



REPUBLIC OF KENYA



**Njuki v Mwangi & another (Environment and Land Appeal
E022 of 2023) [2024] KEELC 1365 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

BM EBOSO, J

MARCH 14, 2024

BETWEEN

JUDY WAITHIRA NJUKI ALIAS JUDY WAITHERA NJUKI APPELLANT

AND

DUNCUN GICHOHI MWANGI 1ST RESPONDENT

PAUL NGANGA MWAURA 2ND RESPONDENT

RULING

1. Judy Waithira Njuki alias Judy Waithera Njuki initiated tis appeal through a memorandum of appeal dated 15/8/2023. She challenged the Judgment rendered on 19/7/2023 by Hon M W Kurumbu, Principal Magistrate, in Thika CMC MCL & E Case No 21 of 2020. Through the impugned Judgment, the trial court found that the 2nd respondent was the proprietor of land that was described as Thika Municipality Block 29/43 and dismissed the appellant’s claim. The trial court allowed the respondents’ counterclaim and decreed eviction of the appellant.
2. The appellant filed a record of appeal in this appeal on or about 9/10/2023. Subsequently, the appellant brought a notice of motion dated 27/10/2023, seeking leave of the court to procure and adduce additional evidence in this appeal. The said application is the subject of this ruling. The application was supported by the appellant’s affidavit sworn on 27/10/2023 and her further affidavit sworn on 15/1/2024. It was canvassed through written submissions dated 8/1/2024, filed by M/s KWEW Advocates LLP.
3. The appellant’s case is that the trial court was presided over by Hon. M W Kurumbu, Principal Magistrate, whose pecuniary jurisdiction was Kshs 10,000,000 yet the suit property was valued at Kshs 13,000,000 at the time of institution of the suit. The appellant contends that the trial court failed to consider on its own motion whether it had jurisdiction to entertain the suit and the counterclaim. The



appellant adds that the additional evidence to be procured and adduced is neither voluminous nor argumentative given that it is in the form of valuation reports.

4. The 2nd respondent opposes the application through grounds of objection dated 16/1/2024. The 2nd respondent contends that a similar motion dated 12/10/2023 filed by the appellant is yet to be determined by the court. The 2nd respondent further contends that the Notice of Withdrawal of the motion dated 12/10/2023 has never been adopted by the Court hence the said motion remains pending for hearing and determination by the Court. The 2nd respondent argues that the present motion therefore amounts to a multiplicity of applications and is illegally and unlawfully presented before the court. The 2nd respondent argues that the appellant is estopped from seeking leave to adduce any additional evidence because the parties have filed and served written submissions on the main appeal pursuant to the Court's directions issued on 16/10/2023.
5. I have considered the application, the response to the application and the submissions tendered on the application. I have also considered the legal frameworks and jurisprudence relevant to the key issue that falls for determination in the application. The key issue that falls for determination in this ruling is the question as to whether the application satisfies the criteria for admission of new or additional evidence by an appellate court.
6. This court's power to admit additional evidence when exercising appellate jurisdiction is donated by Section 78 of the *Civil Procedure Act* which provides as follows:
 - “(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power: -
 - a) to determine a case finally;
 - b) to remand a case;
 - c) to frame issues and refer them for trial;
 - d) to take additional evidence or to require the evidence to be taken;
 - e) to order a new trial.
 - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are charged conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
7. The above jurisdiction is regulated by the framework in Order 42 rule 27 of the *Civil Procedure Rules* which provide as follows:
 - (1) 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 that 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, the



court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

- (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.

8. Over the years, Kenya's superior courts have laid out clear principles that guide appellate courts when exercising jurisdiction to admit fresh evidence at the appellate stage. The Supreme Court of Kenya outlined the following principles in *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR:

“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.”



