



REPUBLIC OF KENYA



**Gee Tee Sons Ltd v Mwangi (Environment and Land Appeal
E005 of 2022) [2023] KEELC 18453 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E005 OF 2022**

BM EBOSO, J

JUNE 29, 2023

BETWEEN

GEE TEE SONS LTD APPELLANT

AND

LYDIA WANJUE MWANGI RESPONDENT

*(Being an appeal against the orders issued by the Chairman – Business
Premises Rent Tribunal on 6/3/2020 in BPRT Case No 83 of 2018)*

RULING

1. Through a notice of motion dated 20/4/2022, the appellant invited this court to grant it leave to adduce additional evidence in this appeal. The additional evidence is a valuation report by M/s Zan Consult Valuers & Management Company Limited, dated 25/6/2018. The application is vehemently opposed by the respondent. The key issue to be determined in this ruling is whether the application meets the criteria which guides our appellate courts when exercising jurisdiction to admit additional evidence in appeals. The prevailing jurisprudence on the question is to be found in the ruling rendered by the Supreme Court of Kenya on 28/9/2018 in *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR.
2. The application is premised on the grounds outlined in: (i) the motion itself; (ii) the supporting affidavit sworn by Mr Genye Ngaruiya on 20/4/2023; and (iii) the written submissions dated 26/10/2022, filed by M/s Kanyi Kiruchi & Co Advocates. The case of the appellant is that the valuation report was not considered; that the appellant was never heard during trial; and that the rules of natural justice dictate that a party should not be condemned unheard.
3. The appellant contends that owing to the Tribunal's reliance on the respondent's valuation report, it assessed rent at Kshs 85,000 per month yet their own valuation contain an assessment of rent at Kshs 190,000 per month. The appellant adds that their valuation report "was not on the file for consideration



hence the case proceeded more or less *ex parte*”. The appellant urges this court to admit the additional evidence.

4. The respondent opposes the application through: (i) grounds of opposition dated 17/5/2022; (ii) her replying affidavit sworn on 17/5/2022; and (iii) written submissions dated 5/12/2022, filed by Ms Nzaku & Nzaku Advocates. The case of the respondent is that on 7/8/2019, the appellant was directed by the Chairman of the Tribunal to file and serve a valuation report within 30 days but the appellant elected not to heed the directive of the Tribunal. She adds that at the time of hearing the case and rendering the impugned decision, the Tribunal was fully aware of the appellant’s disobedience of its order and had no alternative but to rely on the respondent’s valuation report which was the only valuation report that had been filed and served. The respondent contends that the appellant’s application is an attempt by the appellant to sanitize its “deliberate failures”. It is the position of the respondent that granting the plea would be tantamount to rewarding the appellant for what amounts to contempt of court and this would be detrimental and prejudicial to the respondent.
5. Noting that the valuation report was prepared more than one year prior to the date when the Tribunal issued the order directing the appellant to file and serve a valuation report, the respondent urges this court to decline to admit additional evidence.
6. I have considered the application; the response to the application; the parties’ rival submissions; and the relevant jurisprudence on the key issue that fall for determination in the application. As observed in the opening paragraph of this ruling, the single issue to be determined in the application is whether the criteria that guides our appellate courts when exercising jurisdiction to admit additional evidence has been met.
7. The Supreme Court of Kenya laid down the following relevant criteria on 29/9/2018 in a ruling rendered in *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohama & 3 others* [2018] eKLR.

Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- (e) the evidence must be credible in the sense that it is capable of belief;
- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;



- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

8. Does the application satisfy the above criteria? I do not think so. Besides considering the grounds in support of the application, the responses to the application, and the parties rival submissions, I have also had occasion to read the original record of the Tribunal which forms part of the appeal record. It does emerge that on 7/8/2019, the Tribunal made the following verbatim orders in the presence of Mrs Owino [counsel for the appellant] and Ms Monyangi [counsel for the respondent]:

1. The landlord shall formally serve the valuation report and serve the advocate for the tenant within 30 days.
2. The valuers of both parties shall attend the Tribunal and give in respect of their valuation reports.
3. Hearing on 23rd October 2019 at 11.30 a.m”

9. It does emerge that the appellant neither filed nor served the valuation report within 30 days. The appellant never bothered to apply to the Tribunal to enlarge the time for compliance. Indeed, as at 6/3/2020, when the case was ultimately heard, the appellant had not filed and served its valuation report.

10. Owing to the appellant’s failure to comply with the order of the Tribunal, the Tribunal rendered itself as follows on the appellant’s conduct with regard to its failure to tender a valuation report:

“The Tribunal has perused all the pleadings in this matter. The attendance of the landlord in respect of this matter has been very casual. The landlord has not filed any valuation report as ordered by the Tribunal. The Tenant has filed the valuation report which is unchallenged. The recommended monthly rent is Kshs 85,000. The Tribunal has no option but to adopt the Tenant’s Valuation Report in the circumstances of this case.”

11. It is clear from the record of the Tribunal and from the impugned Judgment that the appellant was given the opportunity to present a valuation report and lead evidence by its valuer more than twice but it failed to do so. The order directing the appellant to file and serve a valuation report within 30 days was a valid order of the Tribunal and disobedience of the order amounted to contempt of the Tribunal.



12. That is not all. The exhibited valuation report which the appellant seeks to tender as additional evidence in this appeal indicates that the valuers inspected the premises on 22/6/2018 and the report was prepared and signed on 25/6/2018. This means that the report was available as at 7/8/2019 when the Tribunal first ordered the appellant to file and serve its valuation report. It was also available as at 23/10/2019 when, for the second time, the Tribunal ordered that both parties were to avail their valuers to tender their reports. Thirdly, the report was available as at 6/3/2020 when the Tribunal ultimately heard the dispute. For reasons that only the appellant knows, it failed to tender the valuation report despite being ordered to do so.
13. Given the above circumstances, I do not think the application under consideration meets the criteria that was laid down by the Supreme Court of Kenya in the case of *Mohamed Abdi Mohamud v Ahmed Abdullabi Mohamad & 3 others* [2018] eKLR. The application is, to say the least, an abuse of the due process of the court by the appellant.
14. The result is that the notice of motion dated 20/4/2022 is rejected for lack of merit. The appellant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Wachira for the Appellant/Applicant

Mr Muruthi for the Respondent

Court Assistant: Ms Hinga/Osodo

