

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. E002 OF 2025**

**YANG ZHONG BING .....**  
**APPELLANT**

**=VERSUS=**

**ENG JOSEPH MAINA KIBE .....**  
**RESPONDENT**

(Being an appeal from the ruling of Honourable S. Atambo, Chief Magistrate, delivered on 13<sup>th</sup> December 2024 in Thika MCL Case No. E131 of 2021).

**JUDGMENT**

1. This appeal arises from the ruling of Honourable S. Atambo, Chief Magistrate, delivered on 13<sup>th</sup> December 2024 in Thika MCL Case No. E131 of 2021. The said ruling was in respect of an application dated 16<sup>th</sup> May 2024 filed by the Appellant (the Defendant in the trial court) seeking an order that the trial court review its ruling and order given on 9<sup>th</sup> April 2024, and that the court considers and makes a determination of its Preliminary Objection dated 12<sup>th</sup> October 2023. The application was brought pursuant to Order 45 of the Civil Procedure Rules 2010.
2. I shall give a brief background of the case. The Appellant filed a Preliminary Objection (P.O) dated 12<sup>th</sup> October 2023 on the ground that

the trial court lacked the Pecuniary Jurisdiction to determine the suit because the value of the subject matter was Kshs 50,000,000. In response, the Respondent filed a Replying Affidavit stating that the actual value was Ksh 12,000,000. Both parties filed valuation reports in support of their claim. As a result, the trial court (Hon. V. Asiyu) referred the suit to the Chief Magistrate for further directions on the issue of the two conflicting reports.

3. On 13<sup>th</sup> February 2024, the Chief Magistrate gave directions for the hearing of the P.O dated 12<sup>th</sup> October 2023 and a ruling was reserved for 9<sup>th</sup> April 2024. In the said ruling, the court (Hon. S. Atambo) noted that she had not traced the P.O dated 12<sup>th</sup> October 2023 in the court record but had only seen one dated 3<sup>rd</sup> October 2023.
4. The Appellant, being aggrieved by the said ruling, filed a Notice of Motion application dated 16<sup>th</sup> May 2024 seeking a review of the court's ruling dated 9<sup>th</sup> April 2024. The Appellant also sought an order that the court considers the Preliminary Objection dated 12<sup>th</sup> October 2023. The Appellant contended that the court had failed to make a determination on its P.O dated 12<sup>th</sup> October 2023. The Appellant further contended that there was an error apparent on the face of the record, given that the P.O had been duly filed and that the court (Hon. Asiyu) had even referred to it on 7<sup>th</sup> December 2023.
5. The court considered the application and delivered its ruling on 13<sup>th</sup> December 2024, dismissing the same. It was the court's finding that

the Appellant had failed to prove that there was error in the ruling dated 9<sup>th</sup> April 2024 or that there was discovery of new and important evidence. Consequently, the application was dismissed with costs. The said ruling is the subject of this appeal.

6. The Appellant filed a Memorandum of Appeal dated 6th January 2025 on the following ground:

*That the learned Chief Magistrate erred both in fact and in law in dismissing the Appellant's Motion dated 6<sup>th</sup> May 2024 seeking review of the Ruling/Order of 9<sup>th</sup> August 2024 to consider the Appellant's Notice of Preliminary Objection dated 12<sup>th</sup> October 2024, which was on record, and all submissions filed.*

7. The appeal was canvassed by way of written submissions. The Appellant filed Written Submissions dated 3<sup>rd</sup> March 2025, while the Respondent filed Submissions dated 10<sup>th</sup> April 2025. The same were highlighted by learned counsel for the parties.

### **Appellant's Submissions**

8. Counsel for the Appellant identified only one issue for determination: Whether the learned Chief Magistrate erred both in fact and in law in dismissing the Appellant Notice of Preliminary Objection dated 12<sup>th</sup> October 2023, which was on record and all submissions filed.
9. The Appellant's counsel submitted that the central issue in this appeal concerned the preliminary objection dated 12<sup>th</sup> October 2023, which, according to them, the trial court failed to consider. Counsel pointed

out that the ruling delivered on 9<sup>th</sup> April 2024 only addressed the Preliminary Objection dated 3<sup>rd</sup> October 2023, thereby leaving out the objection that was filed later on 12<sup>th</sup> October 2023, despite the latter being on record.

