



**Advanced Auto Import Ltd v Otieno (Commercial Appeal
E004 of 2024) [2025] KEHC 11526 (KLR) (1 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
COMMERCIAL APPEAL E004 OF 2024**

**DK KEMEL, J
AUGUST 1, 2025**

BETWEEN

ADVANCED AUTO IMPORT LTD APPELLANT

AND

PHILIP OTIENO RESPONDENT

(An appeal arises from the ruling of the Learned Magistrate Hon. Benjamin Limo (PM) in Siaya CMCC NO. E057/2024 delivered on the 22nd October 2024)

JUDGMENT

1. The Appellant herein lodged the present appeal against the ruling of Hon. Benjamin Limo (PM) in Siaya Small Claims Court No. E057/2024 dated 23rd October 2024 wherein he dismissed the Appellants Preliminary Objection dated 5th July 2024.
2. Aggrieved by the aforesaid decision, the Appellant filed a memorandum of appeal dated 29/10/2024 wherein he raised the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact by evoking the overriding objective donated by the [Civil Procedure Act](#) to confer to the trial court jurisdiction that it does not possess.
 2. That the trial magistrate erred in law and fact to recognize that the trial suit arose out of a contract was made; the place where the contract was to be performed or the performance thereof completed or the place where in performance of the contract, any money to which the suit relates was expressly or impliedly payable.
 3. That the learned magistrate erred in law by misapplying the provisions of Section 15 of the [Civil Procedure Act](#) and placing reliance on extraneous previous court decisions.



The Appellant therefore prayed that the appeal be allowed and the ruling dated 23/10/2024 be set aside and substituted with an order allowing the Appellant's Notice of Preliminary Objection dated 5/7/2024 that Siaya Chief Magistrate's Small Claims Court has no jurisdiction to hear and determine Civil Suit No. E057/2024.

3. This being a first appeal, the role of the court is to evaluate and analyze the evidence of the trial court and come to its own independent conclusion as to whether or not to uphold the decision of the lower court. See *Selle Vs. Associated Motor Boat Company Limited* [1968] EA 123.
4. A perusal of the lower court record reveals that the Appellant had raised a Notice of Preliminary objection dated 5/7/2024 wherein it raised issues inter alia; that the Honourable court is not clothed with the requisite territorial jurisdiction to hear and determine the suit whose subject matter is premised on a contract made and/or executed in Kisumu County, required to be performed in Kisumu County, and where in performance thereof, consideration to which the suit relates ought to be paid in Kisumu County where the Defendant has its registered offices and carried on business.
5. The Respondent was granted leave by the trial court to file response to the objection within three days but it seems he did not. Both parties later filed and exchanged submissions.
6. The said Preliminary Objection was canvassed by way of written submissions. The trial court duly considered the submissions and came up with a determination wherein it dismissed the said notice of preliminary objection which precipitated the present appeal.
7. This appeal was canvassed by way of written submissions. Both parties duly complied.
8. The Appellant's submissions are dated 15/5/2025. The Appellant's submissions are a reiteration of its grounds of appeal wherein it submitted that its Notice of Preliminary Objection forms the basis of the appeal as indicated in the record of appeal in that the Appellant challenged the jurisdiction of the trial court in determining the primary suit whose subject matter is premised on a contract made and/or executed in Kisumu County, and where in performance thereof, consideration to which it related ought to have been paid in Kisumu County where the Appellant has its registered office and carries on business. That the trial court had relied on the decision rendered on 9/10/2018 by Justice J. I. Nzioka in the case of *Grobe Dawn Fittings Division Pty Ltd v Ideal Ceramics* to find that it had jurisdiction to hear the primary suit as per the annexed copy of the ruling in the record of appeal. That in the aforesaid authority that the trial court relied on, the Judge based the court's decision on the finding that both the applicant and the Respondent therein had offices in Nairobi where the suit was filed hence saw no need to transfer the suit to Mombasa. The decision found as follows:

“In conclusion, I find that it is a fact that the Defendant/Applicant have been operating a branch/office in Nairobi although the main office is in Mombasa.”

9. It was also submitted that it was erroneous for the learned trial magistrate to rely on an authority instead of the law. The Appellant further faulted the trial court for basing its decision on the overriding objective of the [Civil Procedure Act](#) and Rules made thereunder to disallow the Appellant's Preliminary Objection and hence it was erroneous to use the said overriding objective to bypass jurisdictional safeguards under the guise of expedient. It was contented that the provisions of the [Civil Procedure Act](#) should not be used as a free bus to bypass forum provisions.

It was further submitted that had the trial court strictly followed the provisions of Section 15 of [Civil Procedure Act](#) regarding the place of suing then, it could have allowed the preliminary objection on grounds of territorial jurisdiction. Further, it was submitted that the suit before the court arose out of a contract for the purchase of a motor vehicle and hence the cause of action arose from the place



where the contract was made or the place where the contract was to be performed or the place where in performance of the contract, any money to which the suit relates was expressly or impliedly payable.

