

a) THAT this court has no jurisdiction to hear this matter under Section 3 of the Law of Contract Act Cap 23, and Section 38 Land Act which provides as follows: -

"No suit shall be brought upon a contract for the disposition of an interest in land unless- (a) The contract upon which suit is founded- (i) Is in writing. (ii) Signed by all the parties thereof and (b) The signature of each party has been attested by a witness who is present when the contract was signed by such party."

b)The respondent has expressly admitted in paragraph 4 of his witness statement that this was a sale of land contract.

2. Aggrieved by this decision, the appellant filed a memorandum of appeal dated 7 March 2025, filed on the instant date, raising a single ground of appeal that the learned trial magistrate erred in law and fact in holding that the appellant's PO, which raised a point of law on jurisdiction, should be canvassed during the hearing of evidence by the parties. The appellant urged this court to allow the appeal and set aside the impugned ruling.

3. Thereafter, the appeal was canvassed through written submissions filed by the respective parties' counsel, with the appellant's filed by **Ms. Julius Nyakiangana & Co. Advocates** dated 3 October 2025 and the respondent's by **Ms. Ojjo Senaji & Associates** dated 6 October 2025. In those submissions, both counsel addressed the sole ground of appeal.
4. Accordingly, as this is a first appeal, the authority of this court is set out in **Order 42 Rule 32** of the **Civil Procedure Rules**. Additionally, the court shall be guided by the principles articulated in the well-cited case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123**, which encapsulates the guiding principles as follows: an appellate court shall not interfere with the challenged decision unless it is convinced that the learned trial magistrate misdirected herself and consequently arrived at an erroneous decision, exercised her discretion improperly, and thereby caused injustice through such an erroneous exercise.
5. Regarding the matter at hand, this court has carefully reviewed the records, the impugned ruling, and the competing submissions, and the single issue for determination is the ground of appeal. We will proceed.

6. As submitted by the respondent, the well-cited decision of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696** has long established the tests that a PO must satisfy, and it is vital to reaffirm the relevant principles derived from the landmark case, which articulated that:

“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.”

7. In affirming **Mukisa Biscuit (Supra)**, the Supreme Court of Kenya in **Aviation & Allied Workers Union Kenya v Kenya**

Airways Limited & 3 others [2015] KESC 23 (KLR)
emphasised the following on the threshold of a PO: -

“Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

8. Although this court agrees with the appellant that jurisdiction is everything, without it a court has no power to take one further step, as held in a line of court decisions, it is not in every instance that when a PO raises the issue of jurisdiction that such a point of law meets the legal threshold of a pure point of law, as in the case herein, where the PO called on the learned trial magistrate to consider a contract and to establish whether it was in writing, executed and attested by a witness present when the contract was executed. With all due respect to the appellant and in agreement with the respondent, these are factual matters that call for the adduction of evidence and would properly be addressed during the substantive hearing of the suit.
9. To this court and having considered the proceedings of the lower court particularly where proceedings were set aside to

allow the appellant to file his documents after the respondent had already testified, it is evident the PO was raised late in the day to forestall the hearing of the main suit on the merits, and such conduct is frowned upon by the court, as held by the apex court in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)**, where the court held:

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.

10. Accordingly, this court finds that PO raised matters of fact. It concludes that the learned trial magistrate exercised her discretion judiciously and with reason when she issued directions that the issue of the validity of the contract be addressed during the hearing of the main suit. The court finds that the learned trial magistrate did not err in exercising discretion. Therefore, this court declines to interfere with the exercise of discretion by the learned trial magistrate.
11. Therefore, for the above reasons, this court will not disturb the lower court ruling. This court finds and holds that this appeal is devoid of merit. It is hereby dismissed, and this court upholds the orders issued in the ruling rendered on 10

February 2025. Since it is trite law that costs follow the event, and the appeal being unsuccessful, this court awards costs to the respondent, which shall be borne by the appellant. The court hereby directs that the file be remitted to the trial court expeditiously for a priority hearing.

Orders accordingly.

Delivered and Dated at Machakos this 28th day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
28.04.2026**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant

Mr. Kahama Michael for the respondent.

No appearance for the appellant.