

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**

**CAUSE NO. E722 OF 2025**

**MICHAEL MUTHUSI MUTONI...**

.....**CLAIMANT**

**VERSUS**

**SAMUEL ABWOGA.....1<sup>ST</sup>**

**RESPONDENT**

**ENOCK NGENY.....2<sup>ND</sup>**

**RESPONDENT**

**ELIZABETH MURIUKI .....3<sup>RD</sup>**

**RESPONDENT**

**(Being sued on behalf of THE BIBLE SOCIETY OF  
KENYA)**

**RULING**

1. Before Court is a Notice of Preliminary Objection dated 22<sup>nd</sup> October, 2025, wherein the Claimant contends **THAT:**
  - i. This Honourable Court lacks jurisdiction to hear and determine the Respondent's Counterclaim as the Respondent raises a claim based on the tort of conversion.
  - ii. Paragraph 18 and Prayer 20 (d) in the Counterclaim is a claim based on the alleged tort of conversion and

does not relate to any issue touching on the employer- employee relationship as envisioned by Section 12 of the Employment and Labour Relations Court Act.

- iii. The Counterclaim suffers from want of particulars, with regard to the Claims made in Paragraph 18 and Prayer 20(d)
2. The Claimant, in the circumstances, prays that the Respondent's Counterclaim be struck out or dismissed in toto for want of jurisdiction on the part of the court, or in the alternative, the Respondent's Counterclaim be dismissed in as much as it relates to the Respondent's Claims based on the tort of conversion as set out in Paragraphs 18 and Prayer 20(d).
3. Parties were directed to canvass the objection by way of written submissions, and submissions were received from both parties.

### **The Claimant's Submissions**

4. The Claimant contends that the Respondents, in their Response and Counterclaim, allege that the Claimant engaged in a fraudulent scheme that caused them a loss of Kshs. 36,970,035, which they seek to recover along with other reliefs. It argues that the court lacks jurisdiction and, based on the principle that jurisdiction is fundamental, the matter should not proceed any further.

5. It is the Claimant's submission that a preliminary objection must be based on a pure point of law that is either expressly pleaded or clearly implied from the pleadings, and should not require the court to examine evidence or determine disputed facts, and if upheld, it ought to dispose of the suit or the relevant part of it. He placed reliance in ***Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696***, to support this position.
6. The Claimant submits that the Supreme Court has consistently affirmed that a court's jurisdiction is derived strictly from the Constitution and/or statute, and a court cannot assume jurisdiction beyond what is legally conferred upon it. He sought to rely in ***Owners of the Motor Vessel Lillian S v Caltex Oil (Kenya) Limited [1989] KLR 1***, where the Court of Appeal emphasized that jurisdiction is fundamental and without it, a court has no authority to take any further step.
7. The Claimant submits that where jurisdiction is lacking, proceedings cannot continue, and any actions taken are null and void.
8. It is the Claimant's further submissions that the Supreme Court in ***Petition No. 5 of 2015 Republic v Karisa Chengo & 2 others [2017] eKLR***, held that judges serving in specialized courts established under Article 162(2) of the Constitution are limited to exercising only

the jurisdiction expressly conferred upon those courts, and cannot assume the general jurisdiction of the High Court or adjudicate matters that fall outside their constitutionally and statutorily defined mandate.

9. The Claimant submits that Section 12(1) of the Employment and Labour Relations Court Act grants this Court jurisdiction over disputes arising from or related to employment and labour relations between employers and employees, and that this jurisdiction is confined to specific subject matter and does not extend to the broad, general civil jurisdiction of the High Court. He submits that the key inquiry in every case is whether the dispute genuinely falls within the scope of employment or labour relations as envisaged under Article 162(2)(a) of the Constitution and Section 12 of the Act.
10. It is the Claimant's submission that a claim framed as recovery for "goods lost" while under a person's responsibility is, in substance, a tort claim, typically one of conversion. He submits that determining such a claim requires the court to examine issues such as ownership or possessory rights over the goods, conduct inconsistent with those rights, wrongful appropriation or dealing, as well as causation, valuation, and resulting liability and damages.
11. He submits further that these are not matters grounded in employment or labour relations within the meaning of

Section 12(1), but rather, they fall within the realm of general civil litigation and are ordinarily adjudicated in other forums, not the Employment and Labour Relations Court.