10. Counsel stated that the Appellant subsequently filed an application for review, but the trial court dismissed it through a ruling dated 13<sup>th</sup> December 2024. Counsel added that in that ruling, Hon. S. Atambo indicated that he could not trace the preliminary objection dated 12<sup>th</sup> October 2023 and further held that the applicant had not furnished sufficient reasons to warrant the orders sought. Counsel argued that the present appeal arose solely because the trial magistrate failed to consider and determine that preliminary objection.
11. It was counsel's submission that the trial court committed an error of law by proceeding without addressing the preliminary objection. Counsel emphasized that it is a trite principle that a preliminary objection ought to be considered at the earliest opportunity. Counsel relied on **Ushago Diani Investment Ltd vs Abdulwahab [2023] eKLR, Hassan vs Kitonga & 2 Others [2023]eKLR and Manyenyo vs Muhavi & 5 Others [2023]eKLR.**
12. Counsel further submitted that the right to be heard was violated. Counsel argued that failure to consider the preliminary objection denied the Appellant a fair hearing on a critical issue. Counsel contended that the substance of the objection was jurisdiction,

specifically that the subordinate court lacked pecuniary jurisdiction because the suit property was valued at Kshs. 50,000,000, as indicated in the valuation report. He emphasized that jurisdiction is everything, and a court without jurisdiction must immediately “down its tools,” citing the well-known authority of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] eKLR**. Counsel highlighted that once a jurisdictional issue is raised, the court is required to determine it forthwith based on the available material.

13. It was also submitted that despite the trial court admitting that it could not trace the Preliminary Objection dated 12<sup>th</sup> October 2023, it should nonetheless have dealt with it when determining the review application. Counsel argued that the Appellant had demonstrated that the objection had been filed through the e-filing system, served upon the parties, and accompanied by submissions and supporting documents.
14. The Appellant’s counsel contended that the failure to consider the objection meant that the magistrate proceeded with the matter without determining a fundamental jurisdictional question. He argued that such omission necessitated this appeal because the objection should have been disposed of before the case could proceed on the merits.
15. The Appellant’s counsel also cited Order 45 Rule 1 of the Civil Procedure Rules on review, emphasizing that the Appellant had

discovered new and important evidence, namely that the court had failed to consider a properly filed preliminary objection and had therefore sought review without unreasonable delay.

16. In conclusion, the Appellant's counsel urged the Court to find that the trial magistrate erred by failing to consider the preliminary objection dated 12<sup>th</sup> October 2023, notwithstanding clear evidence in the e-filing system showing that the objection, submissions, and supporting documents had been duly filed. They prayed that the appeal be allowed, the error of the Chief Magistrate be corrected, and that this Court should proceed to determine the preliminary objection on its merits based on the materials already filed.

### **Respondent's Submissions**

17. Counsel for the Appellant identified the following issues for determination: (i) Whether the trial court properly dismissed the review application dated 6<sup>th</sup> May 2024; (ii) Whether LR 4953/2774 is the same as Thika Municipality Block 29/720 and the value of LR 4953/2774 at filing; and (iii) Whether the Preliminary Objection dated 12<sup>th</sup> October 2023 was properly taken.

### **Whether the trial court properly dismissed the review application dated 6<sup>th</sup> May 2024.**

18. The Respondent's counsel argued that the grounds for review are well settled under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. They contended that the Appellant's application

for review, premised on the allegation that the trial court had failed to consider the Preliminary Objection, was founded on a false premise.

19. Counsel maintained that the application for review had been adequately opposed through the affidavit of Joseph Kibe sworn on 26<sup>th</sup> May 2024 and submissions dated 15<sup>th</sup> July 2024. It was their case that the application was filed after an inordinate and unexplained delay of more than one month and was unmeritorious because the trial court had in fact considered the objection on pecuniary jurisdiction in its ruling of 9<sup>th</sup> April 2024.
20. Counsel argued that Order 45 requires review applications to be made without undue delay, failing which the application should be dismissed irrespective of its merits. They cited authorities including *Apondi vs CMB Packaging Kenya Ltd*, *Muthoni Nduati vs Wanyoike Kamau*, and *Panalpina (E.A) Ltd vs Ngae*, in support of their position. According to them, the delay of over a month could not qualify as “sufficient reason.”
21. It was also submitted that the application for review lacked bona fides because the preliminary objection of 12<sup>th</sup> October 2023 had been fully addressed in the ruling of Hon. Asiyo dated 7<sup>th</sup> December 2023, where the court held that the suit property LR 4953/2774 valued at Kshs. 12,000,000 at filing fell within the pecuniary jurisdiction of the Chief Magistrate’s Court. Counsel added that the subsequent ruling by Hon. Stella Atambo delivered on 9<sup>th</sup> April 2024 similarly dismissed the

objection on pecuniary jurisdiction, which was the essence of the Appellant's preliminary objection. Counsel submitted that, as a result, the grounds for review automatically failed.

