



REPUBLIC OF KENYA



**KENYA LAW**  
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**Masila t/a As Japhy Commercial Enterprises v Mulatya (Civil Appeal E054 of 2024) [2025] KEHC 12453 (KLR) (27 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12453 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E054 OF 2024**

**TM MATHEKA, J  
AUGUST 27, 2025**

**BETWEEN**

**JAPHETH MUTISYA MASILA T/A AS JAPHY COMMERCIAL ENTERPRISES ..... APPELLANT**

**AND**

**DOMINIC KIMANZI MULATYA ..... RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion dated 23rd May 2024 brought under section 3 A of the *Civil Procedure Act* and order 42 rule 6(1) and order 51 rule 1 of the Civil Procedure Rules seeking orders of stay of execution of the ruling delivered on 23rd of April 2024 in the SRM'S court case, number E002 of 2024 pending the hearing and determination of this application inter partes. The applicant also sought a stay of execution of the ruling pending the hearing and determination of the applicant's intended appeal in the High Court,
2. The grounds for the application are that the honourable F. Makoyo PM. delivered the judgment awarding the respondent the sum of Kenya shillings, 367, 970/46 cents. And that if stay was not granted he would suffer a substantial loss as once the money was paid out, it would never be recoverable in the event of the success of the intended appeal, that the appeal has a reasonable chance of success, and if execution is carried out, it will render the appeal nugatory. The appellant is willing to abide by any such terms and conditions on security as this court may deem fit to grant.
3. The application is supported by the affidavit of the applicant. That on the 1<sup>st</sup> of September 2022 the respondent executed a contract of employment with a company not party to the suit, but instead chose to sue the wrong party. That the respondent was involved in numerous unlawful activities that resulted in numerous warnings by the employer through the months of September, October, November 2022 that the respondent's conduct invited disciplinary action in which he acknowledged all the accusations. That on 22<sup>nd</sup> November 2022 the respondent's employment contract was terminated by way of



summary dismissal on account of gross misconduct. That accordingly, in adherence to the contract of employment signed by the respondent, his termination was fair and justified. That the damages awarded to the respondent are erroneous and disputed, as in any event, the respondent's dismissal was fair and just and followed due process in accordance with the laws of Kenya.

4. The respondent filed a preliminary objection dated on the ground that this court does not have the requisite jurisdiction to entertain the matter as it offends the provisions of article 162(1) & 2(a) and at 165(5) of *the Constitution* of Kenya 2010 and section 12(1) the Employment And Labor Relations Court Act. CAP 234 B of the laws of Kenya. That the instant application and appeal is fatally incompetent and defective as it offends mandatory legal provisions.
5. The respondents set out the facts of the matter that the appellant was challenging the decision of the learned magistrate sitting in Kilungu ELRC cause No. E002 of 2022 Dominic Mulatia versus Japheth Mutisya. T/a as Japhy Commercial Enterprise. That the respondent had filed the primary suit contending that he had been unfairly and procedurally and illegally terminated from the employment of the of the appellant. He also sought a number of reliefs for unfair termination. The learned magistrate entered judgment on the 24/4/2024 in favor of the respondent, wherein it made a finding that the claimants employment had been unfairly terminated and ordered that that the respondent herein be paid a total sum of Kenya shillings 367, 970.46 plus costs and interest.
6. The respondent set out three issues for determination.
  - i. Whether the high court has jurisdiction to entertain labor matters?
  - ii. What orders should be made?
  - iii. Who should bear the cost of the appeal and the application?
7. The respondent relies on Article 162 (a) of *the Constitution* of Kenya 2010 which empowers the parliament to establish a court with the status of the High Court to hear and determine disputes relating to Employment and Labor Relations, and 165(5) which clearly states that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in article 162.
8. He further relies on section 12 of the Employment and Labor Relations Court Act which gives the ELRC Court the exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162 (2) of *the Constitution* and the provisions of the Act of any other written law extending the court's jurisdiction to employment and labor relations, including disputes relating to or arising out of employment between an employer and an employee.
9. He relies on United States International University versus Attorney General [2012] eKLR where the court held that the it was the intention of drafters to give the industrial court full independence from the High Court .
10. He also cites Owners of MV Lilian S vs Caltex Oil ( Kenya ) Limited (1989) 1 KLR on the import of a court not having jurisdiction and urges this court to be guided accordingly.
11. Relying on s. 27 of the CPA he submits that the applicant be condemned to pay costs. He relies on the Supreme Court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014]eKLR where the court stated it emerges that the award of costs would normally be guided by the principle that 'costs follow the event'. The effect being that the party who calls forth the event by instituting suit will bear the cost if the suit fails, but if this party shows legitimate occasion by successful suit, then the defendant or respondent will bear the costs.