9. In the application under consideration, the appellant seeks the following specific orders: (i) an order directing the Government Valuer – Kiambu County to conduct a valuation of the suit property and ascertain its value as at February 2021 and July 2023; (ii) an order allowing the appellant to adduce additional evidence in form of the Government Valuer’s report on the suit property; (iii) an order admitting additional evidence to be adduced by the appellant in form of a report on the value of the suit property as at February 2021 prepared by M/s Topmark Valuers Limited, dated 11/9/2023; (iv) an order directing the Government Valuer to file in court their report on the value of the suit property as at February 2021 and July 2023; and (v) an order directing the appellant to file a supplementary record of appeal.
10. It is clear from the existing record of appeal that the suit giving rise to the impugned Judgment was initiated in the Chief Magistrate Court by the appellant in February 2020. It is also clear from the plaint [paragraph 8], the defence, and the counterclaim, that the dispute in the suit revolved around the question of ownership of a parcel of land described as Thika Municipality Block 29/43.
11. It does also emerge from the record of the trial court that from 21/1/2021 to 24/2/2022, Hon B M Ekhubi, Principal Magistrate, was seized of the suit in the lower court. The appellant appeared before the said Principal Magistrate severally over the period and expressed her readiness to proceed with trial before the Principal Magistrate. She did not raise any issue relating to the pecuniary jurisdiction of the Principal Magistrate to conduct trial in the suit.
12. Upon transfer of Hon B M Ekhubi, the case was on 12/5/2022 listed before Hon M W Kurumbu, then a Senior Resident Magistrate. Trial commenced before Hon. M W Kurumbu [then a Senior Resident Magistrate] on 25/5/2022 without any objection from the appellant. By the time the appellant finished tendering her evidence on 22/9/2022, Hon Kurumbu had been promoted to a Principal Magistrate. At the time of conclusion of trial and delivery of Judgment, Hon. Kurumbu was still a Principal Magistrate. Throughout the period Hon Kurumbu was seized of the case, the plaintiff did not raise any issue relating to the pecuniary jurisdiction of the Trial Magistrate. Indeed, the plaintiff did not raise the issue in her written submissions before the trial court, dated 20/4/2023. The appellant’s final written submissions before Hon Kurumbu read as follows:

“Your honour, the court has the power and authority to protect parties from losing their properties. Every Kenyan citizen has the right to property and the plaintiff herein has proved beyond reasonable doubt that she is the legal and rightful owner of the suit property. We, therefore, beseech this honourable Court for judgment against the 2nd defendant for orders sought in the plaint.

That is all.”
13. The contest against the pecuniary jurisdiction of the trial court was raised for the first time as the key grounds of appeal in the appellant’s memorandum of appeal dated 15/8/2023 filed in this court on or about 16/8/2023. This was after the appellant had lost his claim in the trial court and after the trial court had made a finding to the effect that the suit property belonged to the 2nd respondent and decreed the appellant to vacate the suit property.
14. This court is seized of this matter as an appellate court. It is not the trial court. It does emerge from the application under consideration that the appellant is inviting this court to step out of its role as a neutral appellate arbiter and assist her procure fresh evidence that would enable her prove the first five grounds of appeal in the memorandum of appeal dated 15/8/2023. Certainly, that is not the role of an appellate court, moreso in the circumstances of the present appeal where it is clear that the appellant



is the one who initiated and prosecuted the primary claim in the trial court and never raised any issue relating to the pecuniary jurisdiction of the trial magistrate.

15. Besides inviting the court to engage in procurement of new evidence, the appellant has invited the court to admit, as new evidence, the valuation report which she procured on 11/9/2023. The memorandum appeal is dated 15/8/2023. The appeal was filed in this court on 16/8/2023. The first five grounds of appeal read as follows:
 1. That the learned trial magistrate erred in law by failing to determine whether she had jurisdiction to hear and determine the suit before her on account of its monetary value and the court's pecuniary jurisdiction contrary to Section 7(1)(c) of the *Magistrates Court Act 2015*.
 2. That the learned trial magistrate erred in law in entertaining a matter in which she lacked pecuniary jurisdiction.
 3. That the learned trial magistrate erred in law and fact when she failed to determine *suo moto* whether the subject matter of the suit was within her pecuniary jurisdiction and make a finding that the trial court was not clothed with the jurisdiction to hear and determine the suit.
 4. That the learned trial magistrate erred in law and fact when she failed to hold that determine [*sic*] the jurisdictional question which must be determined by a court of law at the very outset of a matter before proceeding to hear and finally determine the matter and as such she expanded the pecuniary jurisdiction of the trial court through judicial innovation and craft contrary to law.
 5. That the honourable court erred in law by arrogating to itself jurisdiction on matters whose pecuniary jurisdiction is exclusively reserved for the Environment and Land Court contrary to law.
16. It is clear from the record that is before this court that the additional evidence did not exist during trial. It was procured by the appellant after she lodged this appeal. It was procured purely for the purpose of bolstering the first five grounds of appeal in the memorandum of appeal. It cannot therefore be said to be evidence that existed at the time of trial but could not be obtained with reasonable diligence for use during trial. Neither can it be said to be evidence that existed but was not within the knowledge of the appellant. Suffice it to state that, if the appellant had any doubt about the pecuniary jurisdiction of the trial magistrate, she had the opportunity to procure and place before the trial court a valuation report showing that the value of the suit property was beyond its pecuniary jurisdiction. She did not do that. I do not, in the circumstances, think the valuation report dated 11/9/2023 meets the criteria for admission of new or additional evidence at the appellate stage.
17. For the above reasons, my finding on the single issue in the application dated 27/10/2023 is that the applicant has not satisfied the criteria for admission of new or additional evidence by an appellate court. Consequently, the application dated 27/10/2023 is rejected. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 14TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the presence of:-

Mr Situma for the Appellant



Court Assistant: Hinga

