



**Wanjohi v Njoroge & 2 others (Environment and Land Appeal
E028 of 2022) [2023] KEELC 20496 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E028 OF 2022**

**J OMANGE, J
SEPTEMBER 29, 2023**

BETWEEN

LUCY WANGECHI WANJOHI APPELLANT

AND

HANNAH WAMBUI NJOROGE 1ST RESPONDENT

KEVIN NJOROGE 2ND RESPONDENT

PETER KIMANI NJOROGE 3RD RESPONDENT

*(Being an appeal from the entire judgment by Honourable D. W. Mburu
(Mr.), Senior Principal Magistrate's Court in Milimani Commercial
Court delivered on the 1st day of April 2022) in CMCC NO. 1026 OF 2018)*

RULING

1. Vide Notice of Motion application dated 17th January 2023 the Respondent/applicant seeks the following orders:
 - a. That this Honorable Court be pleased to Order and Direct that the rental income currently being collected by the Appellant/Respondent from the structures/premises erected on the portion of the half acre of the parcel of land known as LR. No. Dagorreti/Mutuini/938 registered in the name of the Respondent/Applicant, be forthwith collected by the 1st Respondent /Applicant or her authorized agent hereof and for her use pending hearing and determination of the appeal herein.
 - b. That in the alternative and without prejudice to the foregoing, this Honorable Court be pleased to Order and Direct that the rental income currently being collected by the Appellant/Respondent from the structures/premises erected on the portion of the half acre of the parcel of land known as LR. No. Dagorreti/Mutuini/938 registered in the name of the 1st



Respondent/Applicant, be forthwith collected and banked by an Estate Agent appointed by this Honorable Court, pending the hearing and determination of the Appeal herein.

- c. Any other orders the court might deem just.
 - d. Costs of the application
2. The Applicant who is the Cross Appellant/ Respondent in the appeal, contends that she is the rightful registered owner of the half acre of the parcel of land known as LR. No. Dagoreti/Mutuini/938 which was affirmed in a Judgement delivered on 1st April 2022 in Millimani Civil Suit No. 1026 of 2015 wherein the Appellant's claim over the suit property was dismissed.
 3. She further depones that the 1st Respondent is in contravention of the final orders that were issued by the court in the said Judgement and that she has been collecting rental income of Ksh 7000/= from mabati structures that she built on the property as the matter was being heard. She therefore prays that the court grants the orders she is seeking as the tenants are trespassers on her land.
 4. The Appellant/ Respondent denies that she was collecting any rent from the suit property and further avers that this issue never came up in the lower court which heard the matter. The matter is being brought up for the first time in the appeal.
 5. Both counsels filed submissions which this court has considered.
 6. Counsel for the applicant refers the court to section 24 and 25 of the [Land Registration Act](#) no 3 of 2012 which states *inter alia*;

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

She also relies on the case of [Agnes Kaluki Kasyoki \(Suing as the Administrator of the Estate of Kasyoki Maliti -Deceased v Mary Kimuli](#) ELC No. 20 of 2018 - Makueni Law Courts) and the Case of [Jacob Waweru Kiarie v Charles Kipchumba Biwott Kiputia](#) EL No. 203 of 2016 -Eldoret Law Courts. Which basically reiterates section 24(a) of the [LRA](#).

7. Counsel for the 1st Respondent submitted that the application is an abuse of the appellate rules as it seeks to tender new issues and evidence at appeal stage without leave. This is contrary to Order 42 of the [civil procedure rules](#). Counsel relied on the case of [Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others](#) [2018] eKLR and further quoted [Bernard Kabeu Kiriu v Francis Waitthaka Kiriu](#) [2021] eKLR where the court gave guidelines on when an applicant can tender fresh evidence in an appeal.
8. Counsel for the 1st Respondent submitted that the threshold laid down in the above case was not met by the applicant to warrant the court entertain this application. Counsel further argued that the further affidavit on record should not be allowed as it tendered new evidence that the Appellant could not respond to. This is against the principles in [Muringa Holdings LTD v Telkom Kenya LTD & 2 Others](#) [2007] eKLR Wherein it was held that

“filing of further Affidavits in response to the Affidavits by opposing parties is supposed to clarify the issues and to enable the court reach a fair decision in the matter but not so that one party has an advantage over the others by introducing documents/facts that should have been introduced at the filing of the Chamber Summons when the statement and Affidavits to support the Notice of Motion were filed.”



9. The Applicant seeks to have this court make a determination that she be allowed to utilize the rent from the suit property on the basis that the lower court has made a determination that she is the legal owner of the property hence she is entitled to all the rights and privileges that appertain thereto. There is a pending appeal that challenges the lower court decision. It would be premature of the court at this interlocutory stage to make a finding that notwithstanding the appeal the applicant's ownership is determined.
10. However, even more pertinent is the fact that the claim for rent is being brought up for the first time on appeal and evidence which was not adduced before the trial court being presented to the court in an interlocutory application. The applicant's application flies against the provision of order 42 rule 27 of the *civil procedure rules* which provides;
- The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—
- (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
- (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.
11. Having considered the forgoing, I find that the application has no merit and is dismissed. Costs to abide determination of the Appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF SEPTEMBER 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Mwangi for Applicant

Ms. Nimi holding brief for Mr. Maina for Respondent

Steve - Court Assistant

