



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Mboleko Limited (Civil Appeal 312 of 2023)  
[2024] KEHC 9860 (KLR) (5 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9860 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 312 OF 2023**

**AC BETT, J  
AUGUST 5, 2024**

**BETWEEN**

**JAMES WACHIRA MWANGI ..... APPELLANT**

**AND**

**MBOLEKO LIMITED ..... RESPONDENT**

*(Being an appeal from the ruling of Hon. M.W. Wanjala (SRM) in Thika CMC Misc. Civil Application No. Civil Case No. 51 of 2022 (OS) delivered on 28th September 2022)*

**JUDGMENT**

1. By way of originating summons dated 24<sup>th</sup> March 2022, the Respondent (“Chargee”) sued the Appellant (“the guarantor”) and Margaret Ngithi Ngiri (“the borrower”) for the following orders:
  - i. That an order allowing the Chargee to sell the suit property known as Land Title Number Kakuzi/Kirimiri Block 9/1773 to recover Kshs. 363,495.54/ together with further interest currently due and owing from the borrower to the chargee as at 18<sup>th</sup> March, 2022.
  - ii. That an order for vacant possession of the property known as Land Title Number Kakuzi/Kirimiri Block 9/1773 to enable the charge to sell the suit property.
  - iii. The appellant to pay the Respondent the costs of the suit.
2. The Respondents’ case was that it advanced a loan facility of Kshs. 200,000/ to the borrower on 28<sup>th</sup> September 2021, which loan was to attract an interest of 10% per month until repaid in full on 30<sup>th</sup> October 2021 and which loan was advanced on the strength of an informal charge over Land Title Number Kakuzi/Kirimiri Block 9/1773 dated 28<sup>th</sup> September 2021.



3. The Respondent claimed that the Appellant requested to restructure the loan but still failed to settle the loan which as of, 18<sup>th</sup> March 2022, was in arrears in the sum of Kshs. 363, 495. 54/= thus prompting the suit.
4. The Appellant entered an appearance but failed to file a response and with the summons being unopposed, the trial court allowed the summons.
5. Aggrieved with the decision of the trial court, the Appellant lodged a memorandum of appeal dated 30<sup>th</sup> September 2022 seeking orders that the appeal be allowed with costs and that the ruling of the trial court be set aside.
6. The appeal is premised on the following grounds;
  - a. The learned trial magistrate erred in law and in fact in allowing the respondents miscellaneous application dated 24<sup>th</sup> March 2022.
  - b. The learned trial magistrate erred in law and in fact in ruling that the court had jurisdiction in entertaining the application.
  - c. The learned trial magistrate erred in law and in fact in failing to appreciate that the respondent is not a licensed money lending institution regulated by the Central Bank of Kenya entitled to charge predatory interest rated of 10% per month on a money lending business.
  - d. The learned trial magistrate erred in law and in fact in failing to appreciate that the application was supported by deponed affidavit of a person with no locus standi in the suit by failing to produce documentary evidence to establish nexus between her and the applicant.
  - e. The learned trial magistrate erred in law and in fact in failing to appreciate that the charge instrument relied upon by the respondent was defective void ad initio as per the provisions of section 43(1) & section 56(3) of the [Land Registration Act](#) No. 3 of 2012.
  - f. The learned trial magistrate erred in law and in fact in failing to appreciate that the charge instrument relied upon by the respondent was poorly executed by the respondent making it unsustainable in law.
  - g. The learned trial magistrate erred in law and in fact in law in failing to appreciate that the value of the suit property is unproportioned to the sum of money in contention defeating underpinned principles of equity and fairness.
5. The appeal was canvassed by way of written submissions pursuant to directions earlier issued by the Court.
6. The Appellant raised the following issues for determination by this court:
  - a. Whether the respondent's case was unopposed at the trial court.
  - b. Whether the trial court had jurisdiction to entertain the suit.
  - c. Whether the Respondents had the locus standi at the trial.
  - d. Whether the Respondents charge document was proper to confer legal right of redemption.
  - e. Whether the Respondent is a licensed money lending institution entitled to 10% monthly interest rate, and,
  - f. Whether the value of the suit property was proportionate to alleged debt.