12. It is his submission that the Court should look beyond the form of the counterclaim and interrogate its substance. He argues that properly characterized, the claim for Kshs.36,970,035 is a tort based recovery claim, not one arising from or relating to employment within the meaning of Section 12.
13. It is its submission that this is essentially a claim for compensation for alleged wrongful interference with property, which calls for determinations on proprietary rights and the application of tort principles, rather than employment or labour relations issues.
14. The Claimant submits that even where the Employment and Labour Relations Court (ELRC) has assumed jurisdiction over disputes “connected” to employment, such as employer-employee loan arrangements, its intervention has been grounded in the employment relationship itself, including contractual terms, staff benefit schemes, or workplace policies. He submits that such cases remain anchored in the employment framework, and do not extend to tort-based claims for recovery of property or damages that require the court to

make determinations on ownership, possessory rights, and other proprietary issues.

15. The Claimant submits that the Respondents' reliance on a pending criminal case does not advance their position, on the basis that a criminal charge or allegation is not proof of civil liability in tort, and the existence of criminal proceedings does not convert a claim into one falling within the jurisdiction of the Employment and Labour Relations Court.
16. He submits that Jurisdiction cannot be created or expanded through criminal allegations, and that it remains strictly grounded in the Constitution and the enabling statute.
17. In summary, the Claimant contends that the Preliminary Objection has been properly raised and argued, as it presents a pure point of law on jurisdiction that goes to the root of the Respondents' Counterclaim.
18. The Claimant thus urges the Court to uphold the Preliminary Objection, strike out or dismiss the Counterclaim for want of jurisdiction, and award costs to the Claimant.

### **The Respondents' Submissions**

19. On their part, the Respondents argue that a preliminary objection must be capable of disposing of the matter at the threshold without requiring the court to examine

evidence, investigate facts, or exercise judicial discretion. It contends that the objection must raise a pure point of law. They submit that where its determination depends on factual inquiry or evaluation of contested pleadings, it ceases to qualify as a valid preliminary objection and is incompetent in law.

20. The Respondents submit that the Claimant's third ground of objection, namely, the alleged want of particulars, does not raise a pure point of law, and that the adequacy or sufficiency of pleadings is a factual issue that can only be determined by examining the pleadings in question, and, where necessary, considering the nature of the dispute and the evidence to be adduced.
21. It is their submission that a determination on whether the Respondents have provided sufficient particulars would require the Court to scrutinize the pleadings, evaluate their adequacy, and potentially exercise discretion on whether further particulars are necessary, which goes beyond the narrow scope of a preliminary objection as defined in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited*.
22. It is their submissions that, on this basis, the Claimant's Preliminary Objection fails to meet the Mukisa Biscuit threshold and is therefore misconceived, incompetent, and an improper use of the preliminary objection procedure.

23. The Respondents submit that the Claimant's position is an unduly narrow and restrictive reading of Section 12(1)(a) of the Employment and Labor Relations Court Act, and that the central issue for determination is whether the jurisdiction of this Honourable Court is automatically ousted merely because the Respondent has pleaded a claim for recovery of Kshs.36,970,035 lost in the course of the Claimant's employment.
24. The Respondents submit that the Claimant's position that the Counterclaim does not arise from the employment relationship is both factually and legally untenable. They argue that the Claimant's employment contract, as a Warehouse Officer, expressly placed him in charge of custody, control, and management of the Respondent's inventory and related systems, and that the alleged loss of Kshs.36,970,035 could only have arisen by virtue of that contractual responsibility.
25. It is further submitted that an employment contract carries an implied duty of fidelity, honesty, and faithful service, and that breach of such duty may give rise to contractual remedies, including recovery of losses caused thereby. Reliance is placed on ***Kipkirui Chepkeres Labati v Cooperative Bank of Kenya Ltd [2022] KEELRC 489 (KLR)***, where the Court recognized an employee's obligation to act in good faith and held that

conduct contrary to that duty constitutes breach of the contract of service.

