



**Kaunguru v Muthula & another (Environment and Land Appeal E004 of 2022) [2023] KEELC 21779 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21779 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL E004 OF 2022  
PM NJOROGE, J  
NOVEMBER 27, 2023**

**BETWEEN**

**ESTHER MICHUKI KAUNGURU ..... APPELLANT**

**AND**

**NANCY NKUENE MUTHULA ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN LUBEKE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgment/Decree of the Chief Magistrate Court at Isiolo delivered on 27<sup>th</sup> July, 2021 by Hon. Samwel Mungai in Isiolo CM EXL NO. 12 OF 2016)*

**JUDGMENT**

1. The memorandum of appeal in this appeal states as follows;

Memorandum of appeal

1. That the honourable trial magistrate erred in law and fact in finding that the appellant had no audience to address the court.
2. That the honourable trial magistrate erred in law and fact in failing to appreciate that the mistake was occasioned by Counsel on record for the Appellant.
3. That the honourable trial magistrate erred in law and fact by putting blame upon the appellant for mistakes occasioned by actions and/or inactions of the appellant's counsel on record.
4. That the judgment/decree of the honourable trial magistrate is bad in Law and fact.



Dated at Meru this 21<sup>st</sup> day of April, 2022

Kevin Ouma &co.

Advocates for the Applicant

2. The appeal was canvassed by way of Written Submissions.
3. The appellant had been enjoined in the primary suit as an interested party. On March 30, 2021 the appellant's Advocate was not present in court and as the matter could not proceed, the appellant was ordered to pay adjournment fees and costs for the 1<sup>st</sup> respondent and her witness for that hearing date ascertained at Kes 9,000/= . On the day of the next hearing date, the appellant had not complied with the court order to pay the adjournment fees and costs as earlier ordered by the court. The presiding magistrate ordered the hearing to proceed and barred the appellant from participating in the proceedings for reason of non-compliance with a court order.
4. The hearing of the suit proceeded without the participation of the appellant and culminated in delivery of the impugned judgment. The appellant's advocate submits that the appellant was condemned unheard. The appellants advocate proffered the case of *Lucy Bosire v Kebanicha Div Lands Distutes Tribunal & others* [2013] eKLR for his assertion that the mistake of an advocate should not be visited upon an innocent litigant and quotes the Court as having said:

“Mistakes of advocates even if blunders should not be visited upon their clients when the situation can be remedied by costs”.
5. The appellant's advocate says that the appellant had a counterclaim which she was not allowed to prosecute and was, therefore, condemned unheard. He also says that the appellant is willing to pay the court adjournment fees and costs ordered by the lower court on March 30, 2021.
6. By a withdrawal notice dated November 29, 2022 and filed in court on December 2, 2022 the appeal against the 2<sup>nd</sup> respondent was withdrawn.
7. The 1<sup>st</sup> respondent opposed the application. On ground 1, she says that it is the appellant who told the court on March 30, 2021 that she was not ready for the hearing to proceed. She was ordered to pay adjournment fees and costs but disobeyed this order and gave no explanation for the disobedience. According to her advocate, choices have consequences and having disobeyed a court order she was the author of her non-participation in subsequent proceedings. She submits that the trial court was right in refusing to hear the appellant.
8. Regarding ground 2, the 1<sup>st</sup> respondent has not demonstrated that Non-payment of adjournment fees and costs as ordered by the court was the advocate's mistake. The court ordered the appellant and not the advocate to pay the adjournment fees and costs. This submission also applies to ground 3 in the memorandum.
9. Regarding ground 4, that the judgment of the trial Magistrate was bad in law and fact, the 1<sup>st</sup> respondent says that the appellant has come to the appeal court with unclean hands after clear disobedience of a court order. She says that this suit has been in court since 2016 and suggests that by disobeying the apposite court order, the intention was to have the hearing and determination of the suit delayed further. It is asserted that the appellant having taken the wrong steps in prosecuting her matter left the trial court with no alternative other than to hear the suit and make a determination. It is the 1<sup>st</sup> respondent's view that the judgment/decree was not bad in law and fact.



10. I have carefully considered the issues raised by the parties to buttress their diametrically incongruent assertions. I will deal with grounds 2, 3 and 4 first.
11. Grounds 2 and 3 will be handled together. I do find that the appellant has not demonstrated, even by the minutest lota of evidence, that failure to pay adjournment fees and costs as ordered by the trial court was the mistake of the appellant's advocate. It is veritably pellucid, the court was unequivocal in ordering the appellant to pay the adjournment fees and costs. It has not been demonstrated how the advocate should bear the responsibility for disobedience of the apposite court order. A diligent litigant ought to have known that it is the litigant who was required to pay the adjournment fees and costs and not the advocate. These 2 grounds are dismissed.
12. Ground 4, in its crafting is veritably nebulous. The appellant has failed to demonstrate how the trial court's Judgment is bad in law and fact. This ground is dismissed.
13. I now turn to ground number 1 that the appellant was refused audience to give her side of the story and to prosecute her counter claim. Both parties agree that the appellant was barred from participating in the proceedings.

Therefore, she was denied the opportunity to prosecute her counter-claim. Although I blame her for disobedience of the court order that led to her being barred from participating in the apposite proceedings, I do find that the decision made by the trial Honourable Magistrate was precipitate and veritably draconian. The dictates of natural justice and the rule of law demand that all litigants be accorded fair and just hearings in all judicial processes. The centrality, cardinality and universality of the principle that no litigant ought to be condemned unheard always take the pinnacle in all judicial processes. I uphold this ground and find that the appellant should not have been condemned unheard.

14. Consequently, I issue the following orders;
  - a. Grounds 2, 3 and 4 are dismissed.
  - b. Ground 1 is upheld with the result that the trial Magistrate's Judgment/Decree is set aside on condition that the appellant will pay to the 1<sup>st</sup> respondent the sum of Kes 9,000/= as adjournment fees and costs within 21 days of today Provided that should the appellant not do so, the setting aside of the Judgment/Decree granted herein shall automatically lapse with the result that the judgment/decree of the lower court shall remain extant.
  - c. This suit is referred back to the Chief Magistrate's court at Isiolo for fresh hearing to be heard by a magistrate seized with the requisite pecuniary jurisdiction other than hon. Samwel M Mungai, who in any case is no longer stationed at Isiolo.
  - d. Costs for this application and for the lower court proceedings shall be in the cause.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2023 IN THE PRESENCE OF:**

Court assistant: Balozi/Rahma

Charles Muchiri for the Appellant

Caleb Mwiti holding brief for Rimita for the 1<sup>st</sup> Respondent.

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

