



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Civil Appeal 31 of 2003**

**DANIEL MUNENE NJIRU.....1<sup>ST</sup> APPELLANT**

**STEPHEN KARIGI.....2<sup>ND</sup> APPELLANT**

**NICASIO MWANIKI.....3<sup>RD</sup> APPELLANT**

**KENYA TEA DEVELOPMENT AUTHORITY.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**NDEGE JOEL MUGO.....RESPONDENT**

**JUDGMENT**

At the beginning of the arguments on appeal counsel for Appellant's Ms Wairimu informed the court that the appeal did not concern 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Appellants and she withdrew their names saying the same were included in error. The appeal is therefore by 3<sup>rd</sup> Appellant against the Respondent. The appeal is against the Ruling of Principal Magistrate's Civil Case No. 249 of 2002 given on 13/6/2003. In that ruling the Trial Magistrate found for Respondent and ordered Judgment be entered on admissions of the Appellant. The Appellant argued that the court had inherent powers to make order that may be required in the interest of justice and in this case the Trial Magistrate did not exercise her discretion judiciously. However the counsel for Respondent argued that the appeal is incompetent and against provisions of Section 65 and Section 75 of Civil Procedure Act in that there is no decree or order in this record of appeal. And that leave of court in making appeal in this case should be obtained first. Also that the rules invoked in the application are not applicable 3 A being for invoking inherent powers of court and 49 for enlargement of time. These rules do not give the court power to withdraw admissions. The document which was filed on 2/10/2002 is clearly signed by the Appellant. The grounds of appeal include:-

1. That the Trial Magistrate erred in law that there was no legal provision on withdrawal of admission, and she refused to allow file defence out of time and holding that the appellant was not illiterate and that the application was an afterthought and that she entered Judgment on a retracted pleading and on believing the Respondent affidavit and totally disregarded averments of the Appellant.

Finally that the Trial Magistrate failed to exercise her discretion judiciously failing to consider that

entering Judgment in the circumstances was prejudicial to appellant.

Upon considering the arguments made by the counsel for Appellant and of Respondent. Firstly I have examined Order XII Civil Procedure Code which deals with admissions Order XII rule 6 allows the court to enter Judgment on admission upon application. That provision does not make allowance for withdrawal of admissions in addition it is clear the Trial Magistrate believed the evidence of the respondent and not the Appellant. She made a finding that the application was an abuse of the court after being convinced that the Appellant was not illiterate and that there was no grounds at all to justify the orders applied for. The Trial Magistrate acted in accordance with rule 6 of that order because there was already an application by Respondent for Judgment on admissions

In the circumstances there was no reason to allow the Appellant to file defence at all. Then there are the points raised by the counsel for respondent on the validity of this appeal. Order XLII does not show that orders under Order XII are appealable of the right. Therefore leave should have been sought and obtained. I therefore do not find the appeal with merit. The same is dismissed with costs to Respondent.

Dated this 29<sup>th</sup> of January, 2008.

**J. N. KHAMINWA**

**JUDGE**

**29/1/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Ms Wairimu**

**Mr. Mucira**

Judgment read in open court.

**J. N. KHAMINWA**

**JUDGE**