



REPUBLIC OF KENYA



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**Kabogo v Mithika (Environment and Land Appeal E069 of 2022)
[2023] KEELC 22059 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22059 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E069 OF 2022**

**BM EBOSO, J
NOVEMBER 27, 2023**

BETWEEN

DAMARIS MARGARET WANJIRU KABOGO APPELLANT

AND

DOMIZIANO MITHIKA RESPONDENT

*(Being an Appeal against the Ruling of Hon. W. Rading, Senior Resident Magistrate,
delivered on 14/7/2022 in Kiambu Chief Magistrate Court MCL & E Case No. E049 of 2021)*

JUDGMENT

Introduction

1. This appeal challenges the ruling rendered on 14/7/2022 by Hon Wilson Rading, Senior Resident Magistrate, in Kiambu CMC Environment & Land Case No. E049 of 2021. Hon Rading signed the ruling in the capacity of Deputy Registrar. The original record of the trial court does not, however, bear anything to suggest that Hon Rading was discharging the statutory jurisdiction of a deputy registrar in the matter. The record indicates that the Hon Rading was seized of a land dispute and was exercising the constitutional and statutory jurisdiction of a Magistrate Court under Article 169 of the Constitution as read together with Section 26(3) of the Environment and Land Court Act and Section 9(a) of the Magistrates' Courts Act. I will outline a brief background to the appeal before I dispose the issues that fall for determination in the appeal.

Background

2. The suit in the lower court was initiated by the respondent through a plaint dated 13/7/2021. The respondent sought: (i) a permanent injunction restraining the appellant from, *inter alia*, trespassing on, cultivating, erecting any building or structures on, and /or doing any act of waste on land parcel



number Nairobi/Block 110/655 [referred to in this Judgment as “the suit property”]; (ii) costs of the suit; and (iii) interest.

3. Simultaneously with the suit, the respondent filed an application of even date, seeking a temporary injunction to restrain the appellant from committing the said acts. The application was premised on grounds that the respondent was the registered proprietor of the suit property, and that the appellant had encroached on it. Upon considering the application ex-parte, the court issued interim orders restraining the appellant from entering, trespassing on, encroaching on, digging, erecting any building or doing any other act of waste on the suit property.
4. The appellant filed a replying affidavit sworn on 26/7/2021 wherein he set out her case. She insisted that she was the legitimate owner of the property and had been in possession since 1972 together with her late husband. She also averred that the suit property was worth Kshs 40,000,000, which was well above the pecuniary jurisdiction of the Magistrates Courts. She further challenged the territorial jurisdiction of the Kiambu Chief Magistrate Court, contending that the suit was located in Nairobi County.
5. On 6/8/2021, the appellant filed an application dated 5/8/2021, seeking an order striking out the suit on the ground that the court lacked both pecuniary and territorial jurisdiction to entertain the matter, given that the suit property was valued at Kshs 40,000,000 and is located in Nairobi County.
6. On 19/8/2021, the lower court gave directions on the hearing of the applications. The appellant filed her submissions. The respondent too filed submissions application. Parties thereafter attended court on numerous occasions and, upon confirming that parties had filed submissions, the court reserved 30/6/2022 as the date on which it was to render a ruling. The ruling was, however, not rendered on 30/6/2022. The ruling was subsequently delivered on 14/7/2022 in the absence of the parties and a copy was sent to the parties via email.
7. Although the lower court had reserved a ruling date for more than one application, the impugned ruling focussed only on the appellant’s application dated 5/8/2021. The lower court found the application unmerited and dismissed it.

Appeal

8. Aggrieved by the ruling of the lower court, the appellant brought this appeal, advancing the following five (5) verbatim grounds:
 1. The Honourable Magistrate erred in law and in fact in failing to consider and appreciate the valuation report of the suit property (LR. No. Nairobi/Block110/655) filed by the appellant herein in the lower court.
 2. The Honourable Magistrate erred in law and in fact in failing to consider that the value of the suit property has appreciated since drafting of the sale agreement dated 7th January 2002 as referred to by the respondent herein.
 3. The Honourable Magistrate erred in law and in fact in failing to appreciate the fact that the suit property (LR. No. Nairobi/Block110/655) is situated in Nairobi County and therefore the geographical jurisdiction lies with the court in Nairobi and not with the lower court at Kiambu.
 4. The Honourable Magistrate erred in law and in fact in failing to appreciate the decision by the lower court in MCELC No. E034 of 2021 given on 8/2/2022 by Honourable A. S. Lesootia (PM.) where the magistrate ordered that the court lacked pecuniary jurisdiction to handle the



suit relating to the same property namely LR No. Nairobi Block 110/655 which was produced before the court.

