



Kariuki v Nyagah (Being sued as the Administrator of the Estate of the Late Joseph Nyagah) & another (Environment and Land Appeal 82 of 2019) [2023] KEELC 692 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 82 OF 2019
JA MOGENI, J
FEBRUARY 15, 2023**

BETWEEN

GINA DIN KARIUKI APPELLANT

AND

**JEREMIAH JOHN MWANIKI NYAGAH (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH NYAGAH) 1ST RESPONDENT
JOSEPH KAHORO T/A UPSTATE AUCTIONEERS 2ND RESPONDENT**

(Being an Appeal from the Ruling and Order of Hon. D. Gesora, Chief Magistrate, delivered on 31/01/2019 in Nairobi CMCC Suit No. 4445 of 2017)

JUDGMENT

Introduction

1. The appellant herein Gina Din Kariuki, was the 1st defendant in CMCC Suit No 4445 of 2017. The 1st respondent herein, Jeremiah John Mwaniki Nyagah was the plaintiff and the 2nd Respondent, Joseph Kahoro t/a upstate auctioneers, was the 2nd defendant in the above stated suit. The plaintiff (1st respondent) had via a plaint dated June 21, 2017 sought for the following orders against the defendants (appellant and 2nd respondent herein):-
 - a) A permanent injunction restraining the defendants and/or their agents from trespassing and/or auctioning the plaintiffs property.
 - b) A proclamation that house number 2 El Shaddai Villa, Kaputei Gardens situate on LR Number 209/10557/2 legally belongs to the plaintiff.



- c) General damages and interest
 - d) Costs of this suit.
 - e) Any other further remedy that this honourable court may deem fit to award.
2. The 1st defendant raised a preliminary objection dated July 13, 2017 on two grounds against the plaintiff's suit in that the trial court lacked of pecuniary jurisdiction to hear and determine the suit as the suit property was worth Kshs 60,000,000.00. The trial court considered the preliminary objection and held that the amount sought for the detained falls within its pecuniary jurisdiction and further that without the filing of a valuation report to ascertain the value of the property, the preliminary objection is premature and cannot stand. The same was dismissed on September 27, 2017. The 1st defendant then filed an application dated July 26, 2018 after obtaining a valuation report seeking review of the orders made on September 29, 2017. The court dismissed the application for review in its ruling delivered on January 31, 2019 citing that the application was res-judicata and cannot be entertained.
 3. The appellant was aggrieved by the decision and by a memorandum of appeal dated February 5, 2019, the appellant herein brought this appeal and sought for orders that: -
 1. This appeal be allowed.
 2. The ruling delivered on January 31, 2019 in Nairobi CMCC suit no 4445 of 2017 be set aside.
 3. An order do issue that the Chief Magistrate's court lacks pecuniary jurisdiction to hear and determine Nairobi CMCC Suit No 4445 of 2017.
 4. Costs of the appeal be provided for.
 4. The appeal is based on the grounds that: -
 1. The learned magistrate erred in law by holding that the Chief Magistrate's court have pecuniary jurisdiction to hear and determine the suit.
 2. The learned magistrate erred in law in ignoring the new evidence placed before him.
 3. The learned magistrate erred in law by holding that the court had pronounced itself on jurisdiction;
 4. The learned magistrate erred in law by holding that there was unreasonable delay in bringing the application for review;
 5. The appeal was canvassed by way of written submissions and both the appellant and the 1st respondent have filed their respective submissions. The 1st respondent opposes the appeal through his written submissions.
 6. Counsel for the appellant, Miller & Co Advocates, submitted that on the issue of review, from the court's ruling, the Chief Magistrate's reasoning was that this application was filed ten (10) months after the decision was rendered and the delay has not been explained, on the issue of value of the property and the only recourse was for the 1st defendant to lodge an appeal on the decision. That the same was res judicata and cannot be entertained. He also submitted that the grounds for review are embroiled in order 45(1) of the Civil procedure rules and that the pertinent ground for review the appellant relied



