



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ouma v Faulu Microfinance Bank Ltd (Cause E015 of 2022)  
[2022] KEELRC 13040 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13040 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE E015 OF 2022  
JW KELI, J  
OCTOBER 27, 2022**

**BETWEEN**

**HAWKINS OUMA ..... APPLICANT**

**AND**

**FAULU MICROFINANCE BANK LTD ..... RESPONDENT**

**RULING**

1. The Claimant filed a statement of claim dated May 31, 2022 against the Respondent claiming unlawful termination and seeking for compensation. Simultaneously the Claimant filed Notice of motion of even date seeking the following orders:-
  - a. That this application be certified urgent and heard on priority basis.
  - b. That pending the hearing and determination of this application this Honourable court do issue an order directing the Respondent to suspend the loan repayment extended to the Applicant and the attendant consequences including :-
    - i. Interest rate of the loan not to be changed.
    - ii. No penalty to accrue on non-repayment of the loan.
    - iii. Classification of the Claimant as a defaulter.
    - iv. Listing the Claimant with the credit reference bureau.
  - c. That the Respondent, their agents, servants, employees or any other person acting on their behalf be restrained from proclaiming, selling or repossessing Motor Vehicle Registration No. KCU XXX E Pending hearing and determination of this Application.



- d. That the Respondent, their agents, servants, employees or any other person acting on their behalf be restrained from proclaiming, selling or repossessing the motor Vehicle Registration No. KCU XXX E pending hearing and determination of this claim.
  - e. That the Respondent, their agents, servants, employees or any other person acting on their behalf be restrained from proclaiming or selling land registration No. S/WANGA/EKERO/3900 pending hearing and determination of this Application.
  - f. That the Respondent, their agents, servants, employees or any other person acting on their behalf be restrained from proclaiming or selling land registration No. S/WANGA/EKERO/3900 pending hearing and determination of this claim .
  - g. Costs of this application be in the cause.
2. The Application is based on grounds listed under the application and supporting affidavit of the claimant/ applicant sworn on the May 31, 2022 summarised herein under:-
  3. The Applicant states he was employed by the respondent in 2014 and promoted to Service Centre Manager stationed at Bondo Branch earning a salary of Kshs.143,519/- subject to standard cost of living adjustment of 6% every 1<sup>st</sup> April of each year.
  4. That during his employment he was fist advanced a loan of Kshs. 840,000/- by the respondent for the purchase of Motor Vehicle registration number KCU XXX E and the said amount was to be paid in 60 instalments of Kshs. 15,967.53/- with 6 % interest.
  5. That the Applicant was again advanced a loan of Kshs. 2,000,000/- by the Respondent for the purchase of a land parcel number S/WANGA/EKERO/3900 and the said amount was to be paid in 120 instalments of Kshs. 22,5444.46/- with 6% interest.
  6. That the Applicant has been servicing the two loans though set monthly repayments deducted from his salary. That he was wrongfully dismissed from employment by the respondent and therefore he has no source of income to service the loans.
  7. That he will stand to suffer irreparably if the Respondent purports to repossess his motor vehicle registration number KCU XXXE and or proclaim and sale of his land parcel registered as land parcel number S/WANGA/EKERO/3900.
  8. That if the orders sought are not granted thereof the actions by the respondent will negate this suit and occasion the applicant immeasurable loss, damage and hardship.

## Response

9. The Respondent entered appearance and filed notice of preliminary objection dated July 18, 2022 with respect to the instant application on following grounds:-
  - a. The Employment and Labour Relations Court is a Constitutional specific court and therefore lacks jurisdiction to hear and determine the notice of motion application dated May 31, 2022 as presented pursuant to Article 162(2)(a) of *the Constitution* of Kenya 2010 and sections 2(1),3 & 12 of the *Employment and Labour Relations Court* cap 234B and same ought to be dismissed with costs to the respondent.
  - b. That the application presented is fraught with malafide, incurably defective, misconceived and hinged on the wrong provisions of the law and procedure.



- c. That the application as presented is wanton abuse of the court process, scandalous, frivolous, vexatious and intended to embarrass the Honourable court and the legal process.
10. The Court gave directions on the hearing of the preliminary objection to be canvassed by way of it's written submissions.
11. The Claimant/ Applicant's written submissions drawn by Namatsi & Co. Advocates on the Notice of Preliminary Objection are dated September 19, 2022.
12. The Respondent's written submissions on the Notice of Preliminary Objection drawn by L.G Menezes & Company Advocates are dated September 19, 2022.