5. The Honourable Magistrate erred in law and in fact in failing to consider the application by the appellant on its merit and stating that it does not amount to a preliminary objection and therefore dismissing the same.
9. The appellant urged this court to: (i) reverse, overturn and/or set aside the ruling of the Honourable M. O. Rading (SRM) delivered on 14/7/2022 at Kiambu in MCELC No. E049 of 2021; (ii) order that the Magistrate Court lacks both pecuniary and geographical jurisdiction to try the case; and (iii) award costs of this appeal to the appellant.

Appellant's Submissions

10. The appeal was canvassed through brief written submissions dated 9/6/2023, filed by M/s Kamau Kinga & Company Advocates. The appellant's counsel submitted on the five grounds of appeal in the sequence in which they were itemized. On the issue of the valuation report filed at the trial court by the appellant, counsel faulted the learned magistrate for rejecting the report on the ground that it was solely commissioned by the appellant. Counsel argued that the learned magistrate should have instead directed the parties to the suit to jointly appoint a valuer to value the suit property.
11. On whether the value of the suit property had appreciated since the drafting of the sale agreement dated 7/1/2002, counsel submitted that the value of the suit property was Kshs 800,000 at the time of signing the agreement. Counsel added that the value of the suit property at the time of signing the agreement for sale in 2002 had obviously increased, given that the suit was filed more than 18 years later. Counsel submitted that the value of the suit property as per the valuation report was Kshs 40,000,000 which was beyond the pecuniary jurisdiction of the Chief Magistrate Court.
12. On the issue of the geographical jurisdiction of the trial court, counsel submitted that the suit property is situate opposite Akima Springs Junior School off the Northern By-Pass in Nairobi County, hence the trial court in Kiambu lacked geographical jurisdiction.
13. On the issue of the trial court failing to consider the decision in Nairobi MCELC No. E034 of 2021 given on 8/2/2022 in which the Nairobi Chief Magistrate Court held that it lacked pecuniary jurisdiction to determine the dispute, counsel posed the question as to whether the lower court in Kiambu should have arrived at the same decision as the lower court in Nairobi MCELC No. E034 of 2021 in terms of the court lacking pecuniary jurisdiction. Counsel further submitted that the only reason the Nairobi Environment and Land Court in ELC Case No. 268 of 2021 transferred the suit to the Milimani Chief Magistrate Court in ELC No. 34 of 2021 was because the appellant had not provided evidence of the current market value of the suit property.
14. On the issue of the Honourable Magistrate failing to consider the application by the appellant on its merits and stating that it did not amount to a preliminary objection and eventually dismissing it, counsel submitted that looking at the facts at the face value could have assisted the court in making its decision on the matter. Counsel added that the value of the property was over and above the pecuniary jurisdiction of the lower court. Counsel argued that the issue the court should have dealt with was the merit of the application by the appellant, dated 5/8/2022, and not whether the application amounted to a preliminary objection or not. Counsel urged the court to allow the appeal and grant the reliefs sought in the memorandum of appeal.
15. Lastly, counsel submitted that leave to appeal against the impugned ruling was not necessary because the application by the appellant, dated 5/8/2021, was about striking out the suit on account of lack



of jurisdiction. Counsel added that the second application by the respondent dated 13/7/2021 sought injunctive orders. Counsel submitted that the appellant's application was anchored under Order 43 of the *Civil Procedure Rules*, adding that any appeal arising from a plea for an order striking out pleadings enjoys an automatic right of appeal. Counsel submitted that the appeal was therefore a matter of right according to Order 43 rule 1(1), (b) of the *Civil Procedure Rules*.

