



REPUBLIC OF KENYA



**Ajong'o v Ajinja & another (Civil Appeal E036 of 2024)
[2025] KEHC 11465 (KLR) (1 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11465 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E036 OF 2024
DK KEMEL, J
AUGUST 1, 2025**

BETWEEN

PETER OCHIENG AJONG'O APPELLANT

AND

OTIENO KEVIN AJINJA 1ST RESPONDENT

ERICK OTIENO OWINO 2ND RESPONDENT

*(Being an appeal against the ruling and order Hon. Mr. J P. Mkala,
Adjudicator dated the 23rd August 2024 in SIAYA SCCCOM No.E 024 of 2024)*

JUDGMENT

1. The appeal arises from the ruling and order of Hon. JP Mkala (RM/Adjudicator) in Siaya Small Claims Case No. E024 of 2024 delivered on 23rd August 2024. The Appellant gave a background history and genesis of the matter that had been lodged before the trial court as follows:
 - A. By a statement of claim dated the 13th March 2024 and found at page 3 of the record of appeal, the Appellant (then claimant) brought a claim based on contract against the Respondent for the sum of Kshs 920,000/= arising out of the breach of a sale agreement between the Appellant and the Respondents, dated the 15th March 2023 for the sale of an independent sole proprietorship filling station situated on LR No. Siaya/Ramba/4779, Ndori Centre Siaya County.
 - B. By the said sale agreement, the Appellant sold to the respondents his interests in the aforesaid petro; station for the sum of Kshs 1,500,000/= (One Million Five Hundred Thousand) of which a down payment in the sum of Kshs 800,000/= was acknowledged by the parties as having been paid at the time of execution of the said sale agreement.



- C. The parties agreed that the balance of Kshs 700,000/= was to be paid in 4 instalments made up and scheduled hereunder;
- a) Kshs. 200,000/- on or before the 24th March 2023;
 - b) Kshs. 200,000/- on or before the 30th of May 2023
 - c) Kshs. 150,000/- on or before the 30th of June 2023;
 - d) Kshs. 150,000/- on or before the 30th of July 2023;
- D. On 24th March 2023, the due date for the first instalment of Kshs. 200,000/=, only Kshs. 30,000/= out of the Kshs. 200,000/= due was paid by the Respondents with the promise to settle the balance the following day, that is 25th March 2023. That the Respondents have since then ignored their obligation under the said sale agreement thus giving rise to litigation, despite promises made and not honored.
- E. That clause 2.10 of the agreement stipulated a penalty for the breach by either party, being one third of the total purchase price under the sale agreement.
- F. The Respondents, in breach of the sale agreement, have failed to pay the claimant the sum of Kshs. 420,000/= as at date thus activating clause 2.10 of the sale agreement and now attracts a penalty of Kshs. 500,000/= aggregating to Kshs. 920,000/= being made up as follows hereunder;
- a) Kshs. 170,000/- in respect of the instalment balance due on 24th March 2023.
 - b) Kshs. 200,000/- in respect of the instalment due on 30th May 2023.
 - c) Kshs. 50,000/- in respect of the instalment due on 30th June 2023.
 - d) Kshs. 500,000/- (penalty for breach as per sale agreement) being one third of the purchase price.
- G. Despite demand and notice of intention to sue being issued on 24th May 2023, the Respondents ignored, failed and or neglected to settle the debt with instalments overdue for over three months and one month respectively for 24th March 2023 and 30th May instalments. The claimant continued to suffer serious losses having sold his business to settle University fees for his daughter who has since been forced to defer with serious financial implications on future resumption of studies hence this suit.
- H. The claimant filed a suit in the Small Claims Court at Kisumu due to none operational similar Court in Siaya at the time but was advised to withdraw the matter due to lack of jurisdiction as the cause of action took place in Siaya Jurisdiction where it should be filed afresh.
- I. In response to the statement of claim, the Respondents first filed a notice of preliminary objection to the claim dated 27th March 2024 and found on page 25 of the record appeal. The grounds of objections were that;
- a) Lack of jurisdiction on the ground that the subject matter- sale agreement was for the sale of the land;
 - b) The claim offends section 13 of the *Small Claims Act*;
 - c) The claim offends section 6 and 7 of the *Civil Procedure Act*;