It was also submitted that from the pleadings filed by the Respondent, it was pleaded that the suit motor vehicle was repossessed in Siaya and returned to the Appellant's yard in Kisumu and hence the Appellant's principle place of business was Kisumu where the contract was made and to be performed. Reliance was placed in the case of *Executive Super Riders Limited v Albert Joacquinne Osumba* [2022] eKLR.

“The Respondent could not be faulted for having filed the suit in the Chief magistrate's Court Kisumu because his subject motor vehicle was repossessed at Ahero in Kisumu County and he needed to act fast to obtain stay orders. However, this did not mean that the suit could not be transferred to the proper court for determination at the appropriate time upon application.”

10. Learned counsel for the Appellant urged the court to find that the Appellant's Notice of Preliminary Objection filed before the trial court had merit and thereafter to allow the appeal with costs.
11. The Respondents submissions are dated 3rd June 2025 wherein learned counsel raised two issue for determination namely whether the preliminary objection was competent and whether the trial court had jurisdiction to hear and determine the Respondent suit.
12. As regards the first issue, it was submitted that the said preliminary objection had challenged the territorial jurisdiction of the trial court on grounds that the subject matter was founded on a contract made or executed in Kisumu County and which required the contract to be performed in Kisumu County and the place where the consideration was to be made. It was submitted that the said preliminary objection required factual details which were to be contested in court through evidence and hence it was properly rejected by the trial court.
13. As regards the second issue, it was submitted that the trial court had jurisdiction to try the matter. Learned counsel referred the court to the provisions of Section 15 of the *Civil Procedure Act*. It was also submitted the subject of the suit in the lower court was about unlawful repossession which took place in Siaya town which is under the territorial jurisdiction of the trial court. It was also added that the issue for repossession in the contract did not stipulate that the repossession must be done in Kisumu and hence repossession can occur anywhere.
14. It was finally submitted that this court should dismiss the appeal with costs and find that the preliminary objection which was raised in the lower court was incompetent as it raised factual matters that require proof.
15. The record of the lower court reveals that the Appellant had raised a Notice of Preliminary Objection dated 5/7/2024 wherein it had raised one ground namely that the court is not clothed with the requisite territorial jurisdiction to hear and determine the suit whose subject matter is premised on a contract made and or executed in Kisumu County, required to be performed in Kisumu and where the consideration was to be paid and where the Appellant (Defendant) has its registered offices and carries on business.
16. The said Preliminary Objection was canvassed by way of written submissions. The trial court duly considered the submissions and came up with a determination wherein it dismissed the said notice of preliminary objection which precipitated the present appeal.
17. I have considered the lower court record and the submissions filed herein. It is not in dispute that the parties herein had entered into a contract in Kisumu over motor vehicle registration KDM 492C



Toyota Spade wherein the Respondent bought the said vehicle on a hire purchase basis and undertook to pay the purchase price by way of instalments. It is not in dispute that the Respondent fell into arrears warranting the Appellant to repossess the same. It is not in dispute that the repossession took place within Siaya township. It is also not in dispute that the transaction took place within Kisumu township where the Appellant carries on business. The issue for determination is whether the trial court had territorial jurisdiction to hear and determine the suit.

As the issue in contention is about territorial jurisdiction, it is necessary to revert back to the provisions of Section 15 of the Civil Procedure Act which provides the guidelines as to where suits are to be instituted.

Section 15 prescribes as follows: -

‘Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- a. The defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
- b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
- c. the cause of action, wholly or in part, arises.

Explanation. (1)— Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation. (2)— A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place (emphasis court)

Explanation. (3)— In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

- i. the place where the contract was made;
- ii. the place where the contract was to be performed or the performance thereof completed;
- iii. the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable’

It is noted that the Respondent and the Appellant entered into a sale agreement wherein the Respondent bought motor vehicle KMDC 492C make Toyota Spade on hire purchase and was to complete the monthly payments within 18 months. The agreement is dated 28/9/2023. The suit having arisen out of a contract for the purchase of a motor vehicle, then the cause of action arises from the place where the contract was made, or the place where the contract was to be performed, or the place where in performance of the contract, any money to which the suit relates was expressly or impliedly payable as per explanation 3 of Section 15 of the Civil Procedure Act. From the pleading filed by the Respondent, it is noted that the motor vehicle was repossessed and returned to the appellant’s car yard in Kisumu which is outside the jurisdiction of this court is a tacit admission that the Appellant’s



principal business is within Kisumu County where the contract was made, and where the contract is to be performed, and where in performance thereof, consideration is to be paid. Upto this point, the Respondent is in agreement. However, the Respondent's grievance is that the vehicle having been repossessed from him in Siaya town, he had every right to lodge a suit within Siaya. It seems the learned trial magistrate agreed with him vide his ruling dated 23/10/2024. According to learned counsel for the Respondent, the contract did not stipulate that all repossessions were to take place in Kisumu County and hence the Respondent was within his rights to file suit in Siaya where the repossession took place. Whereas this may be a germane proposition, the same could be blown out of proportion so much so that parties to such contracts will be having a field day in filing suits where such repossessions take place. Such state of affairs definitely were not envisaged in the contract that was entered on 28/10/2023 and which is clearly outside the guidelines provided by Section 15 of the Civil Procedure Act Explanation (3).