- on in the application is that of “discovery of new and important matter or evidence, which after the exercise of due diligence... could not be produced by him at the time when the order was made.”
7. It was his submission that the appellant obtained the valuation report outside the court timelines of prosecuting the application and once it was obtained, the same was brought to the court’s attention through the application for review.
 8. Further, that in his ruling against the application for review, the Chief Magistrate held that it was res judicata. He relied on section 7 of the Civil Procedure Act in explaining the doctrine of res judicata.
 9. It was also submitted that the court did not address the merits of the valuation report and it was not one of the referenced issues in its ruling against the preliminary objection. It was crucial though in supporting the appellant’s position that the Chief Magistrate lacked pecuniary jurisdiction and that is why it was mentioned as *obiter dictum*.
 10. Counsel submitted that the application for review should have been allowed because the valuation report was new evidence that could not be obtained in the prescribed timelines within which the preliminary objection was prosecuted. In that regard the doctrine of res judicata would not apply in this case. The appellant prays that the ruling in Nairobi CMCC Suit No 4445 of 2017 be set aside, the ruling on the preliminary objection reviewed and the valuation considered as evidence.
 11. On the issue of pecuniary jurisdiction, it was submitted that following the above issue, it stands that the Chief Magistrate lacks pecuniary jurisdiction premised on the valuation report, a supplementary report which confirms the appellant’s submission that the suit property subjected to inflation was of a higher value than 60,000,000/- in comparison to the Kshs 20,000,000/- of the Chief Magistrate. The findings in the valuation certificate on page 72 of the record of appeal further placed the value of the property at Kshs 84,000,000/=.
 12. It was also submitted that the pecuniary jurisdiction of the magistrate’s courts is provided for in section 7 of the Magistrate’s Court Act limiting the Chief Magistrate in particular to handle matters worth 20,000,000/=. They reiterated the authorities cited in the applicant’s submissions on the case of Owners of Motor Vessel “Lilian S” vs Caltex Oil Civil Appeal No 50 of 1989 and Samuel Kamau Macharia & anor v Kenta Commercial Bank Limited & 2 others [2012].
 13. The appellant’s submission is that from the foregoing, the Chief Magistrate would be acting outside scope of the law proceeding with the matter as the amount involved is in excess of his jurisdiction initially estimated to be 3x (three times) and with the valuation report 5x (five times). That there is a reason why the law and the constitution confer jurisdiction upon the different courts, otherwise they would get in each other’s way. If jurisdiction is everything and at the heart of the matter, then the suit cannot proceed before the Chief Magistrate’s court.
 14. The appellant prays that the appeal succeeds on both counts set out in the memorandum.
 15. On his part, the 1st respondent remains adamant that the appeal lacks merit and ought to be dismissed with costs. He submitted that the trial court already pronounced itself on the issue of jurisdiction and as such, a review on the same constitutes an abuse of court process. That while it is indeed true that the court cannot make one single move prior to ensuring that it has the requisite jurisdiction, the honourable trial court clearly and out rightly did so in its decision dated September 27, 2017.
 16. It was his further submission that the appellant had already subjected herself to the jurisdiction of the honourable trial court, leading to the dismissal of her application dated June 21, 2017 with costs. That the appellant’s move in seeking review is an afterthought, well calculated to further lengthen the period within which the matter stays in court.



17. Further, the respondent reiterates that the issue that is currently before this honourable court is and remains whether or not the appellant was just in instructing the 2nd defendant to levy distress upon the him, for the sum of kshs 8,250,000/- which escalates by the day and as such the Chief Magistrates' court might not have the requisite jurisdiction (due to the fact that the rent demanded accrues on a monthly basis) should the delays continue to be occasioned by the appellant. Especially at this stage.
18. The 1st respondent further contends that order 45 touching on the grounds for review are limited, and as such, cannot and should not be misused by the 1st defendant/appellant. while this honourable court should take judicial notice of the specific instances where review is permitted, the respondent would wish to draw the court's attention to the fact that there is no new evidence that has been brought before this honourable court that had not been specifically pleaded by the appellant there is no apparent error on the face of the record to warrant a review to be issued by this honourable court. He relied on the case Civil Appeal No 275 of 2010 *Pancras T Swai v Kenya Breweries Limited* [eKLR 2014].
19. The 1st respondent further submits that the trial court indeed had jurisdiction to hear and determine the suit as the respondent made it clear that the issue in question is whether the appellant herein had the right to instruct the 2nd defendant to levy distress upon the respondent herein for the sum of Kshs 8,250.000/= which is well within the jurisdiction of the Chief Magistrates court. He submitted that seeking an appeal only amounts to forum shopping and as such, the same should be struck out with costs as it constitutes nothing short of an abuse of court process.
20. It was his submission that the trial court pronounced itself logically, without any fear or favour and as such, it is the plaintiffs contention that the appellant cannot seek a review on a ruling based on facts, as the law is clear on recourses available to an aggrieved party.
21. Lastly, on the issue of costs, the 1st respondent submitted that the costs of this appeal should be borne by the appellant as the appeal is an abuse of the court process.

