



**Njoroge v Kanyia ((Suing as a Trustee of and on Behalf of Redeemed Gospel Church)) (Environment and Land Appeal E001 of 2021) [2023] KEELC 17282 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17282 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E001 OF 2021  
CA OCHIENG, J  
MAY 11, 2023**

**BETWEEN**

**GATERU NJOROGE ..... APPELLANT**

**AND**

**STEPHEN M. KANYIA ..... RESPONDENT**

**(SUING AS A TRUSTEE OF AND ON BEHALF OF REDEEMED GOSPEL CHURCH)**

*(Being an Appeal from the Judgment of Kangundo Senior Principal Magistrate's Court in Civil Case No. 204 of 2018 delivered on 17th November, 2020 by Hon. Martha Opanga - (SRM))*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated the 7<sup>th</sup> January, 2021 and filed on the 15<sup>th</sup> January, 2021 the Appellant appealed against the entire Judgment of the Senior Principal Magistrate Hon. Martha Opanga, at Kangundo Law Courts made on 17<sup>th</sup> November, 2020 in Kangundo CMCC No. 204 of 2018 The genesis of this Appeal is the Judgment of Hon. Martha Opanga, Senior Principal Magistrate which was made in favour of the Respondent.
2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 7<sup>th</sup> January, 2021 which contains the following grounds:
  1. That the Honourable Court erred in both law and fact in failing to make a determination on the Preliminary Objection challenging the court's jurisdiction filed in court on 18<sup>th</sup> October, 2019 before hearing the substantive suit or dispersing with any other issue.



2. That the Honourable Court erred in both law and fact in making a determination on the ownership of the property known as Kikambuani/Kanzalu/1000 without having competent jurisdiction to hear the matter.
3. That the Honourable Court erred in law and fact in making a determination in the suit without beforehand establishing that the Defendant had been served with a hearing notice.
4. That the Honourable Court erred in law and fact in finding that the church including all properties therein, the account held at Equity Bank Tala Branch and the land where the church stands belongs to Redeemed Gospel Church.
5. That the Honourable Court erred in law and fact in ordering the transfer of funds in the Account held at Equity Bank Number 0900XXXX10029 to persons who are not signatories to the said Account.
6. That the Honourable Magistrate erred in both law and fact in finding that the Plaintiff had proved his case on a balance of convenience.

It is proposed to urge this Honourable Court to

- i. Set aside the Judgment of the lower court delivered on the 17<sup>th</sup> November, 2020 and the original suit to be dismissed.
- ii. Provide for the cost of this Appeal.

The Appeal was canvassed by way of written submissions.

## **Submissions**

### **Appellant's Submissions**

3. The Appellant in his submissions provided a background of the Appeal and highlighted proceedings in the lower court. He contends that the Judgment in the Lower Court was issued Ex-parte as the Defendant was not given an audience in Court. He explains that he filed an Application dated 9<sup>th</sup> August, 2019 seeking among other orders leave to file a Defense out of time and a Notice of Preliminary Objection dated 16<sup>th</sup> October, 2019 on the issue of jurisdiction of the Court and the same were dismissed without granting him an audience. He argues that the Lower Court did not have jurisdiction to determine the matter as only the Environment and Land Court shall have original jurisdiction to hear and determine any matter relating to the Environment, use and occupation of and title to Land. He insists that it was not fair and just for the Court to proceed with the matter without dealing with the Notice of Preliminary Objection dated the 16<sup>th</sup> October, 2019, which was already filed. Further, that a Notice of Preliminary Objection must be heard and determined first before any further proceeding of the case. He avers that the subject of this case is Land which is an emotive issue and parties in this suit ought to have been given equal opportunity to present their case. Further, that the determination of this Case by the Lower Court as an undefended suit goes against Article 50 of the *Constitution* of Kenya. He claims that Order 11 of the *Civil Procedure Rules* was not adhered to, before the Lower Court matter proceeded. Further, that no Hearing Notice was served upon him. He explains that the Respondent allege that the firm of Khaminwa & Khaminwa Advocates had not filed Notice of Appointment which is not true since, one was filed. To buttress his averments, he relied on the case of *Juma & Another v Attorney General* 2003 eKLR.



