



REPUBLIC OF KENYA



KENYA LAW
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**Kamau & another v Kingdom Bank Limited (Civil Suit
E001 of 2022) [2025] KEHC 4329 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT E001 OF 2022
DKN MAGARE, J
MARCH 26, 2025**

BETWEEN

JONAH WAWERU KAMAU 1ST PLAINTIFF

LIONS SECURITY LIMITED 2ND PLAINTIFF

AND

KINGDOM BANK LIMITED DEFENDANT

RULING

1. The genesis of this matter relates to 18.1.2022 when the Applicant filed suit against the Respondent, claiming the following:
 - i. A declaration that the arrest, detainment, and prosecution of the Plaintiff was unlawful.
 - ii. Loss of Business and future earnings calculated at Kshs 500,000,000
 - iii. Damages for defamation and character assassination of the Plaintiff as shall be determined by the court.
 - iv. Damages for Emotional and mental frustration.
 - v. General Damages as shall be determined by this Honourable Court.
 - vi. Costs of this suit.
 - vii. Interest on(b),(c),(d),(e)&(f)above at court rates.
2. Summons to enter appearance were issued on 19.1.2022. An affidavit of service was filed on 21.1.2022 postulating that Plaintiff had served the defendant on 20.1.2022 copy of received plaint was annexed.
3. A request for judgment was made on 3.2.2022. This request was made when time for entry of appearance had not expired. The defendant had up to and including 7.2.2022 to enter Appearance.



They also had time up to the time before entry of judgment to file defence. this was not a liquidated claim hence interlocutory judgment could not be entered.

4. The defendant entered appearance on 4.02.2022. During that period, as COVID-19 was subsisting, filings were still being done through email. This was before CTS. The email was sent to the court at 1608 hours on 4.2.2022. Payment for the filing was effected on 7.2.2022 via MPESA. On 11.2.2022, the Plaintiff filed a long letter pouring vitriol and accusing all and sundry of corruption and backdating of court documents. No one found time to understand that the request for judgment could only be filed after 8.2.2022.
5. The file contains several letters seeking perusal of the court file. On 14.4.2022, the plaintiff changed his advocates to Njeru Kipkuto and Associates Advocates.
6. The Chief Magistrate wrote a letter dated 9.3.2022 addressing the issue raised in one of the several letters. Unfortunately, the head of the station appeared to unfairly criticize staff who acted with utmost diligence in the matter according to the registry operations manual. The staff had a right to decline to allow a person not on record to peruse the file. The plaintiff was represented at that time. Indeed, due to COVID-19, physical access to the files was restricted. The chief magistrate's letters was thus misinformed and was not in consonance with the facts.
7. An application was thus filed on 19.4.2022 dated 14.4.2022 seeking the following prayers.
 1. That the DCI be ordered to investigate the conduct of registry officials and the role of the Defendants in backdating the filing date on the Memorandum of Appearance of the Defendants.
 2. That the report on the investigation regarding manipulation and/or back-dating of the filing dates of the Defendants' documents be issued to the Plaintiff.
 3. That the Defense by the Defendant is struck out in its entirety.
 4. That as a consequence thereof, summary judgment be entered for the Plaintiff against the Defendant.
 5. That costs of this application be provided for.
8. The application was supported by an affidavit of the applicant. The primary linchpin of the Application was that the Memorandum of Appearance was filed after the plaintiff's previous advocate had already filed a request for judgment on record. The Defence was said to have been filed out of time.
9. He stated that the defence was filed out of time, and the filing date was only backdated in the Registry to make it seem like the defendant filed it on time.
10. The defendant filed a notice of preliminary objection relating to the said notice of motion. A reading of the same appears to be grounds of opposition. It is to the effect that:
 - i. The affidavit supporting the said notice of motion is fatally defective and liable for striking out.
 - ii. The notice of motion dated 14.4.2022 is thus incompetent and has no stand-on and is thus easily liable for striking out. (sic)
11. They also filed similar grounds of opposition dated 22.3.2022. on 13.6.2022.
The plaintiff filed a notice to act in person and a further affidavit dated 13.06.2022 stating that the complaint was genuine.