- d) Claim is defective, incompetent and bad in law therefore incapable of being handled by the Hon Court sitting as a Small Claims Court.
- J. The Learned Honourable Adjudicator pronounced himself on the objections as may be seen on page 161 to 164 of the record of appeal and the Respondents as a result sought to appeal against the dismissal of their objection.
- K. This matter consequently proceeded to hearing, which was conducted viva-voice and a judgement on the matter was delivered on the 3rd June 2024 as it appears on page 116 of the record of appeal.
- L. The Appellant being aggrieved by the judgement, made a review application dated 4th July 2024 wherein he sought to challenge the said judgement on several grounds namely;
- a) There is an error apparent on the face of the record.
- b) Even though the Honourable Court presided over this matter and rendered a judgement on it, it has subsequently become abundantly clear that the exercise was carried out without jurisdiction thus rendering the whole exercise a nullity.
- c) The Honourable Court’s jurisdiction is derived from statute law and in this instance section 12(1) a of the *Small Claim Court Act* chapter 10A of the Laws of Kenya which mandates it to preside over cases relating to a contract for sale and supply of goods or services.
- d) The instant case related to contract for the sale of a petrol station, equipment, infrastructure and buildings as set out in the judgement of 3rd June 2024.
- e) There was no evidence at the trial hereof of any intention to sever the petrol station, the equipment, the building and or infrastructure from the land upon which it was situate before the sale or under the contract.
- f) A petrol station, equipment, infrastructure and buildings meant for use, in situ, are not “goods” envisaged by the definition under section 2 of the *Sale of Goods Act* chapter 31 of the Laws of Kenya.
- M. The gist of the Appellant’s review application was that going by the Small Claim Court’s jurisdiction, as set out under section 12(1)a of the *Small Claim Court Act* chapter 10A of the Laws of Kenya and further the Honourable Adjudicator’s own finding and pronouncement in the judgement of 3rd June 2024 and more particularly page 117 of the record where the Hon Adjudicator found that the interest in the building and the land was indivisible, was wanting and therefore judgement presented an error on the face of the record.
- N. The Respondents opposed the review application by filing a notice of-preliminary objection as well as grounds of opposition all of which have been duly included in the record of the appeal. The review application was disposed of by way of written submissions and the Honourable subordinate court made a ruling there on the 23rd August 2024. The same is found at page 163 of the record of appeal.
- O. In its ruling, the Honourable subordinate Court dismissed the review application on grounds, inter alia; that lack of jurisdiction is not one of the grounds upon which a party can seek review of judgement under section 29 of the *Small Claims Courts Act*; that the Court having already rendered itself on the issue of jurisdiction based on similar grounds, it was thus functus officio.



2. Being aggrieved by the said decision, the Appellant filed the present appeal against the whole of the said decision on the following grounds of appeal.
 - i. The Honourable learned adjudicator erred in law by presiding over a subject matter it had no jurisdiction to adjudicate on.
 - ii. The Honourable learned adjudicator erred in law by misapprehending the Court's review jurisdiction over its own decisions when he shied away from determining whether indeed he had jurisdiction in the pretext that he would be sitting on an appeal over his own earlier decision on the matter of jurisdiction.
 - iii. The Honourable learned adjudicator erred in law in failing to comprehend the review jurisdiction of the court holding that jurisdiction is not one of the grounds that an applicant can take in an application for review pursuant to rule 29 of the *Small Claims Court Rules*.
 - iv. The Honourable learned adjudicator erred in law in turning a blind eye to the various obvious instances of errors apparent on the face of the record and more particularly on the judgement and order of the 3rd June 2024 as specifically pointed out by the Appellant herein in his written submissions dated 14th August 2024 and duly filed in court.
 - v. The Hon learned adjudicator erred in law in ignoring all the decisions of the superior courts brought to his attention emphasizing the fundamental nature of the issue of jurisdiction to court proceedings and proceeding to make further orders herein without caring whether he had jurisdiction or otherwise.
 - vi. The Hon learned adjudicator erred in law in granting unsolicited stay pending appeal orders including on still-born conditionality to deposit a sum of Kshs 200,000/= in joint interest earning accounts held by parties' advocates within 30 days from the date of the application.
 - vii. The Hon learned adjudicator erred in law when he made the impugned ruling and orders on the basis of facts and/or considerations extraneous to the matter before him, and which were neither canvassed nor pleaded by the parties.