## Respondent's Submissions

4. The Respondent in his submissions provides a background of the dispute herein and insists that in the trial Court when the matter was heard, the Appellant negligently failed to file his Defence despite entering appearance and being served with Hearing Notices. Further, that the Appellant after having been served with a Decree evicting him from the suit property, he instituted the instant Appeal. He explains that the duty of the Appellate Court was 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, were justified. He confirms that the Appellant indeed filed a Notice of Preliminary Objection on 16<sup>th</sup> October, 2019 claiming that the court did not have Jurisdiction to hear and determine the matter and the said Preliminary Objection was set to be heard on 10<sup>th</sup> March, 2020 on which date, his Advocate failed to attend court to prosecute their Application for stay including the said Preliminary Objection, culminating in their dismissal for want of prosecution. He insists that the Lower Court had jurisdiction to hand the matter and relied on Section 26(3) and 4(B) of the *Environment and Land Court Act* 2011. Further, that Magistrates had been gazetted to hear land matters vide Gazette Notice No. 27575 (No. 19 of 2011). He contends that the Appellant never produced any evidence to support his case or defence and this proves that he was only chancing his way in the instant matter. He further explains how the Appellant's Counsel was served and insists that the Appellant has not disputed service of summons to enter appearance and therefore his failure to file defence was deliberate. Further, that the Appellant never filed an Application seeking extension of time to file defence or set aside Judgment. He reaffirms that the Sale Agreement presented before the court, clearly showed that the parcel of land was purchased by the Redeemed Gospel Church and not the Appellant. Further, the equity bank account number 0900XXXX10029 was in the names of Redeemed Gospel Church and not the Appellant's name. He states that PW4, who was the vendor of the suit land, confirmed that he indeed sold the disputed parcel of land to Redeemed Gospel Church and not the Appellant. To support his arguments, he relied on the following decisions: *Peters v Sunday Post Ltd* (1958) EA424; *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* (2013) eKLR; *Phoenix Of E.A Assurance Company Limited v SM Thiga t/a Newspaper Service* (2019) eKLR; *Mungai v Gachuhi & Another* (2005) eKLR; *Anjeli Limited v Kenga Simba & 12 others; Chengo Omar & 19 others (Intended Interested Parties)* [2021] eKLR; *James Wanyoike & 2 Others v CMC Motors Group Ltd & 4 Others* (2015) eKLR; *Pius Kipchirchir Kogo v Frank Kimeli Tenai*(2018) eKLR.

## Analysis and Determination

5. Upon consideration of the Memorandum of Appeal, Record of Appeal and the rivalling submissions, the following are the issues for determination: Whether the Lower Court had jurisdiction to handle this matter. Whether the Preliminary Objection filed in the Lower Court was merited. Whether the Respondent proved his case on a balance of probability in the Lower Court. Whether the Appeal is merited.
6. I wish to provide a brief background of this matter before I make a determination of the issues raised herein. The Respondent filed a suit at the Kangundo Senior Principal Magistrates' Court being CMCC No. 204 of 2018 vide a Plaint dated the 27<sup>th</sup> August, 2018 where he sought the following orders against the Appellant:
- An eviction order against the Defendant or any other person claiming under him from Redeemed Gospel Church Kikambuani.



- b. Release of all money held in Equity Bank account 0900XXXX10029 in the name of Redeemed Gospel Church Kikambuani to Bishop Nelson Kimeu Ngutu.
  - c. Costs of the suit with interest thereon.
  - d. Any other remedy that the Honourable Court may deem fit to award.
7. From the lower court records, the Appellant participated in prosecuting a Notice of Motion Application where the Respondent was seeking injunctive orders among other orders and the said Application was allowed vide a Ruling delivered on 12<sup>th</sup> March, 2019. The Appellant despite having been served with summons to enter appearance, failed to file a Defense to controvert the Respondent's averments. The Appellant then proceeded to file a Notice of Motion Application dated the 27<sup>th</sup> March, 2019 where he sought a stay of execution of the Ruling delivered on 12<sup>th</sup> March, 2019 pending Appeal. He further filed a Notice of Preliminary Objection dated the 16<sup>th</sup> October, 2019 seeking to strike out the lower court case claiming that the Magistrate's Court did not have jurisdiction to handle the said case. I note on the 13<sup>th</sup> August, 2019, the Respondent's Counsel informed the trial Court that the Appellant had not filed a Defense and the Appellant's Counsel informed Court they intended to file an Application. Further, the Appellant later filed a Notice of Motion Application on 10<sup>th</sup> March, 2020. I note the aforementioned Application including the Notice of Preliminary Objection were dismissed as the Appellant's Counsel was absent to prosecute them. On 9<sup>th</sup> June, 2020 the trial Magistrate exercised her discretion and directed that the matter do proceed for hearing on 28<sup>th</sup> July, 2020 since the firm of Messrs Khaminwa & Khaminwa had not filed a Defence. Matter proceeded for hearing on 28<sup>th</sup> July, 2020 where the Respondent called four witnesses after which Judgment was delivered on the 17<sup>th</sup> of November, 2020. Further, the eviction orders were issued and the Respondent insists that the Decree emanating from the lower court has since been executed.
8. As to whether the Lower Court had jurisdiction to handle this matter.
9. The Appellant in the Lower Court had filed a Notice of Preliminary Objection dated 16<sup>th</sup> October, 2019 seeking to strike out the suit as the Magistrate's Court did not have jurisdiction to handle it. On jurisdiction of the Magistrate's Court to handle environment and land matters, I wish to make reference to Section 26(3) and (4) of The *Environment and Land Court Act* 2011 which provides inter alia:
- (3) The Chief Justice may by notice in the gazette appoint certain Magistrates to preside over cases involving environment and land matters of any area of the country.
  - (4) Subject to Article 169(2) of the *Constitution*, the Magistrate appointed under sub section 3 shall have jurisdiction to handle;
    - (b) Matters of Civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrate's Court Act."
- See also Section 9 of the *Magistrate's Court Act*, 2015.
10. Based on the legal provisions I have cited above, I beg to disagree with the Appellant's assertions and find that the trial Court indeed had jurisdiction to handle the dispute herein as the fulcrum of the dispute related to title over land. I note the Appellant had filed the impugned Notice of