7. On whether the Respondent's case was unopposed at the trial court, the Appellant submits that he filed his Replying Affidavit on 14<sup>th</sup> July 2022 and his Written Submissions on 25<sup>th</sup> August 2022, long before the ruling was delivered.
8. On whether the trial court had jurisdiction to entertain the suit, the Appellant contends that since the suit was for the recovery of a debt below the sum of Kshs. 1,000,000/=, the Small Claims Court had jurisdiction over the matter.
9. He further contends that since the Respondent sought to enforce a charge with the aim of assuming proprietary rights over Land Title Number Kakuzi/Kirimiri Block 9/1773, the Environment and Land Court under section 13 of the *Environment and Land Court Act* ought to have decided on the matter.
10. He also argues that since Land Title Number Kakuzi/Kirimiri Block 9/1773 is located in Murang'a County, the trial court located in Kiambu County lacked jurisdiction over the matter.
11. On whether the Respondent had the locus standi at the trial, the Appellant claims that the Respondent failed to establish her right to be heard on this matter by failing to identify herself.
12. He argues that the Respondent deponed to an affidavit through one Terry Wijenje claiming to be a director of Mboleko Limited without any documentary evidence in support, yet the charge document declared Kiley Limited as a director of Mboleko Limited.
13. On whether the Respondent's charge document could confer legal right of redemption, the Appellant submits section 79(6)(b) of the *Land Act* requires that whenever there is a breach on the terms of the informal charge, such document ought to be deposited in the relevant registry for registration for the purpose of enforcement.
14. He claims that this position is echoed in section 43(1) of the *Land Registration Act* No. 3 of 2012 which provides that no instrument affecting a disposition in land such as the informal charge in this case shall operate to sell or assign any rights until it is registered.
15. He adds that section 56(3) of the *Land Registration Act* also requires that a charge shall be completed by its registration.
16. The Respondent goes ahead to argue that the informal charge referred to by the Respondent failed to meet the prescribed manner of a charge as set out in Rule 67(2) of the *Land Registration (General) Regulations* 2017 since the execution section of the charge did not have the common seal of Mboleko Ltd, the signature and designation of the person certifying.
17. In support of the assertion that the impugned charge could not confer a legal right of redemption, the Appellant relied on the findings of the court in the case of *Damwana Kenya v Junius Nyaga Njiru & another* [2020] eKLR where the court held as follows;

“20. This court also finds that the trial court also correctly found that the transaction between the Appellant and 1<sup>st</sup> Respondent did not have the requisite consent from Land Control Board. In my view, the transaction between the Appellant and the 1<sup>st</sup> Respondent in respect to LR. Karingani/Ndagani/7267 was simply unsustainable in law. The evidence tendered clearly showed that the 1<sup>st</sup> Respondent was lent some money Kshs.25,200/- by the Appellant but there was no intention to charge the parcel of land as security notwithstanding the fact that the 1<sup>st</sup> Respondent may have left the title deed



with the Appellant. The charge created if at all was illegal invalid and the Appellant could not enforce it because it was not sustainable in law.”

18. On whether the Respondent is a licensed money lending institution entitled to 10% monthly interest rate, the appellant contends that the trial court did not consider that the Respondent did not produce any evidence proving that it was licensed and gazetted as a money lending organization in Kenya mandated to charge interests from money lending business and he cited the case of *Victoria Miseda v Bental Services Ltd* (2020) eKLR in support of this argument.
19. On whether the value of the suit property was proportionate to the alleged debt, the appellant submits that the trial court failed to consider that it was illegal and unfair for the suit property whose value is over Kshs. 9,500,000/ to be ordered to be sold to offset a loan of Kshs. 363, 495. 54/.
20. The Respondent on its part submitted the following issues for consideration by this court:
  - a. Whether the trial court had jurisdiction to entertain the suit.
  - b. Whether the failure of the trial court to consider the appellant’s pleadings is a ground raised in the appeal.
  - c. Whether the Respondent’s director is competent to swear affidavits on its behalf.
  - d. Whether the informal charge created is valid.
  - e. Whether the respondent is by law prohibited from money lending business.
  - f. Whether the interest rates charged are exorbitant and,
  - g. Whether the Chargee is entitled to the orders sought at the trial court.
21. On whether the trial court had jurisdiction to entertain the suit; the Respondent contends that the land records for the suit property are kept at the Thika land Registry as evidenced in the title thus conferring the trial court territorial jurisdiction over the matter.
22. On the jurisdiction of the Small Claims Court, the Respondent contends that the Originating Summons pursuant to which the suit was commenced reveals that the suit was one seeking consent orders to sell the suit property to recover an outstanding loan amount and therefore it falls outside the scope of the Small Claims Court.
23. On the jurisdiction of the Environment and Land Court, the contend that the court lacks the jurisdiction to deal with the issue at hand since it was not a matter concerning land use and occupation.
24. In support of this view, the Respondent relies on the findings of the Court of Appeal in the case of *Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others* (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment) where it was held as follows;

“20. We form this view taking to mind this Court’s decision in the afore-cited case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (supra)* where it was held that the ELC only has jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to “use” (by a tenant or licensee) as in this case, of a chargor’s land. In view of the foregoing, we



agree with learned counsel for the appellants that the learned Judge had no jurisdiction to entertain the respondents' suit as pleaded.”

