



REPUBLIC OF KENYA



**Njoroge & 14 others v Kariuki & another (Environment and Land Appeal  
55 of 2022) [2024] KEELC 596 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 596 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 55 OF 2022**

**BM EBOSO, J**

**FEBRUARY 6, 2024**

**BETWEEN**

**ELIUD NJOROGE ..... 1<sup>ST</sup> APPELLANT**  
**HANNAH MWENDE KIIRU ..... 2<sup>ND</sup> APPELLANT**  
**JOSEPH WANDAI ..... 3<sup>RD</sup> APPELLANT**  
**EPHANTUS NJOROGE ..... 4<sup>TH</sup> APPELLANT**  
**JOSEPH WARUI ..... 5<sup>TH</sup> APPELLANT**  
**BATRICE MUGO ..... 6<sup>TH</sup> APPELLANT**  
**GLORIOUS SHG ..... 7<sup>TH</sup> APPELLANT**  
**ELIJAH NDICHU ..... 8<sup>TH</sup> APPELLANT**  
**JANE KIMANI ..... 9<sup>TH</sup> APPELLANT**  
**PETER KIBANDE ..... 10<sup>TH</sup> APPELLANT**  
**PATRICK MUCHAI ..... 11<sup>TH</sup> APPELLANT**  
**ELIZABETH NUNGARI ..... 12<sup>TH</sup> APPELLANT**  
**JOHN KIARIE ..... 13<sup>TH</sup> APPELLANT**  
**MICHAEL MWAURA ..... 14<sup>TH</sup> APPELLANT**  
**KABERI GITAU ..... 15<sup>TH</sup> APPELLANT**

**AND**

**SAMUEL WAWERU KARIUKI ..... 1<sup>ST</sup> RESPONDENT**  
**NYAKINYUA INVESTMENTS LIMITED ..... 2<sup>ND</sup> RESPONDENT**



*(Being an Appeal against the Ruling of Hon J. A AGONDA, Principal Magistrate, delivered on 2/6/2022 in Ruiru Principal Magistrate Court MCL & E Case No. E146 of 2021)*

## JUDGMENT

### Introduction

1. This appeal challenges the ruling rendered on 2/6/2022 by Hon J. A Agonda, Principal Magistrate, in Ruiru SPMC MCL & E Case No E146 of 2021. The ruling was a determination of the appellants' notice of motion dated 7/4/2022, through which they urged the lower court to review its ruling dated 30/3/2022 and down its tools on the ground that it lacked pecuniary jurisdiction to adjudicate the dispute. The lower court declined to grant the plea, triggering this appeal. One of the key issues to be determined in the appeal is whether the application dated 7/4/2022 met the criteria for review. Before I dispose the key issues in the appeal, I will outline a brief background to the appeal.

### Background

2. A perusal of the record of the trial court reveals that the 1st respondent initiated the suit against the 2nd respondent through a plaint dated 26/10/2021. He alleged that the 2nd respondent had colluded with unknown persons who had erected structures on his late mother's land, parcel number Ruiru/Ruiru East Block 2/758 (the suit property) with a view to defraud him and his late mother's estate. He sought, among other reliefs, a permanent injunction restraining the 2nd respondent, together with his servants and agents, against trespassing/encroaching on the land; an order compelling the 2nd respondent to process and issue him with requisite documents to facilitate processing of title in his name; (iii) an order directing the trespassers/encroachers to give vacant possession of the land.
3. Together with the plaint, the 1st respondent filed a notice of motion dated 26/10/2021 seeking interlocutory injunctive reliefs. During the pendency of the application, the appellants filed a notice of motion dated 18/1/2022 seeking to be joined in the suit, contending that they stood to be affected by any orders made in the suit. The lower court did not first dispose the application for joinder. The lower court elected to dispose the two applications simultaneously. The Learned Magistrate subsequently rendered a ruling dated 30/3/2022 in which she allowed the plea for joinder and simultaneously granted the plea for interlocutory injunctive orders in favour of the 1st respondent.
4. Subsequent to that, the appellants filed a notice of motion dated 7/4/2022, seeking a review of the ruling dated 30/3/2022 on the ground that the lower court lacked pecuniary jurisdiction to adjudicate the dispute. They exhibited a valuation report by M/s Sterling Valuers Limited, indicating that the value of the suit land, without taking into account the developments on the land, was Kshs 20,000,000.
5. In response to the appellants' aforementioned application, the 1st respondent filed a preliminary objection dated 27/4/2022 in which he stated that the appellants' application was an afterthought that offended Order 45 rule 1 (b) of the Civil Procedure Rules. The appellants filed an affidavit dated 10/5/2022 in response to the preliminary objection. Upon considering the parties' rival submissions, the trial court rendered the impugned ruling in which it found that the appellants had not satisfied the requirements for grant of the orders of review.

