



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Magut & another v Kerich (Environment and Land Appeal E007 of 2021)
[2022] KEELC 15326 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E007 OF 2021
MN MWANYALE, J
DECEMBER 7, 2022**

BETWEEN

STEPHEN MAGUT 1ST APPELLANT

ABRAHAM K. RONO 2ND APPELLANT

AND

HENRY K. KERICH RESPONDENT

JUDGMENT

1. By their memorandum of appeal dated December 28, 2021, the appellants Stephen Magut and Abraham K Rono appealed against the ruling of Hon SM Mokua Chief Magistrate Kapsabet, delivered on November 30, 2021 in Kapsabet Environment and Land Court case No 62 of 2018.
2. There were 5 grounds of appeal, to wit,
 - a. Learned trial magistrate erred in law and fact in failing to appreciate the indisposition and sickness of the defence counsel as a ground for his absence on September 13, 2021 when the plaintiff's case was closed.
 - b. That the learned trial magistrate erred in law and in fact in failing to allow the defence a chance to be heard on merit before the matter was fixed for judgment.
 - c. That the learned trial magistrate erred in law and fact in dismissing the defence application dated 23/9/2021 by applying wrong principles of law.
 - d. That the learned trial magistrate erred in law and fact by not granting the appellants an opportunity to be heard on merit and failing to consider the defence and counterclaim on record.



- e. That the learned trial magistrate erred in law and fact in failing to appreciate the evidence of a sufficient cause to warrant review and/or setting aside of the *ex parte* proceedings of September 13, 2021.
3. The appellants prayed that the appeal be allowed and ruling of the learning magistrate to be set aside and appellants be allowed to serve their defence and to cross – examine the respondent. The record of appeal in respect of this appeal was filed on July 5, 2022 and a supplementary record of appeal was filed on October 13, 2022.
4. Upon admission of the appeal for hearing, the court directed the parties to file written submissions in respect of the appeal.
5. The record of appeal as well as the supplementary record of appeal do not have the proceedings leading to the order of 13/9/2021; however from the impugned ruling, it can be garnered that, the suit was fixed for hearing on 13/9/2021 and an application for adjournment on the basis of indisposition of counsel for the defendant was made and was opposed, the court agreeing with the plaintiff's advocate ordered the matter to proceed for hearing. The appellants as defendants filed an application for review and/or setting aside the order issued on 13/9/2021.
6. The court in its ruling delivered on November 30, 2021, dismissed the application for review.
7. In the impugned ruling the learned magistrate found that, the appellant's had not demonstrated why they were absent on the said date, when the court ordered the matter to proceed for hearing.
8. The learned magistrate further found that there were no triable issues as there was no defence that had been filed to warrant the court find that they were triable issue.
9. As noted earlier, both the record of appeal and the supplementary record of appeal do not have the proceedings of 13/9/2021, hence this court has been denied the change to examine the whole record. It is important however to note that in the record of appeal before this court, a defence dated June 2, 2021 together with a counterclaim by the 2nd appellant form part of the record. The court stamp on the defence is dated September 3, 2021 hence it was filed on September 3, 2021.
10. The learned magistrate also found that there was no sufficient cause to warrant a review; as the appellants did not demonstrate why they were not in court on the said date despite service on themselves.

Analysis and Determination: -

11. I have perused the record of appeal and supplementary record of appeal as filed, and as stated elsewhere there are no proceedings for the 13/9/2021 or any proceedings at all. The preparation of both the record of appeal and the supplementary record, left out crucial information and was below par.
12. This court agrees with the learned magistrate in disallowing the application to set aside the order made on 13/9/2021 in so far as there were no sufficient reason non-attendance of the defendants, since the court had directed the defendants to be served in person as well as their advocate then on record; the advocate having been unwell, it was still incumbent on the appellants as defendants to have attended court, and due to their non-attendance, then the learned magistrate was right in finding that there was no sufficient cause; demonstrated to warrant a review; consequently ground 1 and 5 of the appeal have no merit and hereby fail.
13. In the impugned ruling, the learned magistrate had observed that there was no triable issue as there was no defence filed in the suit. This formed grounds 2 and 4 of the appeal.



14. As noted in paragraph 9 of the judgment, there is a joint statement of defence and the 2nd defendant's counterclaim dated June 2, 2021 and filed on September 3, 2021.
15. As to whether the said defence and counterclaim were filed regularly, noting that pleadings closed in 2018, is another issue altogether. But since there was a defence on record, this court finds that there was no basis for the learned trial magistrate to find that there were no triable issues for lack of a defence, unless of course the statement of defence was not on the court record.
16. Accordingly the court, finds merit in ground 2 and 4 of the appeal in so far as the appellants had a defence on record, which the court ought to have considered and heard them on.
17. The upshot is that the appeal partly and to a large extent succeeds and is allowed in terms that;
 - i. The ruling dated November 30, 2021 is hereby set aside together with any consequential orders.
 - ii. The matter is remitted back to the trial court to afford a chance to the appellants and/or their counsel to cross – examine the respondent on the proceedings of 13/9/2021 and for the appellants to conduct their defence case.
 - iii. Costs of the appeal are awarded to the respondents.

DATE AT KAPSABET THIS 7TH DAY OF DECEMBER 2022.

HON. M. N. MWANYALE,

JUDGE.

In the presence of;

Mr. Misoi for Appellants

Ms. Karuga for the Respondent.