### **Determination**

13. The Court determined the issue under the Preliminary Objection for determination is whether the it is merited.

### **Whether the preliminary objection dated July 18, 2022 is merited.**

The Respondent's submissions

14. The Respondent contents that the employment contract between the parties was terminated by the respondent and what exists between them is a purely commercial relationship based on contracts as such the Employment and Labour Relations Court does not have jurisdiction over the matter.
15. That the Supporting Affidavit to the application paragraph 4 and 5 admits that the applicant was previously under the employment of the respondent/objector during which time he obtained financial loans of Kshs. 840,000/- for the purchase of Motor Vehicle Registration Number KCU XXXE as well as Kshs.2,000,000/- for the purchase of land parcel S/WANGA/EKERO/3900 which loans he was faithfully repaying prior to dismissal from work. That the Applicant is now challenging the Respondent's process of recalling the loans issued to former employees.
16. That the court can discern from the pleadings jurisdiction issues raised and the fact the dominant issue are questions of the Motor vehicle asset finance as well as land and charges.
17. That the jurisdiction of the court is given under Section 12 of the *Employment and Labour Relations Court Act* pursuant to Article 162(2)(a) and 165(5) of *the Constitution* of Kenya 2010. That the court has unlimited original and appellate jurisdiction in employment and labour relations disputes.
18. That the jurisdiction of the court is set out under Section 12 of the *Employment and Labour Relations Court Act* to include disputes arising out of employment between the employee and the employer.
19. That under the loan contracts signed by the applicant the objector was at liberty to recall the entire loan amount and treat the loans as a normal commercial loan contract attracting the market rates for commercial rates. To buttress their submissions the objector/ respondent relies on the decision in *Jim Kennedy Kiriro Njeru v Equity Bank(K) limited* (2019)eKLR where the court held that a loan agreement is a distinct legal obligation independent of the employment and the advantage conferred on the employee ends upon the employee's departure from employment. The court finds and determines that submissions are not pleadings and the submissions on applicable loans interest rate is improperly pleaded in the submissions. The Respondent ought to file replying affidavit to plead as such.
20. That it is apparent from the statement of claim the claimant is seeking compensation arising from employer employee relationship in general damages, compensatory damages and loss of income. The



claimant has sought injunctive orders in matters that are for determination by the ordinary civil court as they arise out of commercial contracts.

21. The Objector referred the court to the predominant purpose test in determining if it has jurisdiction where the court in *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another* (2016)eKLR held, '23. When faced with a controversy whether a particular case is a dispute about land(which should be litigated at ELC )or not , the courts utilize the pre-dominant purpose test: in a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction and works.”
22. The Objector submits that the prayers for injunctive orders under the application do not fall under the disputes that are a preserve of the Employment and Labour Relations Court.

### **The Claimant’s submissions on the preliminary objection.**

23. The Claimant submit that the court has exclusive jurisdiction to grant orders under section 12(3) of the *Employment and Labour Relations Act* including any other appropriate relief as the court may deem fit. That the loans in question were secured during Claimant’s employment as employee of the respondent.
24. The Claimant further submits that the objection on basis of the application having been based on the wrong principles of law fails as application cannot be dismissed for want of form under Article 159 of *the Constitution* and the policy set out under Order 51 Rule 10 of the *civil procedure rules*. That the said Order 51 rule 10 states:-  

‘(1)- every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule,

(2) no application shall be defeated on technicality or want of form that does not affect the substance of the application.”
25. The Claimant submits that a Preliminary Objection is on pure points of law and is argued on the assumption that all facts pleaded by the other side are correct. That it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. The claimant relies on the authority in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*(1969)EA 696 where the court held 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. Charles Newbold JA in the said decision held that a preliminary objection cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. To buttress this submission the claimant rely on the decision in *Quick Enterprises Ltd v Kenya Railway corporation* Kisumu HCCC No 22 of 1999 where the court held that: ‘when preliminary points are raised , they should be capable of disposing the matter preliminary without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
26. Further the Claimant/Applicant submits that in determining the preliminary objection the court will also take into account that a preliminary objection must stem from the pleadings and raises pure points of law. To buttress this submission the claimant relies on the decision in *Avtar Singh Bhamra and another v Oriental Commercial Bank* HCCC No. 53 of 2004 where the court held:-‘ a preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”