26. Accordingly, the Respondents argue that the Claimant's characterization of the Counterclaim as a tort of conversion is a misrepresentation aimed at challenging jurisdiction. It is their further submission that the Counterclaim seeks accounting and restitution for losses allegedly arising from breach of contractual duties during the employment relationship, and therefore properly falls within this Court's jurisdiction.
27. The Respondent submits that the Claimant's attempt to separate the claim from the employment relationship is both artificial and unsustainable in law, arguing that conversion involves wrongful interference with property by a person without lawful authority. It is their further submission that in this case, the Claimant had lawful possession of the Respondent's assets solely by virtue of his employment as a Warehouse Officer, meaning that any misappropriation occurred within the employment framework and not as an independent tort detached from that relationship.
28. The Respondent placed reliance on ***Telkom Kenya Limited v Sheikh Alfred Mwanza (Civil Suit No. 579 of 2011) [2015] KEHC 3950 (KLR)***, for the holding that although the claim was framed in tort, the alleged

misappropriation arose during the course of employment and therefore fell within the jurisdiction of the employment court as a dispute arising out of the employer-employee relationship.

29. The Respondent further argues that the Court must look at the substance of the dispute rather than its label, as the Counterclaim concerns recovery of losses allegedly caused by breach of duties arising from the employment contract, including implied duties of fidelity and accountability. They submit that where such duties stem directly from the contract of service, any breach is properly characterized as arising from employment and not as a standalone tort.
30. It is also submitted that the loss occurred during the subsistence of the employment relationship and is inseparable from it. Accordingly, and consistent with the Supreme Court's reasoning in ***Kenya Tea Growers Association & 2 others v NSSF Board of Trustees [2024] KESC***, this Court is competent to determine all issues arising within its jurisdiction, including those necessary for the effective and final determination of the dispute.
31. The Respondents finally submit that the Preliminary Objection should fail as it improperly seeks to defeat a substantive employment-related counterclaim on the basis of form rather than substance, contrary to Article 159(2)

(d) of the Constitution and settled principles governing jurisdiction and pleadings.

### **Analysis and Determination**

32. The issues for determination are: -
- i. Whether the Claimant's Preliminary Objection meets the threshold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, if so,
  - ii. Whether the Court lacks jurisdiction over the Respondent's Counterclaim on the basis that it is founded on the tort of conversion.

### **Whether the Claimant's Preliminary Objection meets the threshold in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**

33. A Preliminary Objection must raise a pure point of law which is argued on the assumption that all facts pleaded are correct, and which, if upheld, is capable of disposing of the matter at once. This principle was settled in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696**.
34. By the foregoing binding legal precedent, where the determination of an objection requires interrogation of pleadings, evaluation of evidence, or ascertainment of facts, it ceases to qualify as a valid preliminary objection.
35. In the present case, the objection on want of particulars as correctly submitted by the Respondents would require the Court to examine the sufficiency of pleadings and possibly

exercise discretion on whether further particulars are necessary.

36. Further, although it is not disputed that the Claimant was employed as a Warehouse Officer and was entrusted with custody and control of the Respondent's inventory, there is a dispute over whether the alleged loss occurred in the course of that employment.
37. The Respondents argue that the claim arises from breach of implied duties of fidelity and contractual responsibility, and therefore falls within Section 12, while the Claimant, on the other hand, argues that the claim is properly one in tort for conversion requiring proprietary findings and thus outside this Court's mandate.
38. The issues herein are thus, without a doubt, not pure points of law and fall outside the ***Mukisa Biscuit*** threshold, which renders the objection incompetent.
39. The objection is therefore devoid of merit and is dismissed with costs in the cause.
40. Orders accordingly.

**SIGNED, DATED, AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY, 2026**

**C. N. BAARI**

## **JUDGE**

### **Appearance:**

Ms. Mutinda present for the Claimant

Ms. Wanja h/b for Mr. Kigwatha for the Respondent

Ms. Esther S - Court Assistant

ORIGINAL