



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISII  
CIVIL APPEAL 177 OF 2007

**SUSAN WAMBURA JACKSON ..... APPELLANT**

**VERSUS**

**CHARLES NYAANGI NYAMOHANGA ..... RESPONDENT**

**JUDGMENT**

This is an appeal against a ruling delivered by E. Awino, P.M. on 15<sup>th</sup> August 2007. The background of that ruling briefly stated is as hereunder:

The appellant filed Migori PMCC No. 269 of 2005 seeking various relieves touching on **plot No.11 B, Gomatira, Isabania**. He alleged that he was the lawful owner of that plot but the respondent had trespassed into the same. The suit was listed for hearing on 18<sup>th</sup> October, 2006 on which day the hearing proceeded in the absence of the respondent's counsel although he had been duly served with a hearing notice. Judgment was delivered on 21<sup>st</sup> November 2006 and the appellant's suit was allowed with costs. The respondent was ordered to vacate the said property. Thereafter the respondent filed an application dated 14<sup>th</sup>

November, 2006 seeking to set aside the ex-parte judgment. The application was scheduled to be heard on 7<sup>th</sup> February, 2007. On that day the respondent's counsel failed to attend court and the application was dismissed for want of prosecution. The respondent filed yet another application seeking review of the orders made on 7<sup>th</sup> February, 2007. He also sought re-instatement of the dismissed application. The subsequent application was listed for hearing on 27<sup>th</sup> February, 2007. The same was heard and a ruling delivered on 24<sup>th</sup> April 2007 when it was dismissed. The trial magistrate held that there had been no exercise of due diligence on the part of the respondent's counsel to prosecute the previous application. The court observed that failure by the respondent's counsel to attend court appeared to have been deliberate rather than a mistake.

The respondent changed advocates and on 14<sup>th</sup> June 2007 he filed yet another application seeking to set aside the ex-parte judgment and decree dated 21<sup>st</sup> November 2006. Ruling in that application was delivered on 15<sup>th</sup> August 2007. The learned trial magistrate allowed the application with costs to the plaintiff.

The appellant was aggrieved by that ruling and preferred an appeal to this court. The grounds of appeal are as hereunder:

- (1) The learned trial magistrate erred in fact and in law in entertaining and granting the chamber summons application dated 14<sup>th</sup> June 2007 seeking to set aside the ex-parte judgment and/or decree dated 21<sup>st</sup> November 2006 when the same was clearly**

**prohibited by the doctrine of *res judicata* in terms of section 7 of the Civil Procedure Act Chapter 21 laws of Kenya.**

- (2) The learned trial magistrate erred in law in finding and holding that the court was seized of jurisdiction of entertaining the chamber summons application dated 14<sup>th</sup> June 2007 when the same was expressed to be brought pursuant to unknown existent provision of the law, to wit, order IXB rule 8 of the Civil Procedure Rules.**
- (3) The learned trial magistrate erred in law in taking into account extraneous issues and/or factors, not relevant to the issues in dispute and/or controversy between the parties. Consequently, the exercise of judicial discretion by the Honourable Principal Magistrate was coloured with impropriety and same reeks of irregularities.**
- (4) The decision of the learned trial magistrate appealed against is irregular, illegal and contrary to provisions of order IXB rule 7 (2) of the Civil Procedure Rules.**
- (5) That the learned trial magistrate erred in law in sitting on an appeal against his own decision issued and delivered on the 24<sup>th</sup> day of April 2007, dismissing an application seeking to set aside the previous dismissal orders dated 7<sup>th</sup> February 2007.**
- (6) The learned trial magistrate erred in not finding that the respondent was non-suited as against the appellant.”**

Counsel for the parties agreed to canvass this appeal by way of written submissions. The submissions were duly filed and I have carefully perused the same. Was the application dated 14<sup>th</sup> June, 2007 ***res judicata***? The respondent's counsel submitted that it was not because the earlier application seeking the same orders had been dismissed for want of prosecution on 7<sup>th</sup> February, 2007. However, the respondent had filed another similar application dated 12<sup>th</sup> February,

2007 which came up for hearing on 27<sup>th</sup> February, 2007. This one was argued inter partes and dismissed on 24<sup>th</sup> April, 2007. The two applications had been made on the same grounds, that the respondent's counsel had failed to diarise the scheduled date for hearing of the suit and thus the ex parte judgment was due to counsel's mistake.

Mr. Kiseru's contention was that the application dated 12<sup>th</sup> February 2007 was for review and setting aside of the ex parte orders dated 7<sup>th</sup> February 2007 and had nothing to do with the ex parte judgment dated 21<sup>st</sup> November, 2006. The respondent then instructed him and he filed the application dated 14<sup>th</sup> June, 2007 seeking to set aside the ex parte judgment dated 21<sup>st</sup> November, 2006 which was granted.

**Section 7 of the Civil Procedure Act** clearly states that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit, and has been heard and finally decided by such court.

A suit is defined as "all civil proceedings commenced in any manner prescribed." No appeal was preferred against the trial court's refusal to review and set aside the ex parte judgment after the application was argued inter partes. Was it therefore proper for the respondent to file another application seeking to set aside the ex parte judgment? In my view, the law did not permit the respondent to do so, even if he had changed advocates. The court had considered such an application and found it unmeritorious and proceeded to dismiss it.

The learned trial magistrate held that the judgment in favour of the appellant had been entered *ex parte* and the application to reinstate the suit was dismissed for want of prosecution and that in the subsequent application for review and/or setting aside of the judgment he had held that the failure by the respondent's advocate to attend court was deliberate.

In his view, "what is unheard cannot be *res judicata*."

With respect, the learned trial magistrate misdirected himself in interpretation of the law. *Ex parte* decrees operate to render a matter decided ***res judicata*** and the defendant's failure to appear will not deprive the plaintiff of the full benefit of his decree. See **"MULLA- THE CODE OF CIVIL PROCEDURE"**, 16 Edition Volume 1 Page 187.

The learned trial magistrate, by hearing the application of 14<sup>th</sup> June, 2007 was sitting on appeal of his earlier decision when he rejected a similar application.

I would therefore uphold grounds 1 and 5 of the memorandum of appeal.

With regard to ground two of the appeal, I do not think that it ought to have been raised at all because the respondent's counsel corrected the provisions of the law under which the application was brought to read **order IXB rule 8** and not **IX rule 8**. In any event, such a mistake, even if it had not been corrected, cannot ***per se*** render otherwise a competent application incompetent.

I do not consider it worth dealing with the other grounds of appeal, having come to the conclusion that the application that gave rise to the ruling appealed against was ***res judicata***. I allow

this appeal and set aside the learned trial magistrate's ruling date 15<sup>th</sup> August, 2007. The respondent's application dated 14<sup>th</sup> June 2007 is dismissed.

The appellant shall have the costs of the appeal as well as costs in the subordinate court.

**DATED, SIGNED AND DELIVERED AT KISII THIS 12<sup>TH</sup> DAY OF JULY, 2010.**

**D. MUSINGA  
JUDGE.**

**12/7/2010**

Before D. Musinga, J.

Mobisa - cc

Mr. Oguttu for the Appellant

Mr. Bosire for Mr. Kisera for the Respondent

**Court:** Judgment delivered in open court on 12<sup>th</sup> July, 2010.

**D. MUSINGA  
JUDGE.**