### Appeal

6. Aggrieved by the ruling of the lower court, the appellants brought this appeal, advancing the following four verbatim grounds:



1. That the Honourable Magistrate erred in law in holding that the application for review on the grounds of pecuniary jurisdiction was an afterthought.
  2. That the Honourable Magistrate erred in law and in fact for holding that the court would be sitting on its own appeal when evidence had been adduced that the suit property was valued at 20 million, which is way beyond the pecuniary jurisdiction of the honourable court.
  3. That the Honourable Magistrate erred in not appreciating the valuation report showing that the property is valued at twenty million, and hence the court could only “down tools” as jurisdiction is everything.
  4. The Honourable Magistrate misdirected herself in failing to reach the correct position that the court has no jurisdiction. [sic]
7. The appellants urged the court to set aside the ruling of the lower court and substitute it with an order that the court lacks jurisdiction and consequently strike out the suit. The appellants further urged the court to order the 1st respondent to bear costs of the appeal.

### **Appellants’ Submissions**

8. The appeal was canvassed through written submissions dated 11/3/2023, filed by M/s Solomon Mugo & Company Advocates. Counsel for the appellants submitted that the trial court lacked pecuniary jurisdiction to entertain the suit given that the valuation report exhibited by the appellants indicated that the forced sale value of the bare land was Kshs 20,000,000. Counsel added that the suit land was fully developed and hence its value was not less than Kshs 100,000,000. Counsel submitted that the appellants did not raise the issue of jurisdiction as an afterthought given that the suit was “still fresh” and had not reached the pre-trial conference stage.
9. Counsel submitted that the trial court ought to have downed its tools immediately the appellants notified it that the value of the subject matter exceeded its pecuniary jurisdiction. Counsel argued that there was no counter-valuation to show otherwise. Counsel further argued that continued exercise of jurisdiction by the lower court would amount to a miscarriage of justice. Counsel urged the court to allow the appeal. Counsel relied on the case of *Family Bank Limited v Shemsa Nassoro Hamdu* [2021] eKLR in support of his submissions.

### **1st Respondent’s Submissions**

10. The 1st respondent filed written submissions dated 4/5/2023 through M/s Gichuki Karuga & Company Advocates. Counsel submitted that the impugned ruling was sound, adding that the valuation report was not in any way new evidence as envisaged under Order 45 rule 1 (b) of the *Civil Procedure Rules*. Counsel further submitted that a reading of Order 45 rule 1 (b) shows that the law requires one to satisfy the court that the evidence being sought to be introduced is not only newly discovered but also important and that the evidence was not within the knowledge of the party seeking the review or could not be produced at the time the decree or order was made. Counsel relied on the decision in the case of *Alpha Fine Foods Ltd v Horcea Kenya Limited and 4 others* [2021] eKLR in support of his submission. Counsel faulted the appellants for introducing the valuation report only after an adverse ruling had been issued.
11. Counsel argued that the appellants, through their application dated 7/4/2022, sought to challenge the jurisdiction of the trial court via “the back door”. Counsel further argued that the issue of jurisdiction was purely a question of law which could not be entertained in an application for review. Counsel



added that if the court were to entertain the application, then the 1st respondent would be required to produce a counter valuation report leading to unending litigation.

12. Counsel submitted that the application was a mere afterthought that offended Order 45 rule (1) (b) of [Civil Procedure Rules](#). Counsel argued that the valuation report which formed the hallmark of the application was procured under the instructions of an advocate who was not privy to the suit and therefore it ought to be expunged from the court record.

### **Analysis and Determination**

13. I have read and considered the original record of the trial court; the record filed in this appeal; the parties' rival submissions; the relevant legal frameworks; and the jurisprudence applicable to the issues that fall for determination in this appeal. The appellants itemized four grounds of appeal. They did not condense the four grounds into concise issues. Similarly, the 1st respondent filed written submissions but did not frame concise issues.

14. Taking into account the four grounds of appeal and the parties' submissions in this appeal, the following are the two key issues that fall for determination in the appeal: (i) Whether the application dated 7/4/2022 satisfied the criteria for review; and (ii) What order should be made in relation to costs. I will dispose the two issues sequentially in the above order. Before that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

15. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [Susan Munyi v Keshar 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.”

16. 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.”

17. This court's jurisdiction to review its judgments is regulated by the framework in Section 80 of the [Civil Procedure Act](#) which provides as follows:

“Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this [Act](#), but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this [Act](#), may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



18. The jurisdiction is further regulated by the framework in Order 45 rule 1 of the *Civil Procedure Rules* which provides as follows:

- “ 1. Any person considering himself aggrieved—
- (1) (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 of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

19. The Court of Appeal in *Daniel Macharia Karagacha v Monicah Watithi Mwangi*, Civil Appeal No. 159 of 2000 rendered itself on the criteria upon which the jurisdiction to review a judgment is exercised as follows:

“Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application.”

20. Did the appellants satisfy the criteria for review? In their application for joinder, the appellants contended that they were bonafide purchasers in possession of various sub-plots within parcel number Ruiru/Ruiru East Block 2/758, adding that some of them had developed the plots. The lower court did not first dispose the plea for joinder. The lower court decided to dispose the appellants’ plea for joinder and the 1st respondent’s plea for interlocutory injunctive order simultaneously. The result was that whereas the Learned Magistrate found merit in the plea for joinder, she proceeded to issue injunctive reliefs in favour of the 1st respondent without according the appellants the opportunity to be heard on the application for interlocutory injunctive reliefs.

