Mwangi v Nairobi City Water & Sewarage Company Limited (Civil Appeal E565 of 2023) [2024] KEHC 13939 (KLR) (Civ) (7 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13939 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E565 OF 2023

TW OUYA, J

NOVEMBER 7, 2024

BETWEEN

PETER THUITA MWANGI .... APPELLANT

AND

NAIROBI CITY WATER & SEWARAGE COMPANY LIMITED .. RESPONDENT

(Being an appeal against the Ruling of the Hon. S.A. Opande (PM) delivered on 29th May, 2023 in Nairobi Milimani CMCC No. 82 OF 2022)

RULING

Background

1. This appeal emanates from the ruling delivered on 29.05.2023 by the lower Court in Nairobi Milimani CMCC No. 82 of 2022 (formerly Nairobi HCCC No. E095 of 2022). Peter Thuita Mwangi, (hereinafter the Appellant), the Plaintiff before the lower Court, initiated a claim by way of plaint dated 03.06.2022, accompanied by a motion under urgency of even date, as against Nairobi City Water & Sewarage Co. Ltd (hereinafter the Respondent), the Defendant before the lower Court, seeking judgment by way of; - a tabulation account for all monthly readings for meter No. 113200XXXX, account No. 1895XXXX old (new 51306XXXX) showing the monthly charges for sewerage only; a declaration that the opening of account No. 1893945 on meter No. 1009XXXX is illegal and charges are null & void all the same to be closed; a permanent injunction to restrain the Respondent its servants and or agents from interfering with the Appellant's water installation as the same is properly licensed; and general damages for malicious damages caused, pain and suffering the Appellants has undergone due to wrong billing by the Respondent.

2. It was averred that at all material times to the suit the Appellant had been the owner of the property known as LR. No. 209/5933 and built eighteen (18) residential units wherein he installed two (2)

meters one to measure the water extracted from the ground to be used for billing by the Water Resource Management Authority, being meter No. 1009XXXX and the other for billing by the Respondent for sewerage, being meter No. 113200XXXX7. That despite the forestated the Respondent has proceeded to open two (2) separate accounts by equally billing for water consumed notwithstanding the fact that the Appellant is only required to pay to it sewerage charges. That despite demand, the Respondent has refused to close the water account or stopped sending bills on the same and or give a tabulation for the monthly sewerage bill. The Appellant equally averred that there being a pending suit before the Water Appeals Tribunal, the same could not proceed due to lack of a Chairperson. As such, the lower Court has jurisdiction to hear and determine the suit.

3. The Respondent filed a statement of defence dated 18.10.2022 denying the key averments in the plaint and averred that the Appellant had earlier filed a similar suit over the same subject matter, being Nairobi HCCC No. 145 of 2017 – Peter Thuita Mwangi v Nairobi Water & Sewerage Co. Ltd, which was dismissed on 04.11.2021 for want of prosecution pursuant to Order 17 Rule 2(1) of the Civil Procedure Rules (CPR). It was further averred that instead of following the right procedure on reinstatement of the dismissed suit, the Appellant decided to file the lower Court suit therefore the same offends the provisions of Section 7 of the *Civil Procedure Act* (CPA) as the suit is res judicata. That the lower Court suit as lodged is frivolous, vexatious, does not disclose any reasonable cause of action. The Respondent equally challenged the lower Court's jurisdiction to entertain the matter on accord of the suit having already been litigated.

4. Prior to its statement of defence, the Respondent filed a motion dated 18.08.2022 expressed to be brought pursuant to Section 7 of the CPA and Order 2 Rule 15 of the CPR seeking inter alia that the lower Court suit and motion dated 03.06.2022 be struck out with costs. The grounds on the face of the motion were amplified in the supporting affidavit sworn by Patrick Maina, who cited being the Respondent's Legal Officer duly authorized by the Respondent and competent to swear the affidavit in support. The gist of his deposition was that the Appellant had earlier instituted a similar suit, Nairobi HCCC No. 145 of 2017, which was dismissed on 04.11.2021 for want of prosecution and rather than have the dismissed suit reinstated, the Appellant opted to file the lower Court suit. That in view of the forestated, the lower Court suit offends the provisions of Section 7 of the CPA, as it is Res Judicata, therefore it is in the interest of justice that the latter and accompanying motion be struck out.

5. The Appellant opposed the motion vide a replying affidavit whose gist was that without his knowledge, due to non-service upon counsel, the High Court proceeded to dismiss Nairobi HCCC No. 145 of 2017 for want of prosecution on 04.11.2021. That in spite of the forestated, the High Court suit was not heard and determined on merit therefore the lower Court suit cannot be cited for being Res Judicata and ought to be allowed to proceed on its merits.

6. The Respondent's motion was disposed of by way of written submissions. By way of a ruling delivered on 29.05.2023, the trial Court allowed the Respondent's motion as prayed.

The Appeal

7. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the trial Court premised on the