



REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT NYERI  
CIVIL APPEAL 95 OF 2008

PETER NYAMU KABEU..... APPELLANT

VERSUS

ELIUD KARANI KABEU..... RESPONDENT

*(Appeal arising from the judgment of Kerugoya PMCC No. 109 of 2007  
by Senior Resident Magistrate Mr. P.T. Nditika)*

JUDGMENT

Eliud Karani Kabeu, the respondent herein, sued Peter Nyamu Kabeu by way of a plaint dated 29<sup>th</sup> March 2007 vide Kerugoya PMCC 109 of 2007 in which he prayed for judgment in the following terms inter alia: ***a permanent injunction to restrain the defendant by himself, his agents, employees from entering, remaining or working, wasting, selling, alienating, disposing of, leasing and or interfering in any manner with the plaintiff's use, occupation and enjoyment of the L.R. No. Mutira/Kirunda/1668 and LR No. Mutira/Kirunda/1669. Costs of suit.*** The plaint was contemporaneously filed with the summons dated 29<sup>th</sup> March 2007 in which the plaintiff prayed for temporary orders of injunction to restrain the defendant from doing the acts complained of in the plaint pending the hearing and determination of the

suit. Temporary orders of injunction were issued on the same date and confirmed on 17<sup>th</sup> May 2007. It would appear the plaint and the summons of appearance were served upon the defendant. The suit was fixed for formal proof since no defence nor a Memorandum of appearance was filed. Judgment was given as prayed on 16<sup>th</sup> April 2008.

When the defendant learnt of the entry of the judgment he took out the summons dated 26<sup>th</sup> May 2008 in which he prayed for two orders:-

1. ***An order for stay of the execution of the decree pending the hearing and determination of the application.***
2. ***An order to set aside the judgment herein and***
3. ***To defend the suit.***

When served with the aforesaid application the plaintiff responded by filing a notice of Preliminary Objection dated 25<sup>th</sup> June 2008 to oppose the same. The Preliminary Objection was heard and upheld on 15<sup>th</sup> October 2008. In essence P.T. Nditika, learned Senior Resident Magistrate refused to hear the application on the basis that the appellant was in contempt of court orders issued on 21<sup>st</sup> May 2008 and she can only be heard upon purging the contempt. The appellant was dissatisfied with the decision hence this appeal.

On appeal the appellant put forward the following grounds:-

1. That the learned magistrate erred in law in upholding the preliminary objection while as the same was not capable of being heard in the circumstance of the case.
2. The trial magistrate in law in observing that the appellant was in contempt of the court without a substantive application.
3. The learned magistrate erred in shutting out appellant from being heard while as it was apparent that he had not participated in the proceedings.
4. The learned erred in suspending the appellant's case in legal without particularizing what the appellant ought to do.
5. The appellant's right of hearing was breached.

When the appeal came up for hearing this court directed that the same be determined by way of written submissions. At the time of writing this judgment the appellant was the only party who had filed his submissions. It is the submission of the appellant that he was branded a contemnor without being prosecuted for contempt. In other words the appellant is saying that all the procedures required to prove contempt on his part were not satisfied.

I have carefully considered the recorded proceedings and the written submissions filed herein. It is apparent that the appellant was not heard because it was a day that he breached the court order issued on 21<sup>st</sup> May 2008. In fact the trial magistrate was also of the view that the appellant can only be heard if he purges the contempt.

I have perused the record of appeal and there is no evidence that an application for contempt was filed, prosecuted and determined against the appellant. In contempt applications procedures have to be strictly adhered to and all necessary steps taken before a committal order can be made. The law requires that prior to the filing of a substantive application for contempt leave must be sought. No such leave was filed. It was therefore wrong for the trial magistrate to uphold the Preliminary Objection. It is obvious that the appellant was condemned unheard. For the above reason the appeal is hereby allowed, the order of upholding the Preliminary Objection issued on 15<sup>th</sup> October 2009 is set aside and is substituted with an order dismissing the Preliminary Objection with costs. The Chamber summons dated 26<sup>th</sup> May 2008 is reinstated with an order directing the same to be heard by another magistrate other than P.T. Nditika. Cost of the appeal is given to the appellant.

***Dated and delivered at Nyeri this 16<sup>th</sup> day of April 2010.***

**J.K. SERGON**

**JUDGE**