27. The Claimant submits that in order to determine if their application is an abuse of court process, scandalous, frivolous, vexatious and intended to embarrass the court and legal process, it is required to ascertain the facts in the application and this can only be done vide hearing and relies on the case of *Henry Wanyama Khaemba v Standard Chartered Bank & Another* (2014)e KLR where the court held that there is limited scope of jurisdiction of preliminary objection and some issues are incapable of being handled under preliminary objection. The claimant further relies on the decision in *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another* (2014)e KLR where the court having considered the preliminary objection raised held that the points raised can be argued in the normal manner and further that one cannot raise a ground of resjudicata by way of preliminary objection.

## Decision

28. The instant Preliminary Objection challenges the jurisdiction of the court on basis that the application seeks to stop the recovery of loans issued to an employee under contract of service that has been terminated which issue is for ordinary civil courts and further the application having been brought on the wrong provisions of the law and that it is an abuse of legal process among others.
29. The Court finds that the respondent has not filed response to the suit or to the application hence its facts are not before the court. The Objector invites the court to apply the predominant test as applied by the court in *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & Another* (2016)eKLR held, ‘23. When faced with a controversy whether a particular case is a dispute about land(which should be litigated at ELC )or not , the courts utilize the pre-dominant purpose test: in a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction and works.’ Whereas the court has no issue with applying the test, the court finds that the objection is raised prematurely the response having not been filed hence the court is unable to ascertain the predominant facts in the application from the one sided pleadings.
30. The Court finds that it has jurisdiction over the matters under the suit hence the instant preliminary objection cannot dispose the suit. The orders sought under the application invoke the exercise of discretion of the court. The court finds and determines that the preliminary objection falls short of the jurisprudence under the Mukisa biscuit case (*supra*) as the preliminary objection cannot dispose the suit. On *prima facie* basis the court finds that the orders sought flow from the employment relationship between the parties hence the court has jurisdiction to hear and determine the application on merit without undue regard to technicalities. The court relies on the decision of the court in *Peter Mutisya Musembi & Another v National Bank of Kenya* (2014)e KLR cited with approval in High Court decision in *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & Another* (2016)eKLR where the court held that, in mixed grill cases, the court can adjudicate over consequential or factual question which on the face of it appear to be within the exclusive jurisdiction of another court in the same judicial tier within the inherent power of the court to do justice without undue regard to technicalities. The court in that case upheld the approach of functionality and not technicality.
31. The court is further persuaded by the decisions in *Henry Wanyama Khaemba v Standard Chartered Bank & Another* (2014)e KLR where the court held that there is limited scope of jurisdiction of preliminary objection and some issues are incapable of being handled under preliminary objection. Such issues would include the question of whether the application is an abuse of the court process or is frivolous. The Court upholds the decision in *George Kamau Kimani & 4 others v County Government*



*of Trans Nzoia & Another* (2014)e KLR where the court having considered the preliminary objection raised held that the points raised can be argued in the normal manner.

32. The Court finds and determines the Notice of Preliminary Objection dated July 18, 2022 is raised prematurely as no defence to the suit or response to the application has been filed. Further the court finds that it has jurisdiction to hear and determine the application dated May 31, 2022 and further issues of abuse of court process, application being vexatious or scandalous cannot be determined by way of preliminary objection. The court has to consider the application and the response. The notice of preliminary objection is dismissed for being raised prematurely and for being bad in law. Costs to the claimant in the cause. It is so ordered.

**Further Court Order.**

33. The Respondent/ Objector is granted leave of 14 days by the court to file response to the suit and to application of even date. The Claimant/Applicant is at liberty to file reply within 14 days of service. Mention on November 30, 2022 to confirm compliance and issue direction on hearing of Application.

It is so ordered.

**RULING DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 27TH OCTOBER 2022.**

**J. W. KELI,**

**JUDGE.**

**In The Presence Of:-**

**Court Assistant : Brenda Wesonga**

**Claimant:-(Ms) Komoro holding brief for Namatsi**

**Respondent: Oriwa Advocate**

