

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
[MILIMANI LAW COURTS]
THE CIVIL APPELLATE DIVISION
(Coram: A.C Mrima, J.)
CIVIL TRIBUNAL APPEAL NO. E991 OF 2024

-between-

- 1. SPRINT COMPANY LIMITED**
- 2. FLORENCE NGUNJU**
KIOI.....APPELLANTS/APPLICANTS

-versus-

POWEL OYUGI
t/a **POWEL** **JEA**
ENTERPRISE.....RESPONDENT

RULING

Introduction and Background:

1. This is a joint ruling in respect of the Notice of Preliminary Objection dated 25th September 2024 lodged by *Powel Oyugi t/a Powell JEA Enterprise*, the Respondent herein, and the application by way of Notice of Motion dated 15th May 2025, instituted by *Sprint Company Limited* and *Florence Ngunju Kioi*, the Applicants herein.
2. Before the trial Court, *Sprint Company Limited* and *Florence Ngunju Kioi*, instituted *Small Claims Court Commercial Case No. E4079 of 2024* (hereinafter referred to as **'the suit'**) where they sought a refund of monies paid to *Powel Oyugi t/a Powel Jea Enterprise*, for a contract that did not materialise.
3. In response to the claim, the Respondent lodged a defence and a counterclaim. In the defence, it was his case that the Applicants changed the description of the subject contract and communicated the same after he had already executed the initial terms to completion. In the counterclaim, he claimed that the Applicants' actions constituted breach of contract. He prayed for an award of damages.

4. The suit was heard. In its judgment, the trial Court found the Applicants to have unilaterally altered the terms of the contract by changing the description of the order and demanding a refund. It entered judgment in favour of the Respondent. It was that decision which elicited the instant appeal.
5. Through a Memorandum of Appeal dated 23rd August 2024, the Applicants sought that the trial Court findings be set aside on the following grounds: -
 1. *The learned trial magistrate/Adjudicator erred in law and in fact in dismissing the Appellants' case and allowing the Respondent's counter claim when all facts pointed in the opposite direction.*
 2. *The learned trial magistrate erred in law and misdirected herself by failing to appreciate the pleadings and entire matter hence entering judgment for the Respondent on the counterclaim in an unclaimed amount of Kshs. 265,000/- allegedly being unpaid balance yet the said amount was not claimed or prayed for in the counterclaim or submissions and which amount was clearly not the unpaid balance.*
 3. *The learned trial magistrate/Adjudicator erred in law and fact in finding that the Appellant was in breach of a contract, yet the circumstances changed once the Respondent agreed to make a refund of the deposit by the Appellant.*
 4. *The learned trial magistrate/Adjudicator erred in law when she completely ignored the evidence adduced by the Appellant and further misdirected herself in allowing the Respondent's counter claim yet no evidence or proof was provided by the Respondent.*
 5. *The learned magistrate erred in law when she held that the Appellants were not entitled to a refund of the amount of Kshs.132,500/- together with interests thereof despite the Respondent's admission that he received deposits for the t-shirts which he in turn never delivered.*
 6. *The learned magistrate erred in law and fact when she failed to appreciate that in keeping both t-shirts and the deposit which had been paid, the Respondent ate his cake and still had it too.*

7. *The learned magistrate erred in law and in fact and misdirected herself when she failed to find that the Appellant had proved his case on a balance of probabilities.*
8. *The learned magistrate occasioned a miscarriage of justice by failing to consider all the evidence presented and instead considered extraneous matters to the detriment of the Appellant.*

The Notice of Preliminary Objection:

6. The above grounds of appeal yielded the Respondent's Notice of Preliminary Objection dated 25th September 2024 which was couched in the following terms: -
 1. *This appeal is barred by dint of Section 38 of the Small Claims Court Act which provides as doth, appeals from the small claims shall be purely on matters of law.*
 2. *The 8 grounds raised in the memorandum of appeal herewith are purely points of fact and evidence.*
 3. *That consequently, the subject of the application and the appeal herein are defective ab initio and ought to be dismissed with costs to the respondent.*
7. This Court then directed the parties to file written submissions on the objection. In his written submissions dated 18th June 2025, the Respondent stated that his objection met the threshold of raising pure questions of law, a requirement established in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA. To lend credence to his position, he argued that the appeal ran afoul Section 38 of the Small Claims Act which confers upon the High Court jurisdiction to consider matters of law only. He drew support from various decision among them; *Kenya Breweries Ltd -vs- Godfrey Odoyo* (2010) eKLR, the English case of *Bracegirdle -vs- Oxley* (2) (1947) 1 ALL ER 126 where the Courts addressed what point of law are. In the former decision, it was observed thus;

... The mandate on a second appeal, that it, on points of law only. Equally, in this appeal, albeit being a first appeal, Small

Claims Court Act prescribes that an appeal to this court from the small claims court be on matters of law only.

8. It was his submission that specifically pleaded in their grounds of appeal that the trial Magistrate erred in '*law and fact*' in the face of statutory exclusion of matters of fact. He argued that this Court has a duty to uphold the findings of fact. He stated that the ground that the award of Kshs. 265,000/- was erroneous is a veiled attempt to challenge the trial Court's factual and evidentiary assessment. He further submitted that the ground regarding alleged failure to produce sufficient or relevant evidence is a factual grievance squarely within the trial Court and is now impermissible for this Court to revisit the evidentiary failure under the guise of a question of law. He claimed that the sufficiency or insufficiency of evidence is not by itself a question of law.

The Notice of Motion dated 15th May 2025:

9. Before the objection was disposed of, the Applicants lodged the Notice of Motion dated 15th May 2025 which application sought the following reliefs: -
 1. *That this Honourable Court be pleased to allow the Appellant to produce additional evidence.*
 2. *That upon grant of prayer 1 above, this Honourable Court be pleased to order the applicant to file supplementary record of appeal.*
 3. *That costs be in the cause.*
10. The application was supported by the Affidavit of *Florence Ngunju* deposed to on a similar date. As can be discerned from the grounds and Affidavit in support of the application, the Applicants in urging that the application be allowed, deposed that the evidence sought to be adduced is the bundle of screenshots of the WhatsApp communication between the parties which was inadvertently not included in the bundle of documents though the same was listed. It was further deposed that the said communications were referred to in the witness statement and that she presented all the evidence to their Advocates, but only one snapshot of the WhatsApp

communications between her and the Respondent was put in the bundle of documents in the trial Court file. She averred that the communication is a series of texts which are self-explanatory and which will sort out the case effectively. She stated that the Respondent, as seen in the communication had agreed to refund the deposit she had paid for the branded T-shirts and when he took too long, he had failed to give him both the T-shirts and the deposit. She asserted that it would be grave injustice for the Respondent to be paid for nothing.

11. In conclusion, she claimed that she should not suffer the mistakes of Counsel, an honest mistake that occurred during filing of the documents.
12. The Court directed the Respondent to file his response to the application where he filed Grounds of Opposition and thereafter parties filed written submissions as well.
13. On its part, the Applicants filed joint written submissions dated 27th June 2025 in support the application and in opposition to the Notice of Preliminary Objection. In asserting the propriety of the appeal, they claimed that judgment was entered on an unpleaded amount. It was their case that the judgment was a nullity since the trial Court exceeded its authority by awarding an amount greater than what was claimed by the Respondent. It was further submitted that the doctrine of unjust enrichment is a point of law. Similarly, it was contended that the Respondent did not prove his case as per the Evidence Act, an issue which he claimed was a point of law.
14. In regard to the quest to adduce additional evidence, the Applicants submitted that under Section 78 of the Civil Procedure Act, an appellate Court has power to take additional evidence or require the evidence to be taken. The Supreme Court decision in *Mohamed Abdi Mohamed -vs- Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR was cited and was urged that they had satisfied the conditions set therein for adducing additional evidence. The Applicants also submitted that the mistake of their Advocate, to fail to file the correspondence, ought not to be visited upon them. They fortified the argument

through the Supreme Court case of *Mohamed Abdi Mohamed - vs- Ahmed Abdullahi Mohamed and 3 others* case (*supra*) where it was observed thus: -

.... there must be cogent and credible evidence that the applicant made concerted efforts or due diligence, through evidence or correspondence of the follow up with the advocates to pursue his rights. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. As we held in Karinga Gaciani Case, "Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not..."