Respondent's Submissions

16. The appeal was opposed through written submissions dated 23/5/2023, filed by M/s Njehu Ndirangu & Company Advocates. Counsel for the respondent submitted that the record of appeal was incomplete and fatally defective, adding that the appellant failed to disclose to the court that she had filed two other applications dated 5/8/2021 and 10/11/2021. Counsel submitted that the appellant failed to annex pleadings relating to the two applications.
17. Counsel contended that both the plaint and the sale agreement dated 7/1/2004 indicated that the purchase price of the suit property was Kshs 800,000 and given that the property had not been developed, the value of Kshs 40,000,000 assigned to the suit property by the appellant was misleading and baseless. Counsel for the respondent contended that the trial court had both pecuniary and geographical jurisdiction to adjudicate the dispute.
18. Counsel submitted that the appellant originally filed the dispute in the Environment and Land Court at Milimani as ELC Case No. 268 of 2021 and the said court transferred the suit to Milimani Chief Magistrate Court where it was assigned ELC Case No. 34 of 2021. Counsel added that the Milimani Chief Magistrate Court having found that it lacked pecuniary jurisdiction, the appellant filed Miscellaneous Application No. E 183 of 2021 at the Environment and Land Court at Milimani, which suit was later dismissed. Counsel added that the respondent subsequently filed the suit at the trial court to have it heard on merit. Counsel argued that the appellant's actions in the conduct of the matter amounted to forum-shopping which amounted to abuse of court process. Counsel relied on the case of *Nyarangi v Musyoki Mogaka & Co. Advocates* (Civil Appeal 80 of 2020 [2022] KEHC 345 (KLR)) in support of his submissions. Counsel added that it was in the interest of all parties that there should be an end to litigation.

Analysis and Determination

19. I have read and considered the original record of the lower court, the grounds of appeal, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not frame a concise statement of common issues that the court is to determine in this appeal. They opted to submit on the five grounds of appeal as itemized in the memorandum of appeal. I will therefore dispose this appeal through brief analysis and disposal of the five grounds of appeal. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
20. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”



21. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
22. While admitting this appeal on 9/3/2023, this court directed parties to submit on the question as to whether leave to appeal was necessary. The appellant submitted on the issue. The case of the appellant is that the application which gave rise to the impugned ruling was a plea under Order 2 rule 15(1) of the *Civil Procedure Rules*, hence leave was not necessary. The respondent did not submit on the issue.
23. I have considered the issue. It is true that the notice of motion dated 5/8/2021 which culminated in the impugned ruling was expressed as having been brought under Order 2 rule 15(1) (c) of the *Civil Procedure Rules*. The application sought an order striking out the respondent’s suit on the ground that it was an abuse of the court process in that the lower court did not have jurisdiction to determine the case. Under Order 43 rule 1 (1) (b) of the *Civil Procedure Rules*, decisions made on applications brought under Order 2 attract automatic right of appeal. This court is therefore satisfied that leave to appeal was not necessary. I now turn to the first ground of appeal.
24. The appellant faulted the lower court for failing to consider and appreciate the valuation report relating to the suit property, namely Nairobi/Block 110/655. It does emerge from the record of the lower court and from the impugned ruling that the appellant annexed a wrong valuation report to the application dated 5/8/2021. She exhibited a valuation report relating to Nairobi/Block 110/665 instead of Nairobi/ Block 110/655. Upon realising the error, the appellant filed a notice of motion dated 10/11/2021 seeking an order allowing her to exhibit the correct valuation report. At the point of giving directions, the lower court was seized of three applications. The learned magistrate decided to determine the three applications in the same ruling.
25. However, although seized of the application dated 10/11/2021 through which the appellant sought leave to replace the wrong exhibits which she had annexed to the application dated 5/8/2021 with the correct ones, the learned magistrate decided to render a determination on the application dated 5/8/2021 without first disposing the issue of wrong exhibits. Indeed, it does appear from the impugned ruling that the learned magistrate did not realize that the exhibit annexed to the application dated 5/8/2021 related to a different property.
26. To the extent that the learned Magistrate disposed the application dated 5/8/2021 without first considering the application dated 10/11/2021, this court agrees with the appellant that the lower court erred in failing to consider and appreciate the relevant valuation report. Procedurally, the learned magistrate should have first disposed the plea for leave to introduce the correct valuation report.
27. The second ground of appeal is that the learned Magistrate erred in failing to consider that the value of the suit property had appreciated since the date of the sale agreement dated 7/1/2002. The impugned ruling was rendered on 14/7/2022. This was more than 20 years from the date of the sale agreement. The sale agreement dated 14/7/2002 cannot, in the circumstances, be an accurate indicator of the current value of the suit property. The proper indicator of the current value of the suit property would be a current valuation report prepared by a duly licensed valuer.



28. The learned magistrate, in paragraph 34 of the impugned ruling, made the following pronouncement:

“As it stands, a valuation report is not one of the primary documents under the *Evidence Act* which this honourable court can adopt as primary source of information or take judicial notice. What is more: is that it was not commissioned by the court but unilaterally by the defendant with no input at all by the plaintiff. In this kind of adversarial system that we have, such unilateral action can be interpreted by the old adage, he who pays the piper calls the tune. At the same time, there is nothing to prevent the parties from getting into a consent to appoint an independent valuer agreed by themselves.”