The Appellant sought for the following orders:

- 1) That the ruling and orders of the Hon Adjudicator delivered on 23rd August 2024 in Siaya SCCCOM024/2024: *Peter Ochieng Ajong'o versus Otieno Kevin Ajinja and Erick Otieno Owino* be and is hereby set aside.
 - 2) That the judgement dated 3rd June 2024 and all consequential orders in Siaya SCCCOM024/2024: *Peter Ochieng Ajong'o versus Otieno Kevin Ajinja and Erick Otieno Owino* be and is hereby set aside for want of jurisdiction and that the claim be struck off.
 - 3) Costs herein be provided for.
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 shows that this was a small claims commercial matter wherein the Claimant(Appellant) sought for the sum of Kshs920,000/= being in respect of unpaid instalments as well as penalties for breach of contract. The same was denied by the Respondents herein. The Respondents prior to the hearing raised a preliminary objection dated 27/3/2024 wherein they



claimed that the court had no jurisdiction to entertain and determine the claim on the ground that it offends the provision of section 13 of the Small Claims Act. It is noted that the trial court vide its ruling dated 2/4/2024 found the objection to be without merit and dismissed it with costs to the Claimant(Appellant). The suit proceeded in earnest for hearing on 27/5/2024. The evidence was as follows;

5. Peter Ochieng Ajongo (CW1) adopted his witness statement as his evidence in chief. He also produced his list of documents which comprised of a sale agreement and a demand letter. He stated that he claims for a sum of Kshs. 400,000/- which is the balance outstanding plus Kshs. 500,000/- being the penalty for breaching the contract. That he was selling a petrol station.

On cross examination, he stated *inter alia*; that he's claiming for Kshs. 420,000/- for breach of contract; that he filed a claim of Kshs. 370,000/- in Kisumu; that the building is part of infrastructure; that the consideration is aggregated to Kshs. 1,500,000/- ; that he did not consider the building on its own as he selected it with the consent of the owner; that the purchaser could have been required to enter into a separate agreement over the land; that he did not sell the petrol station which had a faulty fuel pump; that he had the consent of the land owner.

On re-examination, he stated that he was not to give any warranty and that the business was sold as is.

6. Otieno Kevin Ajinja (RW1) relied on his witness statement dated 11th May 2024 as his evidence in chief. He also produced a hand-written agreement as well as the sale agreement dated 15th March 2024 plus photographs and bank statements. He urged the court to dismiss the claimant's case with costs.

On cross-examination, he stated *inter alia*; that they entered into a sale agreement for the sale of a petrol station; that the claimant coerced them into signing the agreement; that the claimant breached his part of the bargain.

On re-examination, he stated that he understood the contents of the agreement before signing.

7. Erick Owino (RW2) adopted his statement dated 4th May 2024 as his evidence in chief. He added that the agreement was not made properly.

8. Stephen Mitaya (RW3) adopted his witness statement dated 11th May 2024 as his evidence in chief. He testified that he is the owner of the land parcel No. Siaya/Ramba/4779. That there's a petrol station erected on the said land. That the claimant's wife had leased the petrol station from him and that the claimant later joined the wife. That the claimant stopped working at the petrol station on January 2022. That at the time of sale, the fuel pump was not working. That he did not agree to sell the building.

On cross-examination, he stated that he signed the sale agreement for the petrol station as a witness and not for the sale of land or the building.

On re-examination, he stated that the building was built by the claimant and that he had consented to it.