15. In conclusion, it was their case that the additional evidence will not prejudice any party but foster the resolution of the dispute with finality.
16. In opposition to the application, the Respondent through his Grounds of Opposition stated that the object of the appeal which formed the basis of the application is barred by section 38 of the Small Claims Court Act. He reiterated that the admission of the supplementary documents at this stage would inevitably require the Court to re-evaluate the facts, jurisdiction it does not have. It was his case that the Applicants had not provided tangible explanation as to the omission of and or inability to produce the alleged additional evidence during the substantive hearing at the Small Claims Court. The Respondent submitted that under *Order 42 Rule 27, 28 and 29* of the *Civil Procedure Rules*, parties to an appeal are not entitled to produce additional evidence.
17. In urging this Court to refrain from entertaining the additional evidence, it drew support from the case of *Mohammed Abdi Mohamud -vs- Ahmed Abdulahi Mohamad & 3 Others* case (*supra*) where the principles for allowing additional evidence were discussed to include; when it can be shown that the evidence in question could not have been obtained with reasonable diligence for use at the trial Court and was not within the knowledge of or could not have been produced at the time of the suit or petition.

18. In conclusion, it was his case that allowing the application would offend the principle of finality to litigation and undermine the purpose and efficiency of the Small Claims Court.

Analysis:

19. Having appreciated the thrust of both the objection and the application, the following issues arise for determination: -
- i. *Whether the preliminary objection is proper in law.*
 - ii. *Depending on (i) above, the merits of the objection.*
 - iii. *Depending on (ii) above, whether the application be allowed.*
20. A look at the above issues now follow.

[a] Whether the preliminary objection is proper in law:

21. On the first issue, for a preliminary objection to be valid, it must confine itself to pure point of law capable of disposing of a dispute without going to the merits main dispute. It is, therefore, incumbent upon a Court to ascertain that it is not caught up with factual issues that would necessitate the calling of evidence.
22. The decision in ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*** (1969) E.A 696 pg. 700 is the longstanding guide on the nature of preliminary objections. It was observed;

...so far as I am aware, 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 objection may dispose of the suit. Examples are an objection to 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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

23. In Civil Suit No. 85 of 1992, **Oraro vs. Mbaja** [2005] 1 KLR 141, *Hon. Ojwang J*, [as he then was], cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objections;

... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified 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, and 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.

24. In **Omondi -vs- National Bank of Kenya Ltd & Others** {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look the pleadings and other relevant documents but must abide by the principle that it must raise pure points of law. It was held;

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

25. The objection is derived from *Section 38* of the *Small Claims Court Act*. The said section delineates this Court’s jurisdiction in respect of appeals in the following manner:

38. Appeals

- (1) *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.*
- (2) *An appeal from any decision or order referred to in subsection (1) shall be final.*

26. Flowing from the above, it is clear that the concept of 'jurisdiction' is the thrust of the Respondent's objection. As to whether jurisdiction is a pure question of law, the decision of the Supreme Court in Petition No. 7 of 2013 **Mary Wambui Munene -vs- Peter Gichuki Kingara and Six Others**, [2014] eKLR, emphatically stated that '*jurisdiction is a pure question of law and should be resolved on priority basis.*' On the aspect of jurisdiction, the Supreme Court in Constitutional Application No. 2 of 2011, **In the Matter of Interim Independent Electoral Commission** (2011) eKLR observed thus: -

... Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent.

27. The Preliminary Objection arose by clear implication of the grounds in the Memorandum of Appeal as pitted against the provision of section 38 of the Small Claims Act. There is also no contest between the parties as to the correctness of the what is in contest as raised in the grounds of appeal. It is this Court's finding, therefore, that the grounds raised in the Preliminary Objection pass the propriety test of a valid preliminary objection in law. Accordingly, the objection is for consideration.