12. He also relies on Peter Muriuki Ngure vs Equity Bank( K) Limited [2018] eKLR the court stated. However, in view of the fact that this claim was not fully canvassed in court, so as to determine which party would have been successful, it is only fair and just that the defendant be paid costs for defending the claim up to and including the data withdrawal.
13. The appellant began by citing Daniel N Mugenchi vs Kenyatta University and three others [2013]eKLR where the court was of the view that in order to do justice the three courts, the High Court, the Industrial court or the Environment and Land Court should in the spirit of harmonization effect the necessary transfer among themselves until such time as the citizenry is well acquainted with the appropriate forum for each of the claims.
14. The appellant also set down a background of facts and cited the USIU case above confirming that the issues in this case are mostly employment issues and can be properly dealt with by the ELRC.
15. Regarding the orders with this court can make the appellant raised the question as to whether the High Court is in a position to transfer the present matter to the court with the right jurisdiction.
16. The appellant cites section 18 (1) of the *Civil Procedure Act*. He submits that this court has the power and jurisdiction to transfer the present matter to the ELRC court.
17. Relying on Albert Chaurembo and seven others (suing on their own behalf and on behalf of predecessors and or successors in the title in their capacities as the registered trustees of Kenya ports authority pension scheme versus Maurice Munyao and 148 others [2019] eKLR. the appellant submits that in that case, the Supreme Court of Kenya remitted the suit filed in the High Court and thereafter transferred to the Employment and Labor Relations Court to the CEO of the Retirement Benefits Authority, which under the Act had the original jurisdiction to hear the disputes after finding that both the High Court and the Employment and Labor Relations Court had no jurisdiction to hear the matter.
18. The appellant also relied on John Mwangi Karanja vs Alfred Ndiangui [2011] eKLR where the court was of the view that the interests of justice called for the courts to consider the transfer of suits from one court to the other as a procedural matter and not a jurisdictional matter and to forward the matter to the appropriate court for proper and final adjudication. He also relied on Slok Construction Limited vs Eric Odhiambo Odongo [2022]eKLR where the court was of the view that it would not advance the course of justice to terminate the proceedings before him, and directed those further proceedings in the appeal ‘be undertaken by the ELRC since the said court is a court of equal status as the High Court and is empowered to grant the reliefs sought ...’
19. It is submitted that this court is empowered to order the appeal be transferred to the ELRC for the disposal of the same should the court find it is not in a position to determine the case.
20. I have carefully considered the preliminary objection, the rival . submissions and the issues raised by the parties.
21. Only issue for determination is whether there is merit in the Preliminary Objection.
22. In Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 the court defined a Preliminary Objection 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. Examples are: an objection to the jurisdiction of the Court, 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.”

23. In *Oraro vs Mbaja* (2005) 1 KLR 141 Justice Ojwang (as he then was) stated:

“..... A “Preliminary Objection” correctly understood is now well defined as, and declared to be a 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, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

24. On this definition, one can see on the face of it that the P.O herein is a pure point of law speaking to the jurisdiction of this court. From *the Constitution* to the statutes, there is no argument that this court, the High Court is not clothed with the jurisdiction to hear and determine matters labor and employment. The applicant having proceeded in the subordinate court in an ELRC matter ought to have followed that route and filed the appeal in the ELRC court.

#### **Having found that what orders should issue?**

25. The Respondent submits that this court upon finding it lacks jurisdiction to hear the matter can only down its tool by striking out the matter. On the other hand, the appellant submits that the court is empowered to transfer the matter to the appropriate court in the interest of justice.

26. My view is similar to that held by Odunga J as he then was in the *Slok* case above and the view of the Court of Appeal in *Daniel N Mugenchi* (supra). A litigant ought to know the forum in which has the jurisdiction to deal with his case. By filing the matter in the wrong forum, the litigant risks having their case thrown out. However, it is not in the interests of justice to dismiss the appeal for want of jurisdiction.

27. I would find, which I hereby do that the ELRC court is the one that has jurisdiction to hear and determine the application before me and other subsequent proceedings. The matter should therefore be placed before that court.

28. Considering the fact that the parties had to litigate this application it is only fair that the Respondent gets the costs up to this point.

#### **Disposition**

29. The PO is sustainable to the extent that this court has no jurisdiction to deal with labor and employment matters.

30. In the interests of justice, I direct that the whole matter be placed before the ELRC for determination and it be marked as closed in the High Court Civil Appeals Register.

31. The respondent will have the costs of this matter up to this point.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA CTS THIS 27<sup>TH</sup> DAY OF AUGUST 2025**



**MUMBUA T MATHEKA**

**JUDGE**

CA Mwanatumu