29. The above statements were wrong. First the value of the suit property is a factual matter that calls for evidence. Second, under Section 109 of the *Evidence Act*, it was the duty of the party assigning a particular value to the suit property to procure and avail relevant evidence. The party contesting the value assigned by the other party’s valuer would be at liberty to procure a valuation report. It was not the responsibility of the court to procure and avail evidence relating to the value of the suit property.

30. The third ground of appeal is that the learned magistrate erred in failing to appreciate that the suit property is situated in Nairobi County hence it was outside the geographical jurisdiction of the Kiambu Chief Magistrate Court. The learned Magistrate rendered himself as follows on the issue of geographical jurisdiction:

“In my considered opinion, I do agree that there is a thin line separating the Counties of Nairobi and Kiambu more so because the Northern bypass squarely transverses the aforesaid counties. At the application of the parties or when moved, this honourable court has the power to order for a site visit to assert the exact geographic location of the suit property in company of the parties and counsels herein accompanied by the District Surveyor thereby putting to rest this issue of geographical location.

It is Court’s considered view that the issue of whether or not the instant suit is an abuse of the court process will also require the probing of evidence and ascertainment of facts and cannot be raised as Preliminary Objection.”

31. This, again was a misapprehension of the correct position of the law. The boundary of Nairobi and Kiambu is defined in the *Constitution*. Every parcel of land falls within a specific county. Determination of the question as to whether or not the suit property fell within a particular county is one to be made on the basis of evidence presented in support of and against the application. I would not have hesitated to make a pronouncement on the issue were it not for the fact that the question relating to the admission of what the appellant considered to be the correct exhibit was never determined by the lower court. That question ought to be determined first. I will, for this reason, refrain myself from making a finding on this issue.

32. The fourth ground of appeal is that the lower court erred in failing to appreciate the decision by the lower court in MCELC No E034 of 2021 given on 8/2/2022 in which the magistrate court found that it lacked pecuniary jurisdiction to handle a dispute relating to the suit property. I have not seen any evidence which was attached to the application dated 5/8/2021 relating to the above decision. If the appellant had the evidence, I do not think she presented it as an annexure to the application. I therefore have no basis for faulting the lower court on this ground.



33. Lastly, the appellant faulted the lower court for failing to consider her application on its merits and for stating that it did not amount to a preliminary objection. The learned Magistrate made the following statements:

“I have considered the defendant’s application which in all respect is Notice of preliminary Objection couched in the form of an application as well as the written submissions and authorities tendered. The issue for determination is whether the preliminary objection has merit.”

34. Ultimately, the learned Magistrate made the following findings:

“It is court’s considered view that the issue of whether or not the instant suit is an abuse of the court process will also require the probing of evidence and ascertainment of facts and cannot be raised as Preliminary Objection.

Therefore, this court holds and finds that what has been raised by the defendant does not amount to a Preliminary Objection.

Consequently, the court finds and holds that the application dated 5th August 2022 is not merited and is dismissed with costs in the cause.”

35. It is clear from the above excerpts that the learned magistrate disposed a purported preliminary objection that had neither been presented nor argued before him. What was before him were three applications. He did not consider the respondent’s application dated 13/7/2021 and the appellant’s application dated 10/11/2021. Secondly, he substituted the appellant’s notice of motion dated 5/8/2021 with a purported preliminary objection that had neither been presented to the court nor argued before him. If not for anything else, the ruling of the lower court stands to be set aside on the basis of the above grave error.

36. Lastly, the learned magistrate rendered the impugned ruling as a Deputy Registrar yet he was exercising jurisdiction as a Magistrate Court under Article 169 of the *Constitution*, Section 26(3) of the *Environment & Land Court Act* and Section 9(a) of the *Magistrates Courts Act*. For this reason again, the ruling cannot stand.

Disposal Orders

37. For the above reasons, this appeal succeeds and is disposed in the following terms:

- a. The ruling rendered by Hon Wilson Rading on 14/7/2022 in Kiambu CMCC E&L Case No E049 of 2021 is set aside wholly.
- b. All the applications that fell for determination in the said ruling shall be placed before a different magistrate for fresh disposal directions and shall be disposed accordingly.
- c. Parties wishing to apply to the court for leave to present relevant documentary evidence shall present their requests before the court seized of the applications.
- d. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH NOVEMBER 2023

B M EBOSO

JUDGE



In the presence of: -

M/s Waweru for the Appellant

Court Assistant: Hinga