[b] Whether the Preliminary Objection is merited:

28. The Respondent posited that this Court lacks jurisdiction to deal with this appeal since the appeal raised issues of fact and evidence and not law, hence, contravenes Section 38 of the Small Claims Court Act. In Petition No. E282 of 2020, **David Ndi & 4 others -vs- Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended Amicus**

Curiae) [2020] eKLR, this Court discussed the concept of jurisdiction in the following words: -

24. *Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.*

25. *In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows:*

.... By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

29. Drawing from the foregoing, for this Court to determine whether the preferred grounds of appeal are factual or otherwise, a tour of what comprises of matters of law is necessary. Whereas there has been no universally accepted definition of the term '*matters of law*', there has been some working definitions thereto. The term '**point of law**' may also be referred to as '**matter of law**'. The **Black's Law Dictionary** defines '*a matter of fact*' and '*a matter of law*' as follows: -

Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and **Matter of law:** A matter involving a judicial inquiry into the applicable law.

30. Lord Denning, J in **Bracegirdle vs. Oxley** (2) [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

.... The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.

31. Drawing from the above, the Court of Appeal in **Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others** [2014] eKLR sated as under: -

*.... That reasoning has been adopted in this jurisdiction. In **A.G. Vs. DAVID MURAKARU** [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. **This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law.** See also **PATEL vs. UGANDA** [1966] EA 311 and **SHAH Vs. AGUTO** [1970] EA 263.*

32. The foregoing was reiterated in **Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others**, (2014) eKLR. Further, in **Peter Gichuki King'ara vs. IEBC & 2 others**, Nyeri Civil

Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law.

33. Applying the said dichotomy in this case, it is this Court's finding that since the matters in contention in this appeal relate to the manner in which the trial Court exercised its discretion in law in deciding the issues at hand, then such issues transcend the borders of matters of fact into the realm of matters of law.
34. This Court, therefore, must interrogate the trial Court's decision wholly and determine the question whether no reasonable Court or Tribunal would have reached the conclusion it reached. In the premises, the preliminary objection is defeated by the obligation upon this Court in law to ascertain the propriety of the trial Court's decision. The objection is, therefore, not merited as the cumulative effect of the grounds is that various matters of law are to be determined.
35. With the preliminary objection out of the way, the next consideration is whether the application is merited.

[c] The Notice of Motion dated 15th May 2025:

36. It is a principle of law that parties are generally required to adduce all relevant evidence before the trial Court. However, in civil litigation, parties who discover they have left out important pieces of evidence can be allowed to admit fresh evidence on appeal on the basis of settled legal principles. In this matter, Section 38 of the Small Claims Court Act limit appeals on matters of law. Since the application seeks to introduce additional evidence, then ideally that evidence would have to be dealt with by the trial Court through examination-in-chief, cross-examination and re-examination. That is certainly within the ambit of the trial Court and outside the jurisdiction of this Court as an appellate Court under Section 38 of the

Small Claims Court Act. In other words, it is not open for an aggrieved party to seek to introduce fresh evidence in instances where a Court's mandate is only limited to reconsideration of matters of law and the correctness of a decision.

37. The above was affirmed in ***M'Riungu v. Republic*** [1983] KLR 455 where the Court of Appeal observed as follows: -

....Where a right of appeal is confined to question of law, an appellate Court has loyalty to accept the findings of fact of the lower Court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial Court or the first appellate Court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.

38. Flowing from the foregoing discussion, this Court, in light of section 38 of the Small Claims Court Act, must resist the temptation to add into the record any material that was not subjected to the dynamics of examination.

Disposition:

39. Having wholly considered the application and the preliminary objection, the following final orders hereby issue: -

[a] The Notice of Preliminary Objection dated 25th September 2024 be and is hereby dismissed.

[b] The Notice of Motion dated 15th May 2025 is without merit and is hereby dismissed.

[c] The trial Court file be availed.

[d] Each party to bear its own costs of the objection and the application.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 12th day of November, 2025.

**A. C. MRIMA
JUDGE**

Ruling virtually delivered in the presence of:

Miss Mugo, Learned Counsel for the Appellants.

Miss Gwembere, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.