Issues for determination

22. This court has considered the appeal herein, the record of appeal in totality and the rival submissions and the court record generally and identify the following as the issues that emerge for determination:
 - a. Whether the learned magistrate erred in law by holding that the Chief Magistrate's court have pecuniary jurisdiction to hear and determine the suit.
 - b. Whether the learned Magistrate erred in law in ignoring the new evidence placed before him.
 - c. Whether the learned magistrate erred in law by holding that the court had pronounced itself on jurisdiction;
 - d. Whether the learned magistrate erred in law by holding that there was unreasonable delay in bringing the application for review;

Analysis and Determination

23. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions



reached by the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

24. As the court embarks on determination of the instant appeal, it will take into account that the impugned ruling that was delivered by the learned magistrate on January 31, 2019, involved exercise of Judicial discretion. The court will further take into account that it will not interfere with the discretion of the lower court unless it is satisfied that the lower court did misdirect itself both in law and facts. See the case of *Mbogo & another v Shah* [1968]EA 93, where the court held that:-

“..... this court will not interfere with the exercise of discretion by an inferior court, unless it is satisfied that its discretion is clearly wrong because it has misdirected itself or because it has acted on matter which it should not have acted on because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

25. The court will only interfere with the discretion of the learned Magistrate’s judicial discretion if it is satisfied that he did not exercise the said discretion judiciously.
26. This is an appeal against a ruling on an application for review hence the evidence on record for this court to reconsider and analyze is the evidence in respect of the application for review. It includes the application dated July 26, 2018, the supporting affidavit sworn by the appellant on July 26, 2018, replying affidavit sworn on September 26, 2018 by the 1st respondent and the submissions by the parties on the application for review.

Whether the Learned Magistrate erred in law by holding that the Chief Magistrate’s Court have pecuniary jurisdiction to hear and determine the suit.

27. The pecuniary jurisdiction of the Magistrates court is capped at Kshs 20,000,000/=. This is expressly provided for in section 7 of the *Magistrates’ Courts Act* No 26 of 2015 as follows;

“7. Civil jurisdiction of a magistrate’s court

A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-

- (a) twenty million shillings, where the court is presided over by a chief magistrate;
- (b) fifteen million shillings, where the court is presided over by a senior principal magistrate.
- (c) ten million shillings, where the court is presided over by a principal magistrate;



- (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
- (e) five million shillings, where the court is presided over by a resident magistrate.”

