



**Ndisya Trading Company Limited v Nairobi Flour Mills Limited (Commercial Appeal E029 of 2021) [2025] KEHC 9452 (KLR) (Commercial and Tax) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9452 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E029 OF 2021**

**AA VISRAM, J**

**JUNE 26, 2025**

**BETWEEN**

**NDISYA TRADING COMPANY LIMITED ..... APPELLANT**

**AND**

**NAIROBI FLOUR MILLS LIMITED ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. L.L. Gicheha, CM dated 12th March 2021 at the Magistrates Court at Milimani, Nairobi Civil Case No. No. E5100 of 2020)*

**JUDGMENT**

**Introduction and Background**

1. This is an appeal against the ruling of the subordinate court dated 12<sup>th</sup> March, 2021 (“the Ruling”) in which it declined to allow the Appellant’s Preliminary Objection dated 11<sup>th</sup> November, 2020, and allowed the Respondent’s application for summary judgment dated 15<sup>th</sup> October, 2020. The appeal is grounded on the Memorandum of Appeal dated 9<sup>th</sup> April, 2021, as follows: -
  1. That the Learned Magistrate erred in law and fact and misdirected herself when she dismissed the Defendant’s preliminary objection on the basis that there were facts that needed proof and that an application ought to have been filed instead.
  2. That the Learned Magistrate erred in law when she failed to appreciate and consider the provisions of law and the decided cases that had been filed by the Defendant in support of the preliminary objection.
  3. That the Learned Magistrate misdirected herself in law and fact when she failed to consider the case that had been put forward by the Defendant on its merits and when she based her entire



decision on the fact that the Defendant did not file an affidavit to challenge the application, and hence arrived at the wrong conclusion.

4. That the Learned Magistrate erred in law and fact when she relied almost entirely on the facts presented by the Plaintiff and failed completely to give any weight to the Defendant's side of the story and hence arrived at a biased conclusion.
  5. That the Learned Magistrate erred in fact when, in deciding on the question of jurisdiction, she relied on extraneous facts that had not been pleaded by the parties.
  6. That the Learned Magistrate erred in law when, in deciding on the question of jurisdiction, she cited and relied on Section 3 (2) of the Magistrate's Court Act, Cap 10, which Act and provisions of law have been repealed by Section 22 of the Magistrate's Court [Act No.26 of 2015](#).
  7. That the Learned Magistrate misdirected herself when she made a finding that the issuing of cheques was proof of receipt of goods by the Defendant, an allegation that had been challenged.
  8. That the Learned Magistrate misdirected herself in law and fact when she ignored and failed to appreciate or even make any findings on the conditions that ought to be satisfied before granting a prayer for summary judgment.
  9. That the Learned Magistrate misdirected herself in law and fact when she allowed the Plaintiff's application hence entering summary judgment in a claim that had not been proved as required by law.
  10. That the Learned Magistrate erred in law and fact when she ignored the Defendant's submissions in support of the preliminary objection and those in opposition to the application
  11. That the Learned Magistrate failed in her duty as the custodian of the law when she rendered a decision that offended the clear provisions of Section 15 of the [Civil Procedure Act](#), Cap 21, which provide for territorial jurisdiction when filing suits.
  12. That the Learned Magistrate misdirected herself in law and fact when she ignored the existence of a Defence on record that raises many triable issues, a position that had been brought to the attention of the court by the Defendant.
  13. That the Learned Magistrate erred in law and fact when she failed to appreciate the importance of allowing the Defendant a chance to be heard, in the circumstances, through a full hearing.
  14. That the Learned Magistrate acted capriciously and disregarded the principles of equity and natural justice and hence arrived at the wrong conclusion.
2. The Appellant thus seeks that the appeal be allowed with costs. In its suit before the subordinate court, the Respondent averred that its cause of action arose from a contract for supply of goods to the Appellant on diverse dates by the Respondent. It stated that the goods were delivered to, and received by, the Appellant who acknowledged receipt by stamping an acknowledgement on the Goods Delivery Notes, whereupon the Respondent duly issued Invoices for settlement.
  3. The Respondent, on the other hand claimed that the Appellant attempted to settle the debt by issuing various cheques, but the same were dishonoured upon presentation for payment, and accordingly the Respondent incurred bank charges of Kshs. 15,000.00/- following the dishonour of the said cheques. Thus, the Respondent sought a sum of Kshs. 1,441,000.00/- and a further Kshs. 15,000.00/- for the bank charges.



4. Whilst the Appellant entered appearance, it did not file a defence prompting the Respondent to file the application for summary judgment on 15<sup>th</sup> October, 2020. The Appellant thereafter filed a defence on 26<sup>th</sup> October, 2020, and responded to the Respondent's application by filing the Preliminary Objection dated 11<sup>th</sup> November, 2020, and Grounds of Opposition of even same date. The said pleadings were the subject of the Ruling in which the Preliminary Objection was dismissed, and the application for summary judgment allowed.
5. The Learned Magistrate noted the Appellant's objection that the subordinate court lacked territorial jurisdiction and that its defence raises triable issues. The said Ruling forms the subject of the present appeal which was canvassed by way of written submissions which I will briefly highlight below.