12. Before the application was argued the Plaintiff filed another application dated 28.7.2022 seeking the following orders:
 1. That service of this application on the Defendant/Respondent in the first instance be
 2. That this Honourable Court be pleased to revert to the main suit from the court annexed mediation.
 3. That this Honourable Court be pleased to issue interlocutory orders for specific performance.
 4. That the Honourable Court be pleased to allow the Applicant/Plaintiff herein to file his Written Submission as evidence in Chief.
 5. That the cost of this application is borne by the Defendant/Respondent to the Applicant/Plaintiff.
13. The main grounds were that the Defendants were stalling the process. The matter had previously been referred to mediation, but there appear to have been issues that the court will address shortly.
14. The Plaintiff filed a document christened a further supporting affidavit.
15. The Plaintiff filed another application to amend the plaint to join Lions Security limited as the second plaintiff. The orders sought are:
 - a. That the Honorable Court be pleased to grant the Plaintiff leave to amend the Plaint and enjoin Lions Security Limited as the second plaintiff.
 - b. That the annexed draft of the amended Plaint is deemed as duly filed upon payment of the requisite fees.
 - c. That costs be in the cause
16. Unfortunately, the plaintiff communicated to the court the goings-on in the mediation filed through a notice dated 21.11. 2022. The same is hereby expunged. For historical reasons, it should be kept in the mediation file and never in the main file.
17. On 24.3.2023, the plaintiff filed an application dated 24.03.2023 seeking the following orders:
 1. That the Defendant's Board of Directors, namely, Mrs. Margaret Karangatha, and Dr. Gideon, be cited for Contempt of Court, having expressly breached and acted in violation of the Order dated 22 February 2023 by sending an unduly authorized representative for the Mediation.
 2. That the Contemnors be compelled to purge of the Contempt of Court.
 3. That the cost of this Application be awarded to the Plaintiff/Applicant
18. The plaintiff filed a reply to an amended statement of defense on 23.08.2022. Previously, on 16.08.2023, the plaintiff filed a supplementary list of documents in support of their case.
19. The defendant filed an amended statement of defence pursuant to leave granted on 18.07.2023.
20. On the 4.9.2023, the Plaintiff filed a preliminary objection dated 3.9.2023. the same was to the effect that:

Take notice that the 1st and 2nd Plaintiffs/Applicants herein shall, at the earliest opportunity before the hearing of this matter (suit), raise a Preliminary Objection on a point of Law; that the firm of P.M. Muchira & Co. Advocates lacks Locus Standi in these



proceedings. Contrary to the express provisions of the Civil Procedure Rules, 2010 and the Companies Act, 2015 based on the following grounds:-

1. That the said firm has not demonstrated through the resolutions and minutes of the Defendant that it is duly instructed/authorized to act on its behalf.
 2. That the defending of this suit by the said firm of advocates is invalid for want of authority from the Defendant.
 3. The lack of proper authorization shifts the Liability from the Defendant to the firm of P.M. Muchira & Co Advocates.
 4. That the Amended Statement of Defense dated 18th August, 2023 has no stand on thus should be struck out and judgment be entered as prayed in the Amended Plaintiff dated 25th July,2023.
21. The plaintiff filed an amended plaintiff dated 25.07.2023 and filed on the same day. The amended plaintiff introduces the 2nd plaintiff. The plaintiff also increases prayers to 11, including expectation damages, restitution damages and punitive damages. (sic).
22. The plaintiff continued in his filings. On 8.11.2023, he filed an application dated 7.11.2023 seeking the following orders:
- a. That the Honourable Court be pleased to issue a nearer mention date.
 - b. That the Honourable Court makes a ruling on the uncontroverted Preliminary Objection dated 3.09.2023
 - c. Upon granting of the 2nd order, the Honourable court be pleased to issue a nearer date for formal proof hearing date for the Amended Plaintiff dated 25.07.2023.
 - d. That the costs of this application is in the cause.
23. The defendant filed a list of documents on 30.1.2023.
24. Before the application dated 8.1.2023, was dispensed with, the Plaintiff filed another application dated 26.07.2024 seeking the following orders:
1. That the Honourable Court be pleased to fast-track the disposal of this matter.
 2. That the Honourable Court makes a ruling on the uncontroverted Preliminary Objection dated 3rd September 2023.
 3. That, upon granting of the 2nd Order herein, the Honourable Court be pleased to expunge all irregularly filed documents by the firm of P. M. Muchira & Co. Advocates.
 4. That the Honourable Court be pleased to enter judgment in favor of the 1st and 2nd Plaintiff.
 5. That the cost of this application is in the cause
25. Wonders will never cease. The plaintiff lamented that the matter had been mentioned 14 times and that the case was already backlogged. He stated that he was on the verge of being committed to civil jail. He did not see that he had any fault in the delay in the prosecution of the matter. Before the dust could settle, the plaintiff filed yet another application, dated 8.8.2024, seeking the following orders:
- i. That the Honourable Mr. Justice Martin Muya will be pleased to recuse himself from handling any further proceedings in this matter.