28. The *Black's Law Dictionary*, 11th Edition, defines Jurisdiction as a court's power to decide a case or issue a decree. Once a court finds that it has no jurisdiction, it must down its tools and should not take any further step. See the case of *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* [1989] eKLR.
29. The issue as to whether the Magistrates Court had jurisdiction to determine the suit in Nairobi CMCC Suit No 4445 of 2017, must be determined by examining whether the material placed before the trial court was sufficient to warrant the decision arrived at. This court, being an appellate court, has the duty to re-evaluate the evidence placed before the trial court and establish whether the conclusions made on the evidence before the court below and the findings arrived at by that court were justified.
30. The question as to whether the Magistrate's court had jurisdiction to hear and determine the matter, can only be answered after determining what the value of the suit property was. I note that the plaintiff, the appellant's preliminary objection and her application dated July 26, 2018 do not disclose the value of the subject matter and there was no valuation report filed as evidence before the trial court at that time. I must point out that it was the 1st defendant/appellant's contention that the subject property was purchased at Kshs 13,500,000.00 in the year 2001. One of the prayers in the plaintiff was for a proclamation that the suit property legally belongs to the plaintiff and the 1st defendant/appellant in her counterclaim sought for Kshs 8,250,000.00. Other than the 1st defendant/appellant's submission that the subject property is valued at over Kshs 60,000,000.00 and that it attracts a monthly rent of Kshs 250,000.000, there was no evidence to show the value of the suit property, and even the appellant's contention that the trial court had no pecuniary jurisdiction had no basis.
31. Faced with this unsupported allegation by the 1st defendant/appellant, the record at page 96 shows that the court did observe that the 1st defendant/appellant herein did concede that no sale agreement and/or valuation report had been filed so as to ascertain the value of the property. In his ruling, the learned Chief Magistrate held that the amount sought for falls within the pecuniary jurisdiction of the court and proceeded to dismiss the objection on September 27, 2017.
32. I have perused the lower court file and I note that, there was no valuation report filed on record as at the time the lower court delivered its earlier decision on September 27, 2017. The valuation report dated March 9, 2018 from Fortune and Realtors Limited as seen at page 63 was procured after the trial court had already rendered its decision regarding its jurisdiction.
33. This being the case, and bearing in mind that the pecuniary jurisdiction of a Chief Magistrate is capped at Kshs 20,000,000/=, I am in agreement with the trial court's finding that the Magistrates court has jurisdiction to hear and determine the suit, Nairobi CMCC Suit No. 4445 of 2017 as at the time the learned Chief Magistrate was making this decision as the pecuniary value could not be ascertained to be over Kshs 20,000,000.00 as alleged by the appellant.
34. This finding, in my view is justified as the valuation of the suit property had not been ascertained. In any event, the question before the trial court was whether the Magistrate's court had pecuniary jurisdiction to determine the suit, and the court rightly rendered itself on the issue.



Whether the learned Magistrate erred in law in ignoring the new evidence placed before him.

35. The appellant filed an application dated July 26, 2018 seeking a review of the order given on September 27, 2017 and the court to allow the objection dated July 13, 2017 and strike out the suit therein.
36. The law on review of court judgments or orders is found in section 80 of the [Civil Procedure Act](#) and order 45 Civil Procedure Rules 2010.
37. In the case of [Evan Bwire v Andrew Nginda](#) Civil Appeal No 103 of 2000 LLR 8340 the court held that:
- “an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh”.
38. In order for the application to have succeeded, the appellant had a duty to prove, on a balance of probabilities, the existence of the above-mentioned grounds for grant of an order of review, particularly where the application sought to rely on the ground that there was discovery of new and important evidence. One had to strictly prove the same. See [Stephen Wanyoike Kinuthia \(suing on behalf of John Kinuthia Marega \(deceased\) v Kariuki Marega & another](#) [2018]eKLR.
39. The grounds upon which the application for review dated July 26, 2018 were brought were listed on the face of the application as follows: -
1. That there is sufficient reason to review the subject order.
 2. That it is apparent that this honourable court lacks pecuniary jurisdiction to hear and determine the matter herein.
 3. That jurisdiction is everything and where a court of law lacks jurisdiction, it should down its tools.
 4. That the subject order was made when a valuation report in respect of the suit property was not available.
 5. That the 1st defendant has since obtained a valuation report which indicates that the suit property is worth way over Kshs 20, 000, 000.
 6. This honourable court has powers to review its orders and grant the reliefs sought.
 7. That it is in the interest of justice that the application is allowed.
40. The substantive ground was that the trial court lacked pecuniary jurisdiction pursuant to the discovery of new and/or important evidence. This was stated both on the notice of motion and in the supporting affidavit. On the notice of motion, the appellant stated that “the subject order was made when a valuation report in respect of the suit property was not available.”
41. In the supporting affidavit the appellant proceeded to state that “in the ruling, the trial court held that no valuation report was filed with it so as to ascertain the value of the suit property...”.
42. It is my understanding that by her application dated July 26, 2018, the appellant was bringing up the issue of jurisdiction again, attempted to introduce new evidence and sought the trial court to uphold and allow her objection and thereby dismiss the suit on lack of jurisdiction.



