



**Muli v Gichohi (Environment and Land Appeal 3 of 2023)
[2023] KEELC 22568 (KLR) (11 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 3 OF 2023**

AK BOR, J

DECEMBER 11, 2023

BETWEEN

BERNARD MUSEMBI MULI APPELLANT

AND

JOSEPH GATHECA GICHOHI RESPONDENT

JUDGMENT

1. The Respondent filed Nyeri ELC Case No. 261 of 2016 against the Appellant on 6/12/2016 seeking his eviction from the land known as Laikipia/Daiga/Ethi Block 2/150 (“the suit property”) and a permanent injunction to restrain the Appellant from re-entering or occupying the suit property. Judgment was entered in favour of the Respondent on 11/5/2017. The Appellant filed the application dated 9/9/2017 on 23/10/2017 seeking to set aside the judgment. That application was fixed for hearing on 9/5/2018. The Respondent applied to have it dismissed when the Appellant’s advocate failed to attend court. Another application dated 20/5/2018 was filed on 11/6/2018 seeking the setting aside of the orders made on 9/5/2018. That application was compromised by the parties and the Appellant was granted time to file his pleadings.
2. The matter was transferred to Nanyuki 2/7/2018 and registered as Chief Magistrates ELC Case No. 141 of 2018. The Appellant filed a Defence and Counterclaim on 13/8/2018 vide which he sought a declaration that he was the owner of the suit property and averred that the Respondent had trespassed onto his land. He sought a permanent injunction against the Respondent.
3. The Respondent filed his reply to defence and counterclaim and the matter proceeded for hearing. When the suit came up for hearing on 9/7/2019, the Respondent was in court but the Appellant and his advocate were not. The Magistrate proceeded with the hearing after noting that the Appellant had been properly served with the hearing notice. The Respondent adduced evidence and applied to have the Appellant’s counterclaim dismissed which the court allowed. Subsequently, the Respondent



filed his submissions and judgment was delivered by the Learned Njeri Thuku Principal Magistrate on 20/8/2019 in favour of the Respondent.

4. Being aggrieved by that judgment, the Appellant filed a memorandum of appeal dated 24/9/2020 at the Nyeri ELC with three main grounds of appeal. These are that the trial magistrate erred in law by condemning the Appellant unheard and that she erred in law and fact in finding that the Appellant was not the legal owner of the suit property while in fact he had been living on the land for over 30 years. The Appellant contended that the mistakes of his advocate were visited on the client when the Magistrate condemned him unheard.
5. The matter was transferred to the Nanyuki ELC for disposal. The court gave directions for the appeal to be canvassed by written submissions. Parties filed submissions which the court has considered. The Appellant submitted that he was represented in the trial proceedings by the Ongoya & Wambola Advocates who filed pleadings on his behalf but the matter proceeded in his absence and a judgment was delivered. He submitted that the principle of natural justice is that one should not be condemned unheard and cited *Doa Doa Tented Camps and Lodges Limited v Jubilee Insurance Company of Kenya Limited* [2021] eKLR.
6. The Appellant contended that he only became aware that the matter had been heard and judgment delivered in his absence when he was served with an order to vacate the suit property. That his advocate filed two applications dated 20/5/2018 and 9/9/2017 which were dismissed because counsel failed to advise him accordingly. On whether the Appellant was condemned unheard contrary to the rules of natural justice the Appellant relied on *Martha Wangari Karua v IEBC* which he submitted was cited in *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others* [2018] eKLR.
7. Further, the Appellant submitted that he failed to appear in court because his advocate failed to inform him of the trial and urged that he should not be denied justice because of the mistakes of his advocate. He relied on the words of Hon. Madan JA in *Belinda Muras & 6 others v Amos Wainaina* [1978] KLR which was cited in *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others*.
8. The Respondent submitted that the court heard the suit ex parte because it was satisfied that the hearing notice was proper and relied on Order 12 Rule 2(a) of the Civil Procedure Rules. He argued that the Learned Magistrate did not err in any way and that in any event she was not aware of any problems between the Appellant and his advocates.
9. The Respondent contended that the Appellant had not been vigilant from the time the suit was filed in Nyeri way back in 2016. He pointed out that the Appellant did not enter appearance or file defence. The Respondent requested for judgment which was entered against the Appellant who then filed an application for the suit to be reinstated. That application was dismissed on 9/5/2018 for non-attendance and on 27/6/2018 the Appellant brought another application to set aside the orders of 9/5/2018 which was allowed by consent upon the Appellant fulfilling some conditions including paying throwaway costs.
10. The Respondent argued that in view of the foregoing the Appellant's conduct was wanting and added that both he and the court had indulged the Appellant in the past when his two applications were dismissed and the court eventually set aside judgment by consent. The Respondent submitted that the Appellant only had himself to blame for conducting his case before the Magistrate's Court in a lacklustre manner and argued that he should not be denied the fruits of his litigation because of the mistakes of the Appellant and his advocate.



11. The Appellant blames his advocate for failing to inform him of the hearing of the suit and claims that he was condemned unheard by the trial court. After the initial judgment against him was set aside, he was represented by the firm of Ongoya Wambola & Co Advocates. A notice of change of advocates was filed on 22/9/2020 by Gicheru Mzame & Nyangena Associates who vide the letter dated 22/9/2020 requested for proceedings and the pleadings in the case while stating that the Appellant had not been served with the hearing date or applications filed that year. Since he was represented by an advocate, it was enough that his advocate on record had been served. The affidavits of service in the supplementary record of appeal confirm that his advocates on record were served.
12. Another notice of change of advocates was filed on 11/6/2021 by Wangechi Gathua Advocates. No explanation was given by the Appellant on why he did not take steps to progress the matter after the judgment against him was set aside. He should have been more diligent in getting the suit set down for hearing since he had a counterclaim and claims to reside on the suit property.
13. The Appellant filed the application dated 24/9/2020 before the trial court seeking stay of execution pending appeal. He did not apply to have the judgment or proceedings that led to the determination of the case set aside by the trial court. In this court's view, that was the proper court that he should have moved to determine whether he was condemned unheard pursuant to Order 12 Rule 7 of the [Civil Procedure Rules](#).
14. The Appellant submitted that he became aware that the case had proceeded for hearing and that judgment had been entered against him in August 2020 when an order to vacate the suit land was served upon him. The Respondent swore a supplementary affidavit and annexed the affidavits of service which the Appellant excluded when he compiled the record of appeal. He attached affidavits which confirm that the hearing notices dated 16/4/2019 and 29/11/2019 were served upon the Appellant's advocate.
15. Based on this and the general conduct of the Appellant in this case, the court is not persuaded that the Appellant is deserving of the orders he seeks in the appeal. The Appellant was not condemned unheard and is not blameless despite his attempt to heap all the blame on his advocate. There is no correspondence to show that he followed up on the progress of the suit or that he pursued the expeditious determination of his counterclaim.
16. The appeal fails and is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF DECEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Ms. Wangeci Gathua for the Appellant

Mr. Kebuka Wachira for the Respondent

