



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 89 OF 2010**

CAROLYNE NJERI NDIRITU .....APPELLANT

VERSUS

ZABLON WAIRIOKO .....RESPONDENT

**JUDGMENT**

The Judgment is the result of the appeal against the decision of **Hon. B.M. Nzakyo** learned Resident Magistrate vide **Othaya R.M.C.C.No. 17 of 2006**. The record shows that **Carolyn Njeri Ndiritu**, the Appellant, sued **Zablon Wairoko**, the Respondent by way of the Plaint dated 7th April, 2006 in which she sought for judgment in the following terms:

- a. **An injunction do issue to restrain the Defendant, by himself, his agents or servants from interfering with the Plaintiff's use and enjoyment of the premises known as plot 5 A & B Kagere Market, Mahiga Location, Othaya.**
- b. **A mandatory injunctive be issued to order the Defendant to return the iron sheets he removed from the roof of the premises.**
- c. **General damages and damages of an exemplary nature for trespass to the loss of business from 3.4.2006 until the premises are made usable again.**
- d. **Costs of the suit.**

The Respondent filed a defence to counter the suit. In paragraph 9 of the aforesaid defence, the Respondent stated that the trial court had no jurisdiction to hear and determine the suit. In paragraph 10 of the same defence, the Respondent gave notice that he would raise the issue as a preliminary point in law to have the entire suit struck out. On 12th April, 2010, the parties appeared before the learned Resident Magistrate whereupon, the Respondent argued his preliminary objection and urged that court to strike out the suit. The Appellant on her part urged the court not to grant the orders claiming the suit is properly before the court. After considering all the arguments, the court came to the conclusion that the preliminary objection was well founded and proceeded to strike out the entire suit on the basis that the relevant forum the Appellant should have filed his suit was the Business Premises Rent Tribunal (B.P.R.T). The Appellant was unhappy with the decision hence she preferred this appeal.

On appeal the Appellant put forward the following grounds in the Memorandum of Appeal:

1. **That the learned Resident Magistrate misdirected himself and erred in law in ordering the**

**suit struck out with costs for lack of jurisdiction.**

- 2. The learned magistrate misdirected himself and erred in law in failing to appreciate that the BPRT case of 31/2006 Nyeri between the same parties had been finalized and the Tribunal had ordered that the claim for general damages for the destroyed goods be filed in the ordinary court to recovery the same.**
- 3. That the learned resident magistrate misdirected himself and erred in law in striking the appellants suit on a preliminary ground without good reasons for doing so.**
- 4. That the learned magistrate erred in law in failing to hold that the appellants suit paragraph 9 thereof could be cured by amendment.**

I have re-evaluated the case that was before the trial court. I have further taken into account the written submissions filed by both parties. It is the submission of the Appellant that the learned Resident Magistrate fell into error when he made the order striking out the suit while it was apparent that the Business Premises Rent Tribunal vide **Nyeri B.P.R.T No. 31 of 2006** had ordered that the Plaintiff do seek for damages for her destroyed goods before the ordinary courts. The Respondent on the other hand is of the view that the suit before the Resident Magistrate's Court was filed before the Business Premises Rent Tribunal delivered its ruling hence the court cannot be faulted. I have looked at the ruling of the Business Premises Rent Tribunal delivered on 19th May, 2006 and it is clear that the Appellant was directed to file a suit for recovery of damages for her goods which were destroyed in the ordinary courts. The learned Resident Magistrate delivered his ruling on 5th May, 2010. What is not clear is whether the parties brought to the attention of the learned Resident Magistrate the existence of the decision of Business Premises Rent Tribunal . It should be pointed out that the Appellant filed her Plaint dated 7th April, 2006 on the same date. This means the suit was filed before the Business Premises Rent Tribunal delivered its ruling on 19th May, 2006. The Appellant having had the benefit of the Business Premises Rent Tribunal's decision, should have amended her Plaint or at least draw the attention of the trial magistrate of the existence of the decision. The Appellant cannot now turn around and plead the defence of ignorance. There is an attempt to allude that the Appellant acted in person hence she could not competently raise the issue. The record shows the Appellant was all along represented by counsel until she filed a notice to act in person. In my view, I do not think the learned Resident Magistrate can be faulted. He acted within the law in making the orders to strike out the suit. In my view the issues raised on appeal cannot be treated as frivolous but are serious points of law. The problem is that the same cannot be handled by way of an appeal. If well advised, the Appellant could as well have taken out other proceedings other than an appeal.

In the end, I see no merit in the Appeal. The same is dismissed with costs to the Respondent.

**Dated, signed and delivered this 23rd day of August, 2013**

**J.K. SERGON**

**JUDGE**

In open court in the presence of Njuguna for Respondent

Muguku for the Appellant