



**Mutwa & 2 others v Mutembei & 2 others (Civil Appeal
E038 of 2025) [2025] KEHC 11726 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E038 OF 2025
FN MUCHEMI, J
JULY 31, 2025**

BETWEEN

**TABITHA MUNANIE MUTWA 1ST APPELLANT
PRISCILLA LYNET MUTWA 2ND APPELLANT
MONAN VENTURES LIMITED 3RD APPELLANT**

AND

**LAWRENCE NICHOLAS MUTEMBEI 1ST RESPONDENT
HELLEN MAKASI MUTHENGI 2ND RESPONDENT
PLANBEE CONTRACTORS & GENERAL SUPPLIERS LIMITED 3RD
RESPONDENT**

RULING

Brief Facts

1. Coming up for determination is the 1st respondent's Notice of Preliminary Objection dated 5th March 2025 on the grounds that this court lacks jurisdiction to hear and determine this appeal and that the appeal offends Section 38(1) of the *Small Claims Court Act*. It is further deposed that the right of appeal has lapsed with 30 days down the line. The appellant did not file an application for stay before the court below but proceeded to execute and got paid the entire decree by the respondent. Additionally, the appeal amounts to gross abuse of the court process as the appellants are kind of forum shopping. The appellant's company directors gravely breached their duty of reasonable care, skill and diligence under Section 145 of the *Companies Act* and ought to be liable jointly and severally.
2. Parties put in written submissions.



The 1st Respondent's Submissions.

3. The 1st respondent refers to Section 38(1) of the *Small Claims Court Act* and the case of Civil Appeal (Application) No. E263 of 2022 *Sheila Nkatha Muthee & 2 Others vs Alphonse Mwangemi Munga & Others* and submits that an appeal to this court can only be entertained on matters of law and therefore the instant appeal ought to be dismissed as the Memorandum of Appeal dated 4th February 2025 pleads facts. Accordingly, the court has no jurisdiction to hear and determine the instant appeal. To support his contentions, the 1st respondent relies on the cases of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* (1989) eKLR; *Sir Ali Salim vs Shariff Mohammed Sharray* (1938) KLR; *Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others* (2012) eKLR and *Africa Management Communications Limited vs Airtel Kenya Networks Limited* [2016] eKLR.

The Appellants' Submissions

4. The appellants refer to the case of *Aesthetics Limited vs Times and Seasons Chemicals* (Civil Appeal E027 of 2023) [2025] KEHC 2483 (KLR) (Civ) (13 February 2025) and submit that their appeal raises substantial points of law which include denial of the right to a fair hearing under Article 50 of *the Constitution*, violation of the rules of natural justice under Article 47 of *the Constitution*, misapplication of judicial discretion and failure to adhere to procedural fairness by dismissing the case without evaluating their defence.
5. The appellants further rely on the cases of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 and *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others* (2015) eKLR and argues that the preliminary objection is not sustainable as it does not raise pure points of law. As such, the appellants submit that the court has jurisdiction to hear and determine the instant appeal.

The Law

Whether the Preliminary Objection is Sustainable.

6. The case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....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.

7. Sir Charles Newbold P. stated:-

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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.



8. Similarly the Supreme Court in the case of *Hassan Ali Jobo & Another vs Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR 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.

9. Further in the case of *Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others*, [2014] eKLR the court held that:-

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.

10. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

11. The respondent argues that the instant court lacks jurisdiction to entertain the appeal as the appeal is based on questions of fact which is contrary to Section 38(1) of the *Small Claims Court Act*.

12. Section 38(1) of the *Small Claims Court Act* provides:-

A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

13. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of the Small Claims Court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

14. In distinguishing between matters of law and fact the Court of Appeal stated in *Kenya Breweries Ltd vs Godfrey Oduyo* [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.



15. On perusal of the Memorandum of Appeal dated 4th February 2025, the grounds of appeal on denial of a fair hearing, failure to exercise judicial discretion fairly and procedural fairness pursuant to Section 32 of the *Small Claims Act*, which are points of law. In that regard, it is my considered view that the instant appeal is properly before the court and the court has the requisite jurisdiction to entertain it.
16. On the ground that the appellants company directors gravely breached their duty of reasonable care, skill and intelligence under Section 145 of the *Companies Act*, the said ground is a matter of fact and not a pure point of law. The same can only be discerned through evidence and therefore it does not meet the threshold of a preliminary objection.
17. The 1st respondent has also raised issue with the record of appeal not being filed and served within 7 days. I have perused the record and noted that directions on the substantive appeal are yet to be given. Parties were dealing with the application of stay which was compromised on 25th June 2025 whereas the appellant deposited the decretal sum in court. The 1st respondent by that time had filed the current preliminary objection and parties were putting submissions. As a notice of preliminary objection has to be disposed of first, directions on the substantive appeal have not been given. Thus, this ground also fails.
18. It is therefore, my considered view that the Notice of Preliminary Objection dated 5th March 2025 lacks merit and is hereby dismissed with costs to the applicant.
19. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 31ST DAY OF JULY 2025.

**F. MUCHEMI
JUDGE**

