for constructive dismissal, as invoked by the Respondent, is hereby struck out.

23. Orders accordingly.

Read Signed and Delivered this 12th Day of March 2026.

OCHARO KEBIRA

JUDGE