

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. E096 OF 2025**  
*(Before Hon. Lady Justice Monica Mbaru)*

**GEORGE TAITO KIBUNJA.....CLAIMANT**

*VERSUS*

**CUP OF JOE LIMITED.....RESPONDENT**

**RULING**

The ruling herein relates to the Respondent, Cup of Joe Limited's Notice of Preliminary Objection dated 13<sup>th</sup> October 2025. The objection is grounded on the contention that the suit offends the provisions of clause 16 of the employment contract and the internal employee grievance procedure, which call for the settlement of disputes informally. It is further contended that this Court lacks jurisdiction under Article 159(2)(d) of the Constitution and that the claim offends the doctrine of exhaustion. The Respondent therefore argues that the claim is premature and should be struck out.

On these objections, the Respondent submitted that clause 16 of the contract of employment directs parties to apply informal dispute resolution mechanisms, which the Claimant has failed to pursue, contrary to the doctrine of exhaustion.

The doctrine calls for the postponement of judicial consideration of matters to ensure that parties first apply alternative dispute resolution mechanisms, as required under Article 159 of the Constitution and as held in **Geoffrey Muthiga Kabru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR**.

The Respondent further submitted that the Claimant is inviting the Court to rewrite the contract binding the parties. It was argued that unless the Claimant can prove coercion, fraud, or undue influence, he is bound to comply with the contractual terms before approaching the Court, as held in **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited [2002] 2 EA**.

Additionally, the Respondent submitted that the Court has the authority to implement and enforce Article 159 of the Constitution by encouraging alternative dispute resolution mechanisms. Where an employment contract contains an arbitral clause, the Court should allow parties to address disputes pursuant to such terms, as held in **Nedermar Technology B.V. Ltd v Kenya Anti-Corruption Commission & another [2006] eKLR**.

On that basis, the Respondent urged the Court to allow the objection and strike out the suit.

The Claimant opposed the objection, submitting that his claim relates to unlawful and constructive dismissal from employment by the Respondent. He pointed out that the Respondent has already filed a response together with a

counterclaim. He argued that the objections based on clause 16 of the employment contract cannot oust the Court's jurisdiction and that the principles in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA** do not apply in the present case.

The Claimant further submitted that by filing a counterclaim instead of invoking clause 16 of the employment contract, the Respondent has submitted to the jurisdiction of the Court.

It was also submitted that the claim is premised on breach of contract and constructive dismissal, which are matters of fact rather than pure points of law. Such issues cannot be properly raised through a preliminary objection, as held in **Evergreen Marine (Singapore) PTE Limited & another v Petra Development Services Limited [2016] eKLR**. The Claimant argued that a party wishing to challenge jurisdiction must do so at the earliest opportunity, either by entering appearance under protest or by applying to stay proceedings. By filing a substantive response, the Respondent is deemed to have acceded to the Court's jurisdiction.

### **Determination**

Preliminary objections, by their nature, must be based purely on points of law and not on contested facts. Where issues raised require factual interrogation, they do not qualify as proper preliminary objections, as held in **Punyua v**

**Mwaniki & 2 others [2026] KECA 585 (KLR)** and as defined in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**.

In this case, the Respondent has heavily relied on **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR**, where the central issue was the exhaustion of statutory remedies. The Court in that case emphasized that courts ought ordinarily to be fora of last resort and that prescribed dispute resolution mechanisms should first be exhausted.

However, a clause in a contract of employment cannot operate to negate the law or the Constitution, which grants an aggrieved party the right to approach the Court in cases of unlawful, unfair, or wrongful termination of employment or constructive dismissal. Such jurisdiction is conferred under Article 162(2)(a) of the Constitution, the Employment and Labour Relations Court Act, and the Employment Act, among other statutes.

An employment contract clause requiring parties to address disputes informally does not raise a pure point of law. Furthermore, Article 159 of the Constitution should not be applied as a panacea in all cases. Where a legal right exists, the primary forum for an aggrieved employee remains the Court.

The preliminary objection filed by the Respondent does not meet the threshold established in **Mukisa Biscuit Manufacturing Co. Ltd v West End ELRC MOMBASA RULING CAUSE NO. E096 OF 2025**

**Distributors Ltd [1969] EA 696.** A proper preliminary objection must raise a pure point of law that has been pleaded or arises by clear implication and which, if determined, may dispose of the suit. In the present case, clause 16 of the employment contract necessitates factual inquiry, including whether it was properly invoked.

The Claimant’s allegations of wrongful and constructive dismissal require evidentiary examination. Such matters cannot be determined at the preliminary stage without delving into facts.

**Accordingly, the Respondent’s preliminary objection lacks merit and is hereby dismissed. Costs are awarded to the Claimant.**

Delivered in open court at Nairobi, this 23<sup>rd</sup> day of April 2026

**M. MBARŪ  
JUDGE**

**In the presence of:**

Court Assistant: Catherine and Omar

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