22. Counsel further contended that the review application was fatally defective for failure to annex the formal order or decree sought to be reviewed. Counsel relied on *Suleiman Murunga vs Nilestar Holdings Ltd* and *Mutathini Farmers Co. vs Kihoto Farmers Co.* to urge dismissal of the application in limine.
23. In conclusion, counsel urged the Court to uphold Hon. Atambo's ruling of 13<sup>th</sup> December 2024, noting that the Appellant had not demonstrated any error on the face of the record and had filed an application both delayed and defective.

**Whether LR 4953/2774 is the same as Thika Municipality Block 29/720 and the value of LR 4953/2774 at filing**

24. The Respondent's counsel submitted that the Plaintiff's property LR 4953/2774, as pleaded in the plaint, is distinct from Thika Municipality Block 29/720, which is the property pleaded in the Defendant's counterclaim. Counsel stated that the two parcels are over 700 meters apart. They relied on the certificate of official search, title documents, and a survey report which confirmed that both parcels exist separately on the ground.

25. They further relied on a letter from the Director of Survey dated 28 October 2022 confirming that LR 4953/2774 had not been converted and lay outside Block 29, whereas parcels 719 and 720 fell within Block 29. Counsel also cited certified cadastral maps supporting this distinction.
26. On valuation, counsel maintained that LR 4953/2774 was valued at Kshs. 12,000,000 at the time of filing suit in 2021 and had been revalued at Kshs. 16,500,000 by October 2023. They argued that this placed it squarely within the pecuniary jurisdiction of the subordinate court. They contrasted this with the Appellant's valuation report for Block 29/720, which was prepared two years after filing the counterclaim and did not disclose the value at the time of filing.
27. Counsel argued that the Appellant's valuation report purporting to value land and machinery at over Kshs. 50,000,000 was unreliable because it did not demonstrate ownership, models, or the basis of valuation of the machinery.
28. They submitted that the Appellant's invocation of the ad coelum doctrine was misplaced, as it raised factual questions requiring evidence, including the ownership and nature of machinery and structures on the land, issues not suitable for determination in a preliminary objection.

**Whether the preliminary objection dated 12<sup>th</sup> October 2023 was well taken**

29. The Respondent's counsel argued that the Preliminary Objection was defective because it was supported by a pleading titled "bundle of documents on preliminary objections," which included a valuation report. They maintained that once evidence is introduced, the matter ceases to be a pure point of law.
30. Citing **Mukisa Biscuit Manufacturing Co. vs West End Distributors, Attorney General vs Independent Medical Legal Unit, and Oraro vs Mbaja**, counsel emphasized that a proper preliminary objection must be founded on agreed facts and raise a pure point of law. They submitted that where the objection depends on disputed facts or requires factual proof, it cannot be sustained.
31. Counsel argued that the Appellant's objection raised disputed factual issues, including the true value of the properties and whether LR 4953/2774 was the same as Block 29/720. Counsel stated that these disputes required evidence, including calling, examining, and cross-examining witnesses, and thus could not be resolved within the narrow confines of a preliminary objection. Counsel further relied on **A.G. Tanzania vs ANAW, Pontrilas Investments vs CBK, and Aviation & Allied Workers Union v Kenya Airways** to submit that once evidence is introduced, the issues become matters for full hearing, not a preliminary objection.

