



REPUBLIC OF KENYA



**Wachira v Maina & another (Environment and Land Appeal E003 of 2022)
[2023] KEELC 19950 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19950 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

JG KEMEI, J

SEPTEMBER 19, 2023

BETWEEN

PETER GICHIRI WACHIRA APPELLANT

AND

LUCY MUTHONI MAINA 1ST RESPONDENT

DISTRICT LAND REGISTRAR, THIKA 2ND RESPONDENT

*(Being an appeal against the Ruling and Orders of the Senior Principal Magistrate's Court,
Ruiru by Hon. C. A. Otieno, SPM in ELC Petition No. 124 of 2020 delivered on the 22/12/2021)*

JUDGMENT

1. The Appellant filed an appeal against the Ruling delivered by Hon. C. A. Otieno in SPMCC No. 124 of 2020 delivered on the 22/12/2021 on the following grounds:-
 - a. The Learned Magistrate erred in law and fact by arriving at the conclusion that a Court can enter *ex-parte* Judgment on a Counterclaim filed in response to a suit which is yet to be heard and determined on merit without the need for formal proof hearing and thus failing to set aside and/or discharge the *ex-parte* Judgment entered on 26th April 2021.
 - b. The Learned Magistrate erred in law and in fact in failing to give proper and/or sufficient consideration to the evidence and the submissions made by the Appellant.
 - c. The Learned Magistrate erred in law and fact by failing to appreciate that a Plaintiff's suit as filed is a sufficient defence to a Counterclaim and that there is no law that permits entry of interlocutory Judgment with respect to none liquidated claims especially in land matters as was subject of determination before the trial Court.



- d. The Learned Magistrate erred in law and fact in failing to discharge, vary and/or set aside the injunction order granted on 25th March 2021 orders that were obtained without the Plaintiff's knowledge and/or instructions.
 - e. The Learned Magistrate erred in law and in fact by allowing the Defendant to continue benefiting from injunctive orders obtained through falsification of material facts and failure to disclose to the Honourable Court the relevant information.
 - f. The Learned Magistrate erred in law and fact in holding that the Defendant can continue to benefit from injunctive orders not consented to by the Plaintiff.
 - g. The Learned Magistrate erred in law and fact in breaching the Appellant's right to a fair trial and a fair hearing by entering default Judgment on the Counterclaim.
 - h. The Learned Magistrate erred in law and fact in failing to consider the authorities of the Superior Courts cited by the Appellant in the submissions.
 - i. The Learned Magistrate erred in law and fact in Ruling against all the evidence on record and considering extraneous matters that were never pleaded and were never part of the record.
 - j. The Learned Magistrate misconstrued the law and its application to the facts of the case and ended up misdirecting herself by finding that an interlocutory Judgment in default of appearance can be entered in respect to a Counterclaim when the main suit and dispute between the parties is pending hearing and determination by the same Court.
 - k. The Learned Magistrate took into consideration irrelevant issues and misguided herself in making the impugned decision and orders herein.
 - l. On the whole, the decision of the Honourable Magistrate is plainly erroneous and insupportable by the facts, evidence and the submissions and the law.
2. The Appellant prays that:
- a. This appeal be allowed.
 - b. The Ruling of the learned Magistrate dated and delivered on 22nd December 2021 and the orders thereto be set aside and, in its place, this Honourable Court do issue an order allowing the plaintiff's Application dated 3rd November 2021 in terms of prayers (b), (c), (d) and (e) therefore.
 - c. Costs of this Appeal and at the trial court be awarded to the appellant.
3. On the 13/6/2023 parties elected to canvass the appeal by way of written submissions which submissions were to be filed within 21 days from the date thereon. The Court directed the parties to file the said submissions by the close of business on the 28/7/2023.
4. By the time of writing this Judgment none of the parties had complied with the said orders with respect of the filing of the written submissions.
5. Consequently, the Court finds that the parties having failed to file written submissions, there is nothing for the Court to base its determination on. This being an appeal where parties elect to canvass the appeal by way of written submissions the parties are bound by the pleadings including the mode of hearing the appeal.
6. The Court finds that this appeal is unprosecuted and the same be and is hereby dismissed.



7. Each party to meet the costs of the appeal.

8. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kimathi HB Agwara for Appellant

Ms. Gachugu HB Ambani for 1st Respondent

2nd Respondent – Absent

Court Assistant – Phyllis & Lilian