- ii. That the file be placed before the Hon. Lady Chief Justice of the Republic of Kenya to appoint another judge to handle this matter forthwith.
 - iii. That, the cost of this application is in the cause.
26. Unbeknown to me, the matter had already been fixed before me for directions after a transfer from Mombasa in June 2024.
 27. Subsequently, when the matter was placed before me, I discovered, to my horror, that a total of 11 applications and preliminary objections had been filed so far. Only the applications dated 29.9.2022 and 7.11.2023 had been dispensed with. I directed that all parties respond to whichever application was against them. I was to give a ruling date in January 2025. Come January, I gave a ruling date for all the pending applications. As I was concluding this ruling, Plaintiff filed an application dated 30.1.2025 for my recusal. this then was the 12th application.
 28. I gave directions and converted the original ruling date for a ruling on recusal. I dismissed the application and gave a fresh date for ruling for all applications

Submissions

29. The Plaintiff filed submissions relating to the Application dated 14.4.2022. The submissions are dated 13.9.2022. There are also submissions dated 5.2.2024 on the Preliminary Objection dated 3.9.2023. The other submissions relate to the Application dated 24.3.2023 in relation to contempt of court against the Directors of the Defendant.
30. There are submissions relating to the request that the DCI investigate the conduct of registry officials with the result of the Memorandum of Appearance had been backdated. It was submitted that the registry officials were guilty of fraudulent misrepresentation and forgery. The Plaintiffs cited *Derry v Peek (1989)* and HCCRA No. 178B of 2019 to support fraudulent misrepresentation and among others *R V Gambling (1974)* 3 ALL ER 479 to support forgery.
31. The Plaintiffs also relied on the Practice Direction on Electronic Case Management 2020 to submit that emailing a document to the Registry did not constitute filing.
32. It was submitted that the OB recorded at Nyeri Police Station as 38/11/2/2022 led to a letter dated 4.4.2022 that showed reasonable suspicion that warranted investigation. From IO to OCS. That the CCIO advised the Plaintiffs to seek orders from this court to commence investigations against the registry officials.
33. Further, the Plaintiffs submitted that they were denied access to information as espoused under Article 35 of *the Constitution*. He also cited breaches of fair hearing under Article 50 of *the Constitution*.
34. The Plaintiffs did not file submissions relating to the other Applications herein. However, the above submissions were largely cross-cutting and appear to submit all grievances the Plaintiffs raised regarding the Applications and the Preliminary Objections. The Defendant filed no submissions.

