

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
COMMERCIAL AND TAX DIVISION
MILIMANI LAW COURT
CIVIL SUIT NO. E194 OF 2024

SILAS BIYOGO ONDIMU.....

1ST PLAINTIFF

BO SILAS LAW

ADVOCATES..... 2ND

PLAINTIFF

VERSUS

**EQUITY BANK (KENYA)
LIMITED..... DEFENDANT**

RULING

1. This Ruling arises out of a Notice of Preliminary Objection dated 28.3.2025. It was filed by the Defendant who raised objections on points of law to the entire suit on the following grounds:

1) So long as the Plaintiff's cause of action is based as the tort of defamation then the Lower Court has jurisdiction to determine the matter at the first instance and not this Honourable Court.

2) In that regard the present suit has not been appropriately filed and this Honourable Court lacks the requisite jurisdiction to determine the same.

2. The Defendant thus prays that the Plaintiff's suit be dismissed/ struck out with costs to the Defendant.

Background Facts

3. The 1st Plaintiff is a Law Firm while the Defendant is a Bank. The Law Firm held and operated its clients account with the Defendant Bank. The 2nd Plaintiff is an Advocate of the High Court of Kenya. He practices as such in the firm that has sued as the 1st Plaintiff. He also operated a Bank account with the Defendant.
4. The dispute arises out of instructions initiated by the 1st plaintiff to debit its account with the Defendant. The same funds were to be deposited/credited to the 2nd Plaintiff's Bank account with the Defendant. The Plaintiffs aver that the instructions were not followed to the letter. Though the funds were debited from the 1st Plaintiff's Bank account, they were not credited to the 2nd Plaintiff's Bank Account. There are also allegations of declined payments through the 2nd Plaintiff's ATM /Debit card, while he was making purchases at a supermarket.
5. The Plaintiff's avers that they were humiliated and embarrassed by the Defendants actions which amount to breach of a fidelity duty as a banker, breach of Bank customer relationship as well as breaching **Article 35(1)(b) of the Constitution of Kenya 2010**. This relates to violation of economic rights.

6. The Plaintiff, seeks the following reliefs in the Plaint;
- (a) *A declaration be and hereby issue that the Defendant breached customer bank relationship/contract between the Plaintiffs and Defendant.*
 - (b) *A declaration be and hereby issue that the Defendant breached the duty of care towards the Plaintiffs.*
 - (c) *A declaration be and hereby issue that the Defendant conduct was libelous in declining the instructions from the 2nd Plaintiff's ATM Debit Card.*
 - (d) *A declaration be and hereby issue that the Defendant's decision /action of debiting the 1st Plaintiff Bank Account and not offering any explanation, was contrary to Articles 35(1)(b) and 46(c) of the Constitution of Kenya 2010. The said decision/action is therefore, constitutionally infirm, null and void abinitio.*
 - (e) *A declaration be and hereby issue that the Defendant humiliated, embarrassed, inconvenienced, exposed the Plaintiffs to ridicule and caused distress to the plaintiffs.*
 - (f) *Damages for Constitutional infringement of the Plaintiffs rights.*
 - (g) *Damages for loss of credit and reputation by failure to honour the 1st and 2nd Plaintiff's instructions.*
 - (h) *General damages for breach of customer-bank relationship/contract between the Plaintiff and Defendant.*
 - (l) *General damages for defamation of the 2nd Plaintiff plus interest at Court rate from the date of filing suit until judgment is entered.*

- (j) *General damages for breach of the duty of care between the 1st and 2nd Plaintiff and the Defendant plus interest at Court rate from the date of filing suit until judgment is entered.*
 - (k) *Aggravated damages for triggering events which subjected the Plaintiffs to humiliation, ridicule, embarrassment, odium and failure by the Defendant to apologize.*
 - (l) *Damages for inconveniences and distress.*
 - (m) *Costs of this suit together with interest thereon; and*
 - (n) *Any other remedy that this Honourable Court may deem fit to award.*
7. The Defendant has filed a Statement of Defence, denying the claim and any wrong doing. It prays that the same be dismissed.
8. The Plaintiff has filed a Replying Affidavit sworn **by SILAS BIYOGO ONDIMU** on 3.4.2025.
9. The Court directed parties to file written submissions and also highlight the submissions.

Issues for Determination

10. The Court has considered the Notice of Preliminary objection, the Reply to the Preliminary Objection, the written submissions filed and the oral highlights by Counsel for the parties. The Court frames a single issue for determination as follows:
- (a) *Whether the preliminary objection is merited.*

Analysis

11. The leading case on raising a preliminary objection is the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696**. The Court of Appeal stated as follows:

“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 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’.”