43. Because the trial court had considered the issue of jurisdiction, the question that arises is whether it was justified to dismiss an application for review or without according the parties an opportunity to be heard on that issue.
44. In answering this question, I make reference to the provisions of section 7 of the Civil Procedure Act, which provides;
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
45. As pointed out herein above, the trial court held that the issue of the court’s jurisdiction to hear and determine the case had previously been raised before the same court and on the basis of the said evidence. The trial magistrate considered that issue and refused to decline jurisdiction, on among other grounds, that the trial court did pronounce itself on the issue of the value of the property and that the only recourse for the 1st defendant/appellant was to lodge an appeal on the decision. The learned magistrate also refused to decline jurisdiction on the ground that the same is *res judicata* and cannot be entertained.
46. Even though it is true that the trial court could lawfully revisit the issue in an application for review, under section 80 of the Civil Procedure Act or under order 45 of the Civil Procedure Rules, in this matter, I am of the view that the filing on a valuation report together with an application for review appears to be an afterthought in an attempt to re-introduce the issue of jurisdiction. Instructions were issued to the valuers on February 23, 2018 to procure a valuation report of the suit property after the trial court had already made its decision based on the evidence before the court at the time of making the said decision.
47. Being of the view that the issue of the court’s jurisdiction had been raised previously and determined by the trial court, which I find to have been competent to hear and determine that issue, I find and hold that by dint of the provisions of section 7 of the Civil Procedure Act, the trial court was prohibited from entertaining that issue and therefore did not ignore the new evidence.

Whether the Learned magistrate erred in law by holding that the court had pronounced itself on jurisdiction;

48. It is true that the trial Magistrate refused to decline jurisdiction, on among other grounds, that the trial court did pronounce itself on the issue of the value of the property.
49. As earlier stated, I am in agreement with the trial court’s finding that the Magistrates court has jurisdiction to hear and determine the suit, Nairobi CMCC Suit No. 4445 of 2017 as at the time the learned Chief Magistrate was making this decision as the pecuniary value could not be ascertained to be over Kshs 20,000,000.00 as alleged by the Appellant at the time.
50. From my analysis of the material placed before the trial court and the impugned ruling, I find that the learned trial Magistrate neither failed to fully analyze and evaluate the evidence nor reached a wrong decision. I also find that there were no substantial issues raised regarding pleadings by the parties which the trial court failed to address and no miscarriage of justice was occasioned. I therefore find and hold that the learned Magistrate did not error in law by holding that the court had pronounced itself on jurisdiction.



51. In any case, the parties have informed the court that the subject property has been transferred back to the appellant and that the only outstanding for determination in the lower court is the issue of rent arrears. The levy of distress was in the sum of Kshs 8,250,000.00 and this court takes judicial notice that the said amount is within the pecuniary jurisdiction of the Magistrate's court.

Whether the learned magistrate erred in law by holding that there was unreasonable delay in bringing the application for review;

52. On whether the trial court erred by holding that there was unreasonable delay in bringing the application for review, this court is tasked to consider whether the application was filed without unreasonable delay.

53. The trial court's earlier ruling was delivered on September 27, 2017 while the application for review dated July 26, 2018 was filed on July 30, 2018. The trial court in its ruling indicated that the said application was filed 10 months after the earlier decision. This is indicated on page 104 of the record. In the absence of a plausible explanation for such delay, any reasonable court would conclude that the delay is unreasonable.

54. I have perused the lower court file and confirmed that the application for review was filed on July 30, 2018. A period of about 10 months and 5 days to be exact.

55. The court is not satisfied that there is any reasonable explanation for the delay in filing of the application for review. The law requires expeditious filing of such applications for good reason. The applicants have thus failed meet the threshold of expeditious filing as required by order 45 rule 1 of the *rules* and therefore the learned magistrate erred in law by holding that there was unreasonable delay in bringing the application for review.

56. Lastly, on the issue of costs, costs follow event and awarding of costs is a discretionary power exercised by the court as it deems. This is provided in section 27 (1) of the *Civil Procedure Act*.

57. The upshot is that none of the grounds of appeal has been proved. I find and hold that there is no justification to interfere with the findings of the trial magistrate. In the premises, I do not find any merit in this appeal and the same is dismissed with costs to the 1st Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2023.

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MOGENI J

JUDGE

In the Virtual presence of:-

Mr Mugo for Appellant

No appearance for the Respondents*

Caroline Sagina : Court Assistant

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MOGENI J

JUDGE