25. On whether the failure of the trial court to consider the Appellant's pleadings is a ground raised in the appeal, the Respondent argues that this issue is not raised in the grounds of appeal which the Appellant is bound by.
26. It further claims that as set out at paragraph 9 of the trial court's ruling, the Appellant on 7<sup>th</sup> July 2022, requested for seven more days to put in their reply which lapsed on 14<sup>th</sup> July 2022.
27. That, granted the Appellant indicated that he filed his replying affidavit on 16<sup>th</sup> July 2022, the filing was done in defiance of the court directions and without leave of the court and therefore, the replying affidavit was not properly on record.
28. On whether the Respondent's director is competent to swear affidavits on its behalf, the Respondent contends that Terry Wijenje deponed on oath that he is a Director of the Respondent company and the burden laid upon Appellant to disprove the same.
29. In so submitting, the Respondent relied on the case of *Atbi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR where the Court of Appeal held that any director who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that company.
30. On whether the informal charge was valid, the Respondent submits that section 79(6) of the *Land Act* recognizes that an informal charge may be created where a chargee accepts a written and witnessed undertaking from the charge, the clear intention of which is to charge the chargor's land or interest in land with the repayment of monies worth obtained from the charge.
31. It thus contends that in so far as the parties took steps to create the informal charge such as executing a written undertaking in favour of the respondent thus creating an informal charge in respect of the suit property to secure the debt and lastly by depositing the title to the suit property with the respondent, it became a chargee pursuant to the informal charge so created over the suit property enjoying a lien by deposit of the title document. In support of this position the Respondent cites the case of *Tassia Coffee Estate Limited & another v Milele Ventures Limited* [2014] eKLR where it was held as follows;

“Going by these provisions of the law, it would appear that the Defendant/Respondent having deposited his title deed for the suit property with the Plaintiffs/Applicants, it created an informal charge in favour of the Plaintiffs/Applicants over the suit property as security for the payment of the balance of the purchase price for those other parcels of land. The Plaintiffs/Applicants therefore became chargees of an informal charge over the suit property and enjoy a lien by deposit of documents.”
32. On whether the Respondent is by law prohibited from money lending business, the respondent asserts that section 3(1)(a) of the *Banking Act* only regulates institutions that carry on banking business and financial business and that the respondent does not engage in any of those businesses.
33. The Respondent hastens to add that according to section 2 of the *Act*, the *Act* only regulates deposit taking institutions.
34. On whether the interest rates charged are exorbitant, the Respondent submits that the interest rates agreed to by the Respondent and their clients when issuing loans is purely governed by the rules of contract and commercial transactions.



35. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by parties and now discerns the issues for determination as follows:
- a. Whether the Respondent's case was unopposed at the trial court;
  - b. Whether the trial court was seized of jurisdiction to hear and determine the Respondent's suit;
  - c. Whether the Respondent is a money lending institution that ought to be regulated by the Central Bank of Kenya; and
  - d. Whether the informal charge was defective.
36. The Appellant contends that despite the court's finding that the application was unopposed, he in fact had filed a replying affidavit and submissions in response to the application. The Respondent on the hand contends that the Appellant has not raised this issue in his Memorandum of Appeal and therefore this court should not address it.
37. The grounds which may be taken in appeal are set out in Order 42 rule 4 of the [Civil Procedure Rules](#) which provides as follows;

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground”(emphasis added)

38. Confronted with a comparable situation, the Court of Appeal in [Tom Mbaluto & Others ex-parte Tom Mbaluto](#), [2018] eKLR stated the following when interpreting Rule 104 of the [Court of Appeal Rules](#) which is an equivalent to Order 42 Rule 4 of the [Rules](#):

“Rule 104 of the [Court of Appeal Rules](#), among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.

It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also [George Owen Nandy v Ruth Watiri Kibe](#), CA No. 39 of 2015 and [Openda v Abn](#) [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate



court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”(emphasis added)

39. Since both parties submitted on the issue, I believe it would be just and fair to make a determination on the same.

40. I have perused the entire file and noted that during the trial, the trial magistrate on 28<sup>th</sup> April 2022 granted the appellant 7 days to put in their response to the summons and when the matter came up in court again on 25<sup>th</sup> August, 2022, Counsel for the Appellant addressed the court as follows;

“It is for mention to confirm submissions. We have been served by the applicants. Ours are also ready. We have not been able to file because of the system at the registry. We pray for a hearing date.”