9. The trial court later entered judgment dated 3/6/2024. It declared the contract between the Claimant and the Respondent as void ab initio and unenforceable. It further ordered the Claimant to refund Ksh900,000/= paid to him as deposit to the Respondents and that the Respondents were ordered to return back all the equipment and infrastructure to the Claimant (Appellant) immediately upon receipt of Ksh800,000/= from the Claimant. Further, it was ordered that each party to bear their own costs.

10. The Appellant herein later filed an application dated 4/7/2024 seeking for an order that the court reviews/vacates/sets aside the judgment dated 3/6/2024 on the basis that the trial court did not have jurisdiction to entertain the suit in the first place. The trial court vide its ruling dated 23/8/2024



dismissed the prayer for review of sentence but granted the Claimant an order of stay of execution of the decree upon deposit of Kshs200,000/= in joint interest earning account within thirty days failing which the stay shall lapse. This then precipitated the present appeal.

11. The appeal was canvassed by way of written submissions. Both parties duly complied.
12. The Appellant's submissions are dated 13/5/2025. The Appellant raised two issues for determination namely whether or not the issue of jurisdiction can be a ground for review of a judgment under Section 29 of the *Small Claims Court Act* and secondly whether the trial court was functus officio and not able to determine the issue of jurisdiction under the review application. The Appellant submitted by first giving a brief background of the appeal. That he brought a claim against the Respondent for the sum of Ksh920,000/= arising out of breach of a sale agreement between the Appellant and Respondents dated 15/3/2023 for the sale of an independent sole proprietorship filing station situated on LR No. Siaya/Ramba/4779, Ndori Centre Siaya County. That by the said sale agreement, the Appellant sold to the Respondents his interests in the aforesaid petrol station for the sum of Kshs1,500,000/= of which a down payment of kshs 800,000/= was acknowledged by the parties as having been paid at the time of execution of the said agreement. That the parties agreed that the balance of Kshs700,000/= was to be paid in four instalments made up and scheduled as Ksh200,000/= on or before the 24/3/2023, that Kshs200,000/= on or before 30/5/2023, Ksh 150,000/= on or before 30/6/2023, Kshs150,000 on or before 30/7/2023.

That on 24/3/2023, the due date for the first instalment of Ksh200,000/= only Ksh30,000/= out of Ksh200,000/= due, was paid by the Respondents with a promise to settle the balance the (25/3/2023). That the Respondents have since then ignored their obligation under the said sale agreement thus giving rise to litigation. Despite promises made and not honored, E. Clause 2.10 of the agreement stipulated a penalty for breach by either party, being one third of the total purchase price under the sale agreement. The Respondents in breach of sale agreement, have failed to pay the Claimant the sum Kshs420,000/= as at date thus activating clause 2.10 of the sale agreement and now attract a penalty of Ksh500,000/= aggregating to kshs920,000/= being made up as kshs 170,000/=in respect of instalment balance due on the 24/3/2023, Kshs200,000/= in respect of the instalment due on 30/5/2023, Ksh50,000/= in respect of instalment due on 30/6/2023, Kshs500,000/= penalty for breach as per sale agreement) being one third of the purchase price, despite demand and notice of intention to sue being issued on 24/5/2023 and 30/5/2023 instalment. The claimant continued to suffer serious losses having sold his business to settle university fees for his daughter who has since been forced to defer with serious financial implications on further resumption of studies hence this suit. The Claimant filed a suit in the Small Claims at Kisumu due to non-operational similar court in Siaya at the time but was advised to withdraw the matter due to lack of jurisdiction as the cause took place in Siaya jurisdiction where it should be filed afresh.

13. It was submitted that the trial court had earlier made a ruling regarding the Respondents' preliminary objection that the trial court did not have jurisdiction and in which the trial court dismissed the said preliminary objection and held that it had jurisdiction to determine the claim. It was the Appellant's view that lack of jurisdiction can form a solid ground for an application for review of a judgment of a Small Claims Court. It was further submitted that the error of lack of jurisdiction by the trial court was apparent on the face of the record as the same was so glaring warranting the review sought.

The Appellant also submitted that the trial court was not functus officio on the issue of jurisdiction as held by the learned trial magistrate since the court had not yet determined the issue fully. It was contended that the learned trial magistrate despite establishing that the subject of the sale agreement was sale of goods and not land and which could not be severed, failed to rule on it. The Appellant



therefore blamed the trial court for failing to thrash out the issue of jurisdiction substantively. It was finally submitted that the appeal should be allowed as prayed with costs.