21. Having been joined as interested parties in the suit at that point, the appellants commissioned a valuation of the suit land devoid of any development. The professional assessment, dated 4/4/2022, returned a value of Kshs 20,000,000, a figure that was beyond the pecuniary jurisdiction of the highest ranking magistrate at Ruiru Law Courts at the time, which was Kshs 15,000,000. Confronted with the above dilemma, the appellant moved the lower court to review its injunctive order of 30/3/2022 and down its tools for want of pecuniary jurisdiction.

22. From the record, the case of the appellants was that, having been joined in the suit on 30/3/2022, they procured a valuation report dated 4/4/2022 and the report had returned a value that was beyond the



pecuniary jurisdiction of the lower court. There was no controverting evidence on the aspect of value of the suit land.

23. I have looked at how the Learned Magistrate rendered herself on the appellants' application. She stated thus:

“I have well considered the reasons given by the interested for seeking an order of review based on the fact that this court lacks pecuniary jurisdiction as the suit property is valued at Kshs. 20 million as per the valuation report dated 4/4/2022. It is my view that the interested parties have not satisfied the requirements for grant of the orders of review.

One of the key elements a court is bound to consider when granting an order for stay is the security given by the interested parties for the due performance of the decree (sic). And it is upon such consideration that a court of law will make a determination on the same. This court well considered the interested parties' arguments. It is accepted that a question of jurisdiction should be raised and decided at the earliest possible moment. That the question of jurisdiction once raised should be decided on the material available before court at that time. I concur with the principle, which principle has been referred by the 3rd and 7th defendants, contained in the classic case of *Owners of the Motor Vessel Lilian 'S'* [1989] KLR where Justice Nyarangi, JA, opined as follows:

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Should this court find that it lacks requisite jurisdiction to hear and determine this suit, it will down its tools immediately without further prompting.

The court herein having rendered itself regarding the issue of temporary injunction before the issue of jurisdiction was raised. I am of the considered view that this court is functus officio having granted orders of injunction to the plaintiff herein as the parties were awaiting for the matter to be slated for main suit. I concur with the plaintiff's advocate that the issue of jurisdiction was an afterthought and this court cannot review its orders regarding the jurisdiction especially where it had been raised that the plaintiff did not obtain letters of administration as the suit property belonged to deceased.”

24. It is clear from the above excerpt that the Learned Magistrate misdirected herself. What was before the Learned Magistrate was not an application for stay. It is not clear why the Learned Magistrate pronounced herself on the issue of stay. This was clearly a misdirection or error.
25. Secondly, the appellants did not have a prior opportunity to raise the issue of pecuniary jurisdiction. They were joined to the suit on 30/3/2022. On 4/4/2022, they procured the valuation report which returned the value of Kshs 20,000,000 for the suit land without development. On 7/4/2022, they prepared an application raising the issue of pecuniary jurisdiction.
26. From the above analysis, it is clear that the lower court disposed the application for interlocutory injunctive on the premise that it had pecuniary jurisdiction. However, following the joinder of the appellants and their procurement of a valuation report, it emerged that the lower court lacked



pecuniary jurisdiction. Clearly the valuation report was new evidence which the newly joined parties had introduced. That evidence was not available to the lower court prior to that.

27. This court's evaluation of the application dated 7/4/2022 is that the criteria set out under Order 45 rule 1 of the *Civil Procedure Rules* was properly satisfied by the appellants who prior to 30/3/2022 were not parties to the suit and did not have prior opportunity to ventilate the issue of pecuniary jurisdiction of the lower court. The scenario would be different if litigants who, all along, were parties to the suit were the ones ventilating the issue of pecuniary jurisdiction at that point.
28. For the above reasons, it is the finding of this court that the application dated 7/4/2022 properly satisfied the criteria for review, and that the lower court erred in dismissing the said application.
29. On costs, the errors giving rise to this appeal were committed by the Learned Magistrate. Consequently, parties will bear their respective costs of the appeal. On costs of the suit in the lower court, there was no evidence to suggest that the plaintiff in the lower court was aware of the improved value of the suit land and deliberately elected to go to a court that did not have pecuniary jurisdiction. For that reason, there will be no award of costs in the suit in the lower court.

### **Disposal Orders**

30. In the end, this appeal is allowed in the following terms:
  - a. The ruling of the Principal Magistrate in Ruiru SPMC MCL&E Case No E146 of 2021 rendered on 2/6/2022 is set aside.
  - b. The said suit, Ruiru SPMC MCL&E Case No E146 of 2021, is struck out for want of pecuniary jurisdiction.
  - c. Parties shall bear their respective costs of the said case.
  - d. Parties shall, similarly, bear their respective costs of this appeal

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6<sup>TH</sup> DAY OF FEBRUARY 2024**

**B. M. EBOSO**

**JUDGE**

In the presence of: -

Ms. Thuo for the Appellant

Mr. Gichuki for the 1st Respondent

Court Assistant: Hinga