41. The court further noted that the 2<sup>nd</sup> respondent’s (Now Appellant’s) Submissions and Replying Affidavit were not on record and proceeded to give a ruling date. The trial Magistrate also noted that at the time of writing the ruling, the said documents were still not on record.

42. I have looked at the lower court file and indeed I have seen the replying affidavit by James Wachira Mwangi sworn on 8<sup>th</sup> July 2022 and which was filed in court on 14<sup>th</sup> July 2022. The affidavit was however filed outside the 7-day period that was directed by the court.

43. It must be appreciated that court orders are not mere suggestions to parties and disobedience of court do bear consequences. I share the sentiments of the court in the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* (2013) eKLR where it was held:

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with, and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”(emphasis added)

44. Having established that the Replying Affidavit and the Submissions of the Appellant were not properly on record, it is my finding that the trial court was correct to find that the summons by the Respondent was unopposed.

45. Be that as it may, it was still incumbent upon the trial court to consider whether it was seized of the jurisdiction to hear and determine the Respondent’s claim.

46. The question of jurisdiction cannot be wished away as without it, a court ought to down its tools. It is trite law that jurisdiction is pivotal to all court proceedings. Any act done by a court of law in absence of jurisdiction is a nullity. See the decision of the Court of Appeal in the case of *Motor Vessel “williams” v Caltex Oil Kenya Ltd* [1989] KLR 1 the Court of Appeal held: -

“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 does its tools in the matter before it the moment it holds the opinion that it is without jurisdiction....where the court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”(emphasis added)



47. Noteworthy, a question of jurisdiction can be raised at any point in the proceedings during a trial, on a first appeal and even on subsequent appeals. See the decision of the Court of Appeal in in [Kenya Ports Authority v Modern Holdings E.A. Ltd](#) [2017] eKLR, where the court had this to say: -

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard.”(emphasis added)

48. Before delving further into this issue, I think it is imperative to consider the constitutional and/or statutory anchor upon which the trial court’s jurisdiction was drawn and/or flows from.

49. As earlier indicated, this Appeal arose from the Judgment and Decree of the Small Claims Court which was established under Section 4 of the [Claims Court Act](#) CAP 10A as a subordinate Court pursuant to Article 169(1)(d) of the [Constitution](#).

50. Section 12 of the [Act](#) on the other hand addresses the jurisdiction of the said Court and provides as follows:

12. Nature of claims and pecuniary jurisdiction

(1) Subject to this [Act](#), the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—

- (a) a contract for sale and supply of goods or services;
- (b) a contract relating to money held and received;
- (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
- (d) compensation for personal injuries; and
- (e) set-off and counterclaim under any contract.

(2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.

(3) The pecuniary jurisdiction of the Court shall be limited to one million shillings.

(4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.(emphasis added).

51. Needless to state Section 12 of The [Small Claims Court Act](#) limits the nature and pecuniary jurisdiction of the court. There is nowhere in the [Small Claims Court Act](#) that grants it jurisdiction to grant orders to a chargee to sell the charged property.



52. This was the nature of the suit before the court. It was neither just a simple claim relating to a contract for money held and received as stipulated by Section 12(1) (b) of the Act nor was it within the purview of 12(1)(b) of the same Act or Section 12(1)(a)(c)(d) or (e), thereof.
53. In so far as the claim before the claim Adjudicator sought orders for disposal of immovable property(land) and its vacant possession, the value of the land in question mattered not, the Small Claims Court was nonetheless barred from entertaining the matter as matters pertaining to the use, title and occupation to land; are excluded from those that can be entertained by the Small Claims Court.
54. If the prayers were for summary judgment for the aforesaid sum advanced pursuant to the informal charge only, it would have fallen within the jurisdiction of the court. But the prayer was for much more. It was seeking the disposition of the 1st respondent's land.
55. In light of the above, it is my finding that the trial court lacked jurisdiction to hear and determine the Respondent's Originating Summons. I will therefore not deal with the remaining issues as they are rendered moot by the decision on jurisdiction.
56. Accordingly, the appeal is hereby allowed. The judgment of the lower court is hereby set aside, and the Originating Summons struck out with costs.
57. The appellant shall have the costs of the appeal assessed at 50,000/=.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 5<sup>TH</sup> DAY OF AUGUST 2024.**

**A.C. BETT**

**JUDGE**