Analysis

35. The Plaintiff herein has tied himself with ropes and is shouting at the passersby and sundry to come and untie him. He is the proverbial professional litigant who does all in litigation and ironically forgets the subject of the litigation as narrated in his pleadings. Parties must be candid.
36. A party cannot file a case to use it to advance vendettas and sideshows. Cases are not filed to be used as booby traps for arm-twisting others towards a specific motivation other than what is pleaded. Madam



J (as he then was) gravely honest and not just condemning lies on the part of the litigants and advocates and Odunga J (as he then was) followed suit when presented with such like negation of the principles underlying genuine litigation. Odunga J (as he then was), in *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N vs. N* [1991] KLR 685 lamented as follows:

Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in *N vs. N* [1991] KLR 685 he expressed himself in the following terms:

“I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

37. The Plaintiffs are out on full combat. The combat should leave all stones rolling towards the Defendant and against all in the path of the rolling stones. But do all men kill the thing they do not love? This reminds me of the sentiments of Shylock in reference to Antonio in Act I Scene III of William Shakespeare’s *The Merchant of Venice* as follows:

How like a fawning publican he looks!
If I forgive him
Which he calls “interest.” Cursèd be my tribe
On me, my bargains and my well-won thrift,
Even there where merchants most do congregate,
He hates our sacred nation, and he rails,
I will feed fat the ancient grudge I bear him.
If I can catch him once upon the hip,
The rate of usance here with us in Venice.
He lends out money gratis and brings down
But more for that in low simplicity
I hate him for he is a Christian,

38. I have had occasion to scrupulously read the Application filed by the Plaintiffs and the Preliminary Objections alongside the applicable laws. The Application leveled by the Plaintiff herein are unnecessary and not anchored in law. There was, for instance, no utility seeking an order of court for a mention date when there is the procedure for requesting court dates not demonstrated to have been used without success.

39. It was also unnecessary for the Plaintiff to file Applications after the initial Applications were determined. This describes a motive other than the expeditious determination of the suit, which is his own suit.



40. On the Application dated 14.4.2022, government agencies must have independence. The court, for instance, cannot order the Directorate of Crimination Investigations to carry out what is their constitutional and statutory mandate without a basis. The better way of seeking redress under such circumstances would be through administrative law. I understand that Plaintiff should refer to the letter dated 4.4.2022, which, in their view, showed reasonable suspicion on the part of the that warranted investigations on the part of the court registry.
41. The investigation would not be in the interest of justice as the Memorandum of Appearance is said to have been backdated and filed within the time as earlier observed herein. The allegations of the slow pace of the prosecution of this suit were largely caused by the Plaintiffs themselves. The alleged Bundle of Documents was filed during the pretrial window, and I do not see the utility in expunging them from the record.
42. The Plaintiff must understand that the date of a document is not the date it is received at the court registry. The date of filing a document is also not the date of the document. The date of filing is the date the party pays court fees for the document as may be applicable. The Plaintiff misconstrued that the documents were considered filed on the date emailed to the court, which was factually incorrect. In any event, late filing would not drive a party from the seat of justice.
43. The Application dated 26.7.2024 sort an order that there be a ruling on the preliminary objection dated 3.9.2023 and the documents irregularly filed by the Defendant be expunged from the record and judgment be entered for the Plaintiffs. The Preliminary Objection did not raise any point of law. It was not a preliminary Objection as it could not have disposed of the suit.
44. The applications dated 8.11.2023 also related to a prayer for a mention date to fast-track the suit. The court has the duty to hear and determine an Application. However, this Application was unnecessary. In it, the Plaintiffs also desired expeditious determination of the suit. The directions like expeditious pretrial would suffice. Expunging documents improperly or irregularly filed was a pretrial issue. The suit would not be allowed against the Defendant without hearing the Defendant. There are procedures for admissions and summary judgment which the Plaintiffs ought to have invoked if he believed a summary judgment or judgment on admission was the necessary procedure. None was applied.
45. By the Application dated 28.7.2022, the Plaintiff also sought specific performance and reversion of the suit to court from mediation. This is while the suit is pending. The law remains on specific performance as an equitable remedy. In *Thrift Homes Ltd vs. Kenya Investment Ltd 2015 eKLR*, the court stated that: -
- “specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.
46. Having said the above, I do not think an order for specific performance would be issued in the circumstances of this matter relating to malicious prosecution. there is nothing to be performed. The matter is now seized by this court and the prayer for reversion from medication is mute.
47. The Application dated 24.3.2023 follows suit. It sought contempt of court procedure against the Directors of the Defendant for sending unduly authorized personnel to the mediation. There is



no evidence that any unauthorised party had ever represented the Defendant. In any case, issues of mediation remain in mediation. It is embarrassing for the plaintiffs to disclose the goings in mediation.