### **The Appellant's submissions**

6. The Appellant faults the Learned Magistrate for dismissing its Preliminary Objection based on a finding that there were facts that needed proof and concluded that an application ought to have been filed instead. It submitted that the Objection was raised on the basis of the provisions of Section 15 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) on the question of where to file suits. The Appellant relied on the definition of 'cause of action' as highlighted by the court in *Aggrey Outa Ong'ang'o v Nairobi County Government* [2019] KEELRC 896 (KLR) in support of its argument that that the jurisdiction of the court is in Kitui because that is where the contract was performed, and where the money was payable.
7. Additionally, that the Respondent pleaded in his *Plaint* that the contract was made in Nairobi, but failed to provide any contract between him and the Appellant, confirming and supporting its position.
8. That that the trial magistrate totally ignored, not only the law, but also the Appellant's submissions on this question, complete with supporting authorities, which had been very elaborately articulated in order to demonstrate why the suit ought not to have been filed before Milimani Chief Magistrate's Court.
9. It argued that the Trial Magistrate relied on extraneous facts that had not been pleaded by the parties, and that one such fact stated in the Ruling is where the court stated that, "The Plaintiff submits that the contract between the Plaintiff and Defendant was entered in Nairobi". A further extraneous fact is the part of the Ruling which reads "The Plaintiff has offices in Nairobi as well as the Defendant". It submitted that the court relied on the above facts which were never pleaded by the parties, and the court arrived at the wrong conclusion based on its said reliance.
10. It contended that in making its determination on the subject of the Preliminary Objection, the court cited and relied on Section 3(2) of the Magistrate's Court Act (Chapter 10 of the Laws of Kenya) which Act and provisions of law have since been repealed by Section 22 of the Magistrate's Court *Act No. 26 of 2015*. The Learned Magistrate therefore misdirected herself when she relied on the said repealed law in reaching her findings on jurisdiction.
11. Additionally, that the lower court did not consider or analyze the prevailing law in respect of Section 15 of the *Civil Procedure Act*, despite the Appellant's reference to the said provisions.
12. The Appellant faulted the Learned Magistrate for making a finding that the summary judgment application was unopposed on the basis that it had not filed a *Replying Affidavit*. It relied on Order 51, rule 14 of the Civil Procedure (Amendment) Rules, 2020, to submit this provision allows the filing of various pleadings to oppose an application. It stated that it filed Grounds of Opposition, and that the Learned Magistrate was under a duty to take into consideration the contents of the same. The Appellant submitted that it was at liberty to file any of the pleadings provided for under the law,



and it was therefore wrong for the Learned Magistrate to find that the Respondent's application was uncontroverted when there were, in fact, Grounds of Opposition on record. Further, that even if the Appellant had never challenged the claim, the said claim ought to have still been subjected to formal proof.

13. It contended that none of the conditions for the grant of a summary judgment were met, that is, the matter was not plain and obvious, the Defence raised triable issues and the Appellant had not admitted the debt in any way. Further that at the time the court retired to write its Ruling, there was already a Defence on record, and there were Grounds of Opposition to the summary judgment application, which were not considered.

### **The Respondent's submissions**

14. The Respondent relied on Section 15 of the *Civil Procedure Act* to submit that in the suit before the trial court, it was not disputed that its registered office is in Nairobi, that the goods in issue were ordered from the Respondent's registered office situated in Nairobi, and that the payment due for the goods was to be paid in Nairobi. Further, that the performance or payment for the goods was to take place in Nairobi and indeed the attempted payments by the Appellant took place in Nairobi, where the Respondent banked the dishonoured cheques issued by the Appellant. The Respondent contended that the Appellant had previously paid it for goods supplied at Nairobi. The Respondent relies on the decision in *Sustainable Management Services v New Mitaboni F.C. S. [2017] KEHC 3781 (KLR)* to submit that the suit was lawfully filed in the trial court and the objection as to the place of suing was misplaced. It stated that the Appellant never offered any evidence before the trial court nor did it place before the court any material to oust the trial court's jurisdiction. As such, the Respondent urged the Court to uphold the finding of the trial court.
15. On the summary judgment, the Respondent relied on Order 36, rule 1 of the Civil Procedure Rules and Section 55(1) of the *Bills of Exchange Act* (Chapter 27 of the Laws of Kenya) to submit that the cheques issued by the Appellant to the Respondent are Bills of Exchange, and the Respondent as the holder thereof, is entitled to the value of the dishonoured cheques. The onus was therefore on the Appellant to show circumstances which will disentitle the Respondent to a judgment to which otherwise he would be entitled to. This onus was never discharged.
16. The Respondent submitted that the Appellant did not file a Replying Affidavit to the Respondent's Notice of Motion, and that the Defence as filed by the Appellant does not raise any bonafide triable issue. The Appellant had not, by way of Affidavit denied receiving the goods, and did not explain why it issued the subject cheques that were dishonoured upon presentation for payment. It submitted that issuance of cheques in attempted settlement of the debt owed to the Respondent is an admission of indebtedness, and it is for this indebtedness, that the subject cheques were issued to the Respondent. In support of the above argument, the Respondent relied on a number of authorities including: *Modern Distributors Limited V Ndungu Njeru T/A Ndungu Njeru Filling Station [2006] KEHC 1956 (KLR)* and *Equatorial Commercial Bank v Wilfred Nyasim Orocko [2015] KEHC 8122 (KLR)*.
17. It contended it was proper and procedural for the subordinate court to enter summary judgment in the present matter because it is trite law that the duty lies with the Defendant to demonstrate that it has a triable issue or defence. This was not done before the trial court because the Respondent had demonstrated that it supplied goods as per the Goods Delivery Notes exhibited, and had shown that cheques issued by the Appellant to clear the debt were dishonoured. The Appellant merely denied owing the money claimed, and its pleading were a sham, and frivolous.