14. The Respondent's submissions are dated 20/5/2025. It was submitted that the Appellant's application dated 4/7/2024 seeking for review or setting aside of the judgment/decreed dated 3/6/2024 was properly rejected by the trial court. It was further submitted that the Appellant had not presented evidence showing that there was an error apparent on the record. Further, it was submitted that the said application had not been supported with a supporting affidavit and therefore the same was properly dismissed by the court. It was finally submitted that the appeal should be dismissed and the court upholds the decision of the lower court dated 23/8/2024 and that the costs of the appeal be awarded to the Respondents.
14. I have considered the record of appeal and the submissions filed herein. The issues for determination are firstly whether jurisdiction can be a ground for review of a judgement under section 29 of the [Small Claims Court Act](#) and secondly, whether the trial court was functus officio at the time and thus incapable of determining the Appellant's review application dated 4/7/2024.
15. It is noted that the Appellant had lodged the application dated 4/7/2024 wherein he sought for an order to review/vacate/set aside the judgment of the trial court dated 3/6/2024 on the grounds that the Appellant had come to know that the trial court did not have jurisdiction to entertain the suit. It was also the Appellant's contention that the case before the trial court was a contract for the sale of a petrol station, equipment, infrastructure and buildings and in which the trial court in its judgment severed the petrol station, equipment, building, infrastructure from the land which was situated before the sale or contract took place. It was also the Appellant's view that the items mentioned in the sale contract are not per se goods as envisaged under the [Sale of Goods Act](#). Since the Appellant's main plank in that application heavily relied on the court's power of review, it is necessary to look at the salient provisions under the [Civil Procedure Rules](#). The power of review is provided for under Order 45 Rule 1 of the [Civil Procedure Rules](#) which are as follows:

“ Any person considering himself aggrieved –

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review; may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

From the foregoing provisions, the Appellant was under obligation to show that after the entry of judgment dated 3/6/2024 he came to discover new and important matter or evidence which after the exercise of due diligence was not within his knowledge or that there is an error apparent on the face of the record or for any other sufficient reason. It is also noted that the Appellant contended that the trial court did not have jurisdiction to determine the matter as claimed.

16. Pursuant to Rule 29 of the [Small Claims Act](#), the court may review any decree passed or order given in proceedings under the Act on the written request of any party aggrieved by such decree or order where it is shown to the satisfaction of the court that the decree or order sought to be reviewed –



- a. has an error apparent on the face of the record; or
- b. has a clerical or arithmetical mistake.

From the foregoing provision, it is clear that lack of jurisdiction is not one of the grounds to give rise to an order for review. It is instructive that the trial court had earlier dealt with a notice of preliminary objection that had been raised by the Respondents wherein the trial court ruled on 2/4/2024 that it had jurisdiction. Indeed, the Appellant at the time vociferously defended the fact that the court had jurisdiction to determine the matter and thereafter the Appellant went ahead to tender his evidence and which led to the trial court's judgment dated 3/6/2024. Indeed, the trial court vide the impugned ruling dated 23/8/2024 pointed out that it had become functus officio and that the Appellant if aggrieved ought to have proceeded on appeal but not review. The fact that the Appellant had participated on the issue of jurisdiction leading to the trial court's ruling dated 2/4/2024, is evidence that he had sufficient knowledge of the same and thus it was not a matter that can fall for review as he had knowledge about the issue of jurisdiction all along from 2/4/2024 until the delivery of the judgement on 3/6/2024. It is quite surprising that the Appellant could support the view that the trial court had jurisdiction to determine his claim after the Respondents raised the issue of jurisdiction and later on turn around and claim that the court did not have jurisdiction. The Appellant ought to have lodged an appeal against the ruling dated 2/4/2024 but did not do so because at that time it suited his interests. It is only after the judgement on 3.6.2024 that he changed his mind and sought to approach the court for a review of the judgement on the ground that the court lacked jurisdiction all along as the subject matter of the claim did not fall within the scope of those contemplated by the [Small Claims Court Act](#).