Preliminary Objection without filing a Defence. In the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004, the Court held that: -

A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

11. In the circumstances, while associating myself with the cited decision as well as relying on the legal provisions I have quoted, I find that the trial Court was right in dismissing the aforementioned Notice of Preliminary Objection.
12. As to whether the Respondent proved his case on a balance of probability in the Lower Court and if the Appeal is merited.
13. The Appellant has sought to set aside the Lower Court Judgment and for the suit to be heard afresh. He insists that he was not granted an opportunity to be heard since he was not served with a hearing notice. The Respondent contends that the Decree has since been executed. The Appellant avers that the trial Magistrate was wrong in finding that the Respondent has proved his case on a balance of probability without giving him an audience. From the lower court record, I note the Appellant’s Counsel claims to have filed its Notice of Appointment of Advocates on 7<sup>th</sup> September, 2018 but the same does not bear a court stamp. Further, I note the Counsels severally participated in the proceedings in the lower court but they have not provided a reason why they failed to file their Defence or seek leave to file one out of time. I have perused the Appellant’s Notice of Motion Application dated the 9<sup>th</sup> August, 2019 and I note there was no prayer seeking leave of Court to file a Defense out of time, hence I find the Appellant’s averments uncandid. The Respondent called four witnesses who testified in support of their claim. From the evidence tendered in court, I note PW4 Jonathan Musyoka Nyamai confirmed he sold land parcel No. Kikambuani/Kangundo/1000 (suit land) to the Redeemed Gospel Church and as per two documents produced as exhibits dated the 23<sup>rd</sup> September, 2013 and 3<sup>rd</sup> January, 2014 respectively, which were signed with the vendor, the Appellant actually signed for the Buyer Redeemed Gospel Church. Further, the alleged Bank Account Number 0900XXXX10029 at Equity Bank was also in the name of Redeemed Gospel Church and not the Appellant. To my mind, since the Appellant had failed to file a Defence to controvert the Respondent’s averments, he cannot cry foul. Further, since the Respondent tendered evidence to prove his claim, the Learned Magistrate was right in finding that they had proved their case on a balance of probability.
14. In the case of *Union Insurance Company of Kenya v Ramzan Abdul Danji*, Civil Application No. NAI 79 of 1998 the Court held:

...The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.”
15. While in the case of *Anjeli Limited v Kenga Simba & 12 others; Chengo Omar & 19 others (Intended Interested Parties)* [2021] eKLR, the Court stated as follows:-

Whichever way I look at it, there is no substance in this application. The defendants were properly served and opted not to come to court. If a party is properly served and opts not to come to court, he can have nobody but himself to blame when judgment is entered against him. Nobody should shun a court proceeding thinking that they will automatically get an order for setting aside the judgment. Once a party is served, that party has been given an opportunity to be heard, and if he spurns it, he cannot start claiming that the constitutional



right to a fair hearing has been violated. I am not persuaded that there is anything that will be gained in setting aside the judgment for no claim is being lodged by the applicants over the suit land. The conclusion is that I find no merit in this application and it is hereby dismissed with costs. The result is that the respondent is free to proceed with execution of the decree.”

16. Yet in the case of *James Wanyoike & 2 Others v CMC Motors Group Ltd & 4 Others* (2015) eKLR as:

...that the tests for setting aside an ex parte Judgment are

- a. Whether there is a defence on merits
- b. Whether there would be any prejudice to the plaintiff
- c. What is the explanation for any delay.”

17. Based on the facts as presented while associating myself with the decisions cited above, I opine that the Appellant has himself to blame and has come to the Appellate Court too late in the day. He was granted several opportunities to be heard and he failed to grab them and now blames the trial Magistrate for exercising her discretion and directing the matter to proceed for hearing. Since he opted not to file his Defence, he cannot invoke the provisions of Article 50 of the *Constitution* as a right to be heard does not exist in a vacuum. Further, from the prayers sought herein, there was not even a draft Defence to persuade this court to set aside the impugned Judgment. It is trite that where there is no Defence, the suit is undefended and this means it can proceed with the Plaintiff in absence of the Defendant. Further, the issue raised by the Appellant, that the Respondent failed to comply with Order 11 of the *Civil Procedure Rules* cannot stand since the lower court suit was undefended. To my mind, I believe the Appeal is an afterthought as even the Decree has already been executed. I opine that the Appellant seeks to dangle his constitutional rights just to frustrate the efforts of the Respondent. It is my considered view that there is no plausible reason canvassed to warrant the setting aside of the impugned Lower Court Judgment and directing that the matter be heard afresh.

18. In the circumstances, I find the Appeal unmerited and will proceed to dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11<sup>TH</sup> DAY OF MAY, 2023**

**CHRISTINE OCHIENG**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