12. The Court is invited to make a finding that this suit ought to have been filed at the Magistrates Court. That as per **Section 11 of the Civil Procedure Act** the suit should have been filed in the Court with the lowest competent grade to try it. **Section 11 of the Civil Procedure Act** states as follows:

11. Court in which suit to be instituted

Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county

competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

- (i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and**
- (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same county.**

- 13. The Defendant maintains that this is a claim arising out of breach of contract. That the general damages awarded may not exceed Ksh.20 million which is the ceiling jurisdiction of the Magistrates Court.
- 14. The Defendant urges the Court to make a finding that no general damages are available arising out of a claim for breach of contract. The Court is referred to **Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] eKLR.**

15. That since the same ought to have been filed before the Magistrates Court but was filed before the High Court, it ought to be struck out. That it is a routine defamation case and can be heard there.
16. The Plaintiffs on the other hand submit that the suit is not based entirely on the tort of defamation. That the suit is based on among others a claim arising out of breach of customer bank relationship/contract; an infringement of Plaintiffs rights, damages for constitutional infringements, damages arising out of defamation among others.
17. The Plaintiffs further submitted that they have pleaded their case fully. They rely on **Daniel Otieno Migori vs South Nyanza Sugar Co. Ltd [2018] eKLR.**
18. It was further pleaded that the suit is multi-faceted. The Plaintiffs relied upon **Opalla vs South Nyanza Sugar Company Limited Migori (Civil Appeal 127 of 2022) [2024].**
19. It is also submitted that the claim for infringement of economic rights under **Articles 35 (1) (b) and 46 (c) of the Constitution** ought to be tried before the High Court. This is as per **Articles 165 (3) (a) and (h) of the Constitution of Kenya** and **Section 5 of the High Court (Organization and Administration) Act Cap 8C of the Laws of Kenya.**
20. It is submitted that the Court should not shut out the Petitioner who alleges violation of rights granted by the Constitution. Reliance was placed upon **Law Society of Kenya & Supreme Court of Kenya & Another: Abdulahi SC & 19 Others (Interested Parties) (Petition E026 of 2024) [2024] KHEC 7819 (KLR). (Constitution and Human Rights) 28th June 2024) (Ruling); Nairobi Bottlers Limited vs Ndung'u & Another (Civil Appeal**

99 of 2018) [2023] and Kamau vs Itumbi (Civil Case No. E231 of 2021 [2023].

21. That the Magistrate's Court lacked jurisdiction to deal with issues of constitutional infringement and awarding of damages. That this was the sole preserve of the High Court.

(a) Whether the Preliminary Objection is merited.

22. To this Court, the issue that seems to vex the Defendant is that this suit should have been filed for trial before the Magistrates Court and not the High Court.

23. There is no submission made that the High Court lacks the jurisdiction to hear a claim arising out of defamation. The case of **Kamau vs Itumbi (2023) KEHC 18422 (KLR)** confirms that indeed the High Court can hear a defamation suit. The distinction being that this Court can award general damages in excess of Khs 20 million. The Magistrate's Court cannot make an award in excess of its pecuniary jurisdiction of Kshs. 20 million. The Court stated as follows:

"In Interactive Gaming & Lotteries Limited v Safaricom Limited (Commercial Civil Case E684 of 2021) [2021] KEHC 335 (KLR) (Commercial and Tax) (Ruling), Majanja J. agreed with the view expressed above by Justice Githua. I am also in agreement. The argument by the Respondent that the High Court has no jurisdiction to hear matters related to defamation is not sustainable in law. It is clear that both the High Court and the magistrate's court have jurisdiction in defamation matters except that the magistrate's court is limited by pecuniary jurisdiction of up to Ksh.20,000,000/=."

24. This Court is also persuaded that it has the jurisdiction to hear and determine cases arising out of infringement of the articles of the Constitution of Kenya. That jurisdiction also

extends to awarding of general damages arising from such infringements.

25. Lastly, Court notes that the Defendant invites the Court to exercise its discretion. That rather than dismiss or struck out the suit, the Court can also transfer the suit to the Magistrate's Court for hearing and disposal.
26. This calls upon the Court to exercise its discretionary powers. This runs contrary to the principles laid out in the **Mukisa Biscuit case**.
27. The Court notes that for a preliminary objection to succeed, it has to rely upon and raise pure points of Law.
28. Asking the court to exercise its discretion by transferring the suit to the Magistrate's Court reveals that the objection is not based on pure points of the law.
29. The submissions that the claim is one arising out of the tort of defamation and hence, general damages if awarded may not exceed Kshs.20 million, is highly speculative.
30. It is speculative to submit that Court may not award Kshs.20 million, should the suit succeed. This point is not conceded by the Plaintiffs. There are insufficient materials at this juncture to indicate that the Plaintiffs will succeed in their suit, or that the nature and measure of damages that may be awarded may not exceed Kshs.20 million.
31. Looking at the arguments advanced, perhaps the better way of dealing with the application would have been by way of filing an application for striking out rather than raising a Notice of Preliminary Objection. The Defendant/Applicant would have been able to present material evidence before the Court, by way of Affidavits.

32. As matters stand for now, the Court is restricted to determining the Notice of Preliminary Objection on points of law only. The Court should not deal with factual evidence.
33. This Court is of the considered opinion that it has not been sufficiently persuaded at this juncture, that it lacks the jurisdiction to hear and determine this case. There are issues that could be tried before the Magistrates Court, while other issues remain for hearing and determination before this court. It would therefore follow that this Court is clothed with the jurisdiction to try this claim.
34. To this Court the Preliminary Objection is not well taken. The same is dismissed.
35. As to the costs, the same lie at the discretion of this Court, unless the Court orders and directs otherwise. The costs of the Notice of Preliminary Objection dated 28.3.2025 are awarded to the Plaintiffs.

Determination

36. The Defendant's Notice of Preliminary Objection dated 28.3.2025 is hereby dismissed as lacking in merits.
37. The costs thereof are awarded to the Plaintiffs.
38. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS
16TH DAY OF APRIL, 2026.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Miss Chenger for the 1st and 2nd Plaintiff.

Miss Ameso for the Defendant.

Mr. Peter Wabwire - Court Assistant.