Under section 13(5) of the [Small Claims Court Act](#), the same

“A claim shall not be brought before the court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over title to or possession of land, or employment and labour relations.”

Again, under section 12 of the [Small Claims Court Act](#), the court has jurisdiction to determine any civil claim relating to inter alia; a contract for sale and supply of goods or services; a contract relating to money held and received; liability in tort in respect of loss or damage caused to property or for delivery or recovery of movable property; set-off and counterclaim under any contract.

Looking at the Appellant's claim, it is noted that the same relates to a claim for Kshs 920, 000/ comprising of balance of purchase price and penalties. It transpired from the agreement and the evidence of the parties that the sale was in respect of a petrol station and equipment on land parcel Siaya/Karapul/Ramba/4779 but that the land was not part of the deal as can be seen by the sale agreement vide Clause 1(c) thereof. Indeed, the claim was for payment of money and not specific performance and hence a contract for sale and supply of goods or services. The Appellant vide his statement dated 13/3/2024 clearly confirmed that he was selling his interest in a petrol station and that upon conclusion of the sale transaction, the Respondents would then enter into a separate agreement with the land owner of parcel Siaya/Karapul/Ramba/4779. According to the Appellant, he had sold his business to the Respondents. It is apparent that the Appellant having agreed that the trial court had jurisdiction, now turned around and challenged the trial court on the ground that it had no jurisdiction to determine his claim after the judgement was delivered. It is also noted that the learned trial magistrate had difficulty in agreeing with the Appellant that the claim was not entirely on supply of goods and services as contemplated by section 12(1) of the [Small Claims Court Act](#) since the definition of the same under the [Sale of Goods Act](#) chapter 13 Laws of Kenya is quite different. It is instructive that the petrol station and building are items fastened to the ground and which cannot be severed from the land. It is clear that the learned trial magistrate was conscious and well aware of the same but did not



delve into it vide his ruling when he mentioned the words “indivisibility of interests in the building and land”. At that juncture, the learned trial magistrate ought to have held that there was a lack of jurisdiction and downed his tools but he did not as he had earlier on ruled that he had jurisdiction vide his ruling dated 2/4/2024. It was therefore quite obvious that the issue of jurisdiction still stood out like a sore thumb and did not need a lot of arguments about it. It was an error apparent on the face of the record for all to see. The Appellant was aware of this all along but opted not to take action but kept quiet because at the time the circumstances suited him. I find that he could not sit on his laurels until the entry of judgement and then claim that he had no knowledge about it. I am unable to believe the assertions by the Appellant that the matter of jurisdiction was not within his knowledge all the way from the time the hearing started in earnest until the delivery of the judgement. Hence, the Appellant’s review application dated 4/7/2024 was properly rejected by the trial court as the Appellant ought to have lodged an appeal against the ruling dated 2/4/2024.

17. As regards the issue of whether the trial court had become functus officio, it is noted that the trial court had ruled on a preliminary objection dated 2/4/2024 that it had jurisdiction to entertain the claim. The parties therefore proceeded with the hearing of the matter up to conclusion. The Appellant was expected to proceed on appeal against the ruling dated 2/4/2024 but not to approach the trial court for review of the same. The trial court had become functus officio regarding the issue of jurisdiction and that it could not delve into it as it had rendered itself on it. Looking at the circumstances of the case as it unfolded before the trial court, one cannot miss the fact that the Appellant, having known that the trial court had no jurisdiction still proceeded with his matter up to the end and that when the outcome turned out to be unfavourable to him, decided to seek refuge under the issue of jurisdiction yet the same had already been dealt with. I am satisfied that the trial court properly rejected the Appellant’s application dated 4/7/2024.
18. In view of the foregoing observations, it is my finding that the Appellant’s appeal lacks merit. The same is dismissed with costs to the Respondents.

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

D.KEMEI

JUDGE

In the presence of:

Aloo.....for Appellant

Kevin Ajinja..... Respondents

Kevin/Kimaiyo.....Court Assistant