It is further apparent from the Respondent's own pleadings, and in particular paragraph 4 of his Pleat, that he filed this suit before the Honourable Court on a singular basis that the motor vehicle was allegedly repossessed in Siaya Town which made him presume that the correct judicial forum was the trial Court. This was not in compliance with Explanation 3 under Section 15 of the Civil Procedure Act which lays down a comprehensive guideline on the three different scenarios where a cause of action arising out of a contract needs to be pursued.

Learned counsel for the Appellant sought reliance in the case of Executive Super Riders Limited V Albert Joacquinne Osumba Kisumu High Court Misc App. No. E030/2022 [2022] eKLR wherein the Plaintiff had instituted his suit before the Kisumu Chief Magistrate's Court on a singular basis that his car was repossessed at Ahero within Kisumu County, however the Defendant's registered offices were in Nairobi. The trial court found as follows: -

'The Respondent could not be faulted for having filed the suit in the Chief Magistrate's Court Kisumu because his subject motor vehicle was repossessed at Ahero Kisumu County and he needed to act fact to obtain stay orders. However, this did not mean that the suit could not be transferred to the proper court for determination at the appropriate time upon application.'

In the foregoing case, Kamau J, went on to make the following finding following an application to transfer the suit from Kisumu to Nairobi where the cause of action arose: -

"For the foregoing reasons, this court came to the firm conclusion that the applicant had made out a case befitting of the grant of the orders that it sought as it had demonstrated that the Chief Magistrate's Court at Kisumu lacked territorial jurisdiction to her and determine the case between it and the Respondent herein."

It is noted that the learned counsel for the Respondent has contended that the above authority was in respect of an application for transfer and not about a preliminary objection. The above authority appears to have been raised by the Appellant's counsel with a view to drawing the court's attention regarding the transfer of a suit from one court to another on grounds that the former court lacked territorial jurisdiction.

18. From the foregoing, it is clear that the Respondent's suit ought to have been filed in Kisumu County. Even though the Respondent claimed that he needed to get first relief following repossession of his care, it is noted that Kisumu Law Courts was not far from Siaya and that he could have rushed there and lodged the suit. In any event, suits currently are filed online and therefore there was no hindrance regarding filing the suit in Kisumu. Hence, it is my finding that the trial court did not have the requisite territorial jurisdiction to entertain the suit.



19. Further to the issue of the court’s jurisdiction, learned counsel for the Respondent has contended that the preliminary objection raised by the Appellant was properly rejected by the trial court on the basis that the same was not on a pure point of law and sought reliance in the case of *Oraro Vs Mbajja* [2005] eKLR where the court held as follow:

“I think the principle is abundantly clear. A preliminary objection.” Correctly understood is now well 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 preliminary objection, and yet it bears factual aspects calling for a 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.”

A preliminary objection has been described in the case of *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors* [1969] EA 696 as:

“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 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.”

As regards jurisdiction, the same was described in the case of *Owners of Motor Vessel “Lilians’ Vs Caltex Oil (K) LTD* [1989] KLR 1 as:

“Jurisdiction is everything without which a court of law has no powers to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.”

20. The issue of jurisdiction is quite crucial for any court and that the moment it is realized that the court lacks jurisdiction, the said court is expected to down its tools. Under such circumstances, the court need not wait for parties to raise preliminary objections regarding the court’s lack of jurisdiction to entertain certain cases. In the present scenario, the trial court was guided by the provisions of Section 15 of the *Civil Procedure Act* (Explanation No. 3) and that the suit having been based on contract, the trial court ought to have held that it did not have territorial jurisdiction to entertain the suit. The mere fact that the repossession took place in Siaya did not give the Respondent the liberty to institute suit in Siaya since the contract was entered into Kisumu where the Appellant’s offices are situated. The trial court’s use of the overriding objective of the *Civil Procedure Act* was in error since jurisdiction is everything and that without it the court could not make any move in the matter.
21. Finally, it is noted that learned counsel for the Respondent has taken issue with the preliminary objection on the ground that the same required the court to determine certain facts through evidence. Looking at the pleadings as a whole and juxtaposed with the provision of Section 15 of the *Civil Procedure Act*, it is clear that even without a preliminary objection being raised, the Respondent’s suit ought to have been filed in Kisumu County and not Siaya as the trial court lacked the requisite territorial jurisdiction.
22. In the result, it is my finding that the Appellant’s appeal has merit. The same is allowed. The ruling by the learned trial magistrate dated 23rd October, 2024 is hereby set aside and substituted with an order



allowing the Appellant's Preliminary Objection dated 5/7/2024 with the result that the Respondent suit is dismissed with costs. As the appeal has succeeded, the Appellant is awarded costs thereof.

DATED AND DELIVERED AT SIAYA THIS 1ST DAY OF AUGUST 2025.

D. KEMEI

JUDGE

In the presence of:

Mweisigwa.....for Appellant.

Ochieng.....for Respondent.

Kimaiyo.....Court Assistant.

