



**Kinonge v Thika Water & Sewerage Co. Limited (Civil Appeal
118 of 2023) [2025] KEHC 5067 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 118 OF 2023
FN MUCHEMI, J
APRIL 25, 2025**

BETWEEN

MICHAEL MWANGI KINONGE APPELLANT

AND

THIKA WATER & SEWARAGE CO. LIMITED RESPONDENT

RULING

Brief Facts

1. This is a ruling of the respondent's Notice of Preliminary Objection dated 9th December 2024 based on grounds that this appeal is incompetent, fatally defective and inadmissible as it raises points of fact and evidence contrary to Section 38 of the [Small Claims Court Act](#) which provides for appeals from the Small Claims Court purely on points of law.
2. Parties disposed of the preliminary objection by way of written submissions.

The Respondent's Submissions.

3. The respondent relies on the case of [Owners of the Motor Vessel "Lillian S" vs Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1 and submits that the current court lacks jurisdiction to entertain the present matter as the appeal raises points on fact and evidence contrary to section 38 of the [Small Claims Court Act](#). The respondent further relies on the cases of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR and Mwita vs Woodventure (K) Limited & Another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment) and submits that on a second appeal as is similar to the duty of the current court under Section 38 of the [Small Claims Court Act](#), the court confines itself to matters of law only unless it is shown that the 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. The respondent reiterates that the grounds contained in the instant



appeal are marred with factual and evidential issues and therefore the jurisdiction of the instant court is usurped.

The Appellant's Submissions

4. The appellant mainly submits on the merits of the appeal and only stated that the current court has jurisdiction to determine the instant appeal.

The Law

Whether the preliminary objection is sustainable.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. The respondent argues that the court does not have jurisdiction to entertain the appeal as it raises matters of fact and evidence contrary to Section 38 of the *Small Claims Court Act*.

11. The law on the question of jurisdiction was enunciated in the case of Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited [1989] KLR 1 where the court held:-

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court 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 before it the moment it holds the opinion that it is without jurisdiction.



12. On the source of jurisdiction, it was held in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others* (2012) eKLR that:-

A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

13. The appellate jurisdiction of the current court is provided for in Section 38 of the *Small Claims Court Act* which provides:-

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.

14. On perusal of the memorandum of appeal, it is notable that the appeal mainly revolves around refund of moneys that the appellant claimed he had paid as part of the water bills for services that were not provided to him by the respondent. The trial magistrate rendered her judgment on 1st November 2022 dismissing the claim on the grounds that the appellant had not proved his case on a balance of probabilities. On further perusal of the grounds of appeal, this court will be tasked to evaluate the evidence and interrogate facts to determine the appeal. No matters of law have been raised in the grounds of appeal contrary to the provisions of Section 38 of the Act which allows for appeals on matters purely on points of law.

15. Accordingly, the notice of preliminary objection dated 9th December 2024 has merit and is hereby upheld this appeal is hereby struck out for being incompetent with costs to the respondent.

16. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF APRIL 2025.

**F. MUCHEMI
JUDGE**