48. Needless to say, Defendant, in its status as a company, was a separate legal entity from its directors. Some of the Applications filed by the Plaintiffs were laughable. The court must determine them, however. At times, it is good to declare something void, unnecessary, or null for the good, making it known as such. In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, Lord Denning held as follows as regards the effect of a null and void act:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

49. The Application dated 23.8.22 sought to strike out the amended defence. Leave was granted to Defendant to amend the defence on 18.7.2023. The Amended Defence was filed on 21.8.2023. The Plaintiffs had already amended their Plaint filed on 26.7.2023. The issue of the amendment is moot. I dismiss the Application. In any case, the court will always seek to save pleadings rather than strike the same out. In the case of *Viren D. M. Joshi v Bags and Balers Manufacturers (K) Ltd & another* [2021] eKLR, Mativo J, as he then was, posited as follows regarding striking out:

24. A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses.[8] A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.[9] An argument that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. In *Madison Insurance Company Limited v Augustine Kamanda Gitau*[10] the court addressed the grounds for striking out a pleading with admirable clarity. It stated: -

11. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless or fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

25. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)*[11] the court stated: -

A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate



shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

26. The jurisdiction to strike out suits must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court.
50. The absence of a resolution appointing the Defendant's advocates is not a pure point of law as it needs evidence to substantiate it. The Company can also, in law, ratify such proceedings. As regards the necessity for a company Resolution to back the institution of the suit, Odunga J (as he then was). in his Judgement in the *Leo Investments Ltd v Trident Insurance Company Ltd* (2014) eKLR referred to the holding of Hewett, J. in *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd* HCCC No. 391 of 2000 as follows:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company, but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

51. A preliminary objection has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations. The Court is not involved with questions of fact. In



hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

52. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus The Board Of Trustees of the Cashewnut Industry Development Trust Fund, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar Es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.”

53. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra): -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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.

At page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

54. A Tanzania Court of Appeal sitting in Dar es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a



point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

55. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

56. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable. The question of authorization is a question of fact that cannot be dealt with at the preliminary stage.

57. The Preliminary Objections herein must, therefore, fall as they are not based on pure points of law. The same are dismissed for lack of merit. The foregoing equally applies to the preliminary Objection dated 3.9.2023 by the Plaintiff and the Preliminary Objection dated 22.4.2022 by the Defendant. The matters raised therein are matters of evidence and not pure points of law. The Application also fails in the manner detailed above. I dismiss all of them for lack of merit.

Determination

58. In the upshot, I make the following Orders:

- a. The Application dated 14.4.2022 is dismissed for lack of merit
- b. The Application dated 23.3.2023 is dismissed for lack of merit
- c. The Application dated 26.7.2022 is dismissed for lack of merit
- d. The Application dated 8.8.2022 is dismissed for lack of merit
- e. The Preliminary Objections filed herein and dated 22.4.2022 and 3.9.2023 are hereby dismissed
- f. All pending applications stand dismissed for lack of merit.



- g. The Defendant shall have costs of the dismissed applications of Ksh. 45,000, payable within 30 days, in default execution do issue
- h. In the interest of expeditious hearing and determination of this suit, the suit herein shall conclude by 26.4.2026, failing of which it shall be dismissed with costs.
- i. Mention on 14/5/2025 for trial directions.

DATED, SIGNED AND DELIVERED AT NYERI ON THE 26TH DAY OF MARCH OF THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-FIVE.

KIZITO MAGARE

JUDGE

In the presence of;

Mr. Rurige for the Defendant

Plaintiff present

Court Assistant: Michael

M.D. KIZITO, J.