32. According to counsel, the Preliminary Objection also failed the three-stage test articulated by Nambuye JA in *Attorney General & Another v Andrew Mwaura Githinji*, which required that: (a) a pure point of law be raised; (b) all facts pleaded be correct and agreed; and (c) the objection be capable of disposing of the matter. They submitted that the Appellant failed all three limbs.
33. Counsel noted that improper raising of preliminary objections only delays trials and escalates litigation costs, contrary to the warning in *Mukisa Biscuit*. They accused the Appellant of repeatedly filing objections and applications since 2023 with the intention of delaying the hearing on the merits.
34. The Respondent's counsel concluded that Hon. Asiyo and Hon. Atambo had already determined the preliminary objection of 12<sup>th</sup> October 2023, and that the subsequent review application filed late and without merit was properly dismissed. Counsel maintained that the objection was not a pure point of law but was laden with evidence and riddled with factual disputes. Counsel asserted that LR 4953/2774 fell within the pecuniary jurisdiction of the subordinate court at all material times. Counsel urged the Court to dismiss the appeal with costs and remit the file to the trial court for expeditious hearing.

### **Analysis and Determination**

35. I have considered the Record of Appeal, the impugned ruling delivered on 13<sup>th</sup>

December 2024, the Memorandum of Appeal, and the submissions filed by both parties which were highlighted by counsel. In my view, the following issue arises for determination: Whether the trial court erred in dismissing the review application.

36. The Appellant's case is that the trial court ignored a duly filed Preliminary Objection dated 12<sup>th</sup> October 2023, and therefore failed to determine a jurisdictional issue. According to the Appellant, this constituted an error apparent on the face of the record and justified review under Order 45 Rule 1.
37. The Respondent contends that the review application was properly dismissed because:(i) the objection had in fact been determined;(ii) the ruling sought to be reviewed contained no error; (iii) the application was filed after unexplained delay; and (iv) the Appellant had not annexed a decree or order sought to be reviewed.
38. Review under Order 45 is a restricted remedy. It is available only on grounds of:
- (a) discovery of new and important evidence not within the applicant's knowledge;*
  - (b) an error apparent on the face of the record; or*
  - (c) any other sufficient reason.*
39. The application must also be made without unreasonable delay.

40. The impugned ruling shows that the trial court dismissed the review application because it found no error in the ruling of 9<sup>th</sup> April 2024, and no new evidence had been presented. The court also noted that it could not trace the Preliminary Objection dated 12<sup>th</sup> October 2023.
41. The question is whether this inability to trace the objection amounted to an error apparent on the face of the record. Not every alleged mistake qualifies as such. As held in *National Bank of Kenya vs Ndungu Njau*, a court is not permitted under review to sit on appeal over its own decision.
42. The record before this Court shows that both Hon. Asiyo and Hon. Atambo had previously considered the question of pecuniary jurisdiction and made findings on it, including reference to the conflicting valuation reports. A perusal of the ruling of 9<sup>th</sup> April 2024 shows that the court addressed the Preliminary Objection on jurisdiction, albeit referring to the P.O dated 3<sup>rd</sup> October 2023. The court stated as follows:

*“It is the defendant's contention that plaintiff's his property is worth Kshs.60,000,000/=hence beyond this court's jurisdiction. For this it availed a valuation report as proof of the same but it is evident from the annexures and proof of the proceedings herein, the property worth Kshs.60,000,000/ if land No. Thika Municipality Block 29/720 which is a totally different parcel of land from LR No. 4953/2774 which belongs to the Plaintiff. The records, annexures of documents forming this court record are.....”*

*“It is therefore the finding of this court that not only has it been established that L. R. No. 4953/2774 and Thika Municipality Block 29/720 are 2 distinct parcels of land but also their value is different and therefore, the pecuniary jurisdiction of land parcel No.4953/2774 falls within the jurisdiction of this court. Thus, this ground of the preliminary objection automatically fails.”*

43. The substance of the jurisdictional argument on whether the value of the subject matter ousted the trial court’s pecuniary jurisdiction was addressed.
44. In the circumstances, I find that the Appellant did not meet the threshold for review. An alleged failure to consider a particular document, where the substantive issue raised in that document was in fact addressed in the ruling, does not amount to an error apparent on the face of the record.
45. Further, the review application was filed more than one month after the ruling. The Appellant did not explain the delay. Under Order 45, delay alone is sufficient ground to defeat a review application.
46. Consequently, I find no merit in the appeal, and it is hereby dismissed with costs.

**Dated, signed and delivered virtually at Thika this 19<sup>th</sup> day of November 2025.**

.....  
**J. M ONYANGO**

## **JUDGE**

### **In the presence of:**

1. Mr Outa for the Respondent
2. No appearance for the Appellant

Court Assistant: Hinga

ORIGINAL