18. It submitted that the Learned Magistrate arrived at the correct finding based on the material placed before the Court and that Section 15 of the *Civil Procedure Act* cures the anomaly as to place of suing.

### **Analysis and Determination**

19. I have considered the grounds set out in the memorandum of appeal and the material on the record together with the rival submissions of the parties and the applicable law. In my view the core issue is whether or not the subordinate court's erred in dismissing the Appellant's Objection and allowing the Respondent's application for summary judgment? As stated, the Appellant's Objection was in respect of the territorial jurisdiction of the subordinate court to handle the suit. The Learned Magistrate rejected the Objection because the same raised issues that required to be proven, and stated that the best way to prove the same was through an application. I agree. In *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696*, the predecessor of the Court of Appeal laid out the factors that merit a preliminary objection as follows: -

“....a Preliminary Objection consists of a pure 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 on 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”(Emphasis mine)

20. In sum, for one to succeed in putting up a Preliminary Objection, the facts pleaded by the other party are assumed to be correct; it must be a matter of law which is capable of disposing off the suit; it must not be blurred by factual details calling for evidence; it must not call upon the Court to exercise discretion. From the record, it is evident that the Appellant was inviting the Court's discretion to determine whether the matter was to be filed in Kitui or Nairobi. Evidence would be required to determine such a question which is matter of fact and law. Moreover, because the parties are unable to agree on this point, the same is a contested issue of fact, and not a pure point of law. It therefore may not form the basis of a preliminary objection (see *Syngenta East Africa Limited v Soy-Kabatik Agri Centre Limited [2021] KEHC 12821 (KLR)*).
21. As regards the decision to allow the Respondent's application for summary judgment, I find that this was a decision based on the discretion of the court. The jurisdiction of courts to set aside a default judgment is wide and unfettered, and the appellate Court will not interfere with the decision of the trial court unless it is satisfied that the said court in exercising its discretion, has misdirected itself in some matter, and as a result, has arrived at a wrong decision, or unless it is manifest from the case as a whole, that the court has been clearly wrong in the exercise of its discretion, and that as a result, there has been an injustice (see *Mbogo v Shah [1968] EA 93* and *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] KECA 39 (KLR)*).
22. There is no dispute that the Appellant was served with summons of the suit, it entered appearance, but failed to file a defence in time. In such a situation Order 36(1) of the Civil Procedure Rules, permits



a Plaintiff to seek default judgment against the Defendant for a liquidated amount claimed, and such a judgment is regular. However, even where such a judgment is regular, a court may still proceed to set aside the judgment if it is in the interest of justice, and in particular may consider doing so in circumstances where a Defendant demonstrates that it has a good defence, and any prejudice will be occasioned. Such a setting aside may be assuaged by an award of costs (see *Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another* [1998] KECA 40 (KLR)).

23. In the present matter the subordinate court noted that the Respondent had produced delivery notes and cheques issued by the Appellant to the Respondent and that this evidence was not controverted because the Appellant had not filed a Replying Affidavit or any sworn evidence to the contrary. While it is correct to state that Order 51, rule 14 of the Civil Procedure Rules allows the filing of various pleadings in opposition to an application, there is a difference between deposition setting out factual matters under oath and grounds of opposition, which are general averments not made under oath. The Court of Appeal in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] KECA 125 (KLR) held that affidavits occupy a “higher pedestal” than grounds of opposition as follows:-

(34) The position before us is that the Appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the Appellants’ claims? (Emphasis mine)

24. Based on the law as set out above, the Learned Magistrate reached a reasonable conclusion when she found that the evidence remains uncontroverted in the absence of a Replying Affidavit. In *Equatorial Commercial Bank* (supra) the court stated that the issuance of a dishonoured cheque is an admission of claim in the sense of the law. Applying the facts to the law, given that it was not in dispute that the cheques were issued by the Appellant to the respondent, I am persuaded that the Learned Magistrate reached a reasonable conclusion on this issue.

25. Based on the reasons set out above, I am satisfied that the lower court exercised its discretion appropriately and I decline to interfere with its decision.

**Conclusion and Disposition**

26. In the upshot, I find and hold that the appeal is without merit. The same is dismissed with costs and the Ruling of the lower court dated 12<sup>th</sup> March, 2021, is upheld;

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF JUNE, 2025**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

Court Assistant: Sakina

.....for Appellant

.....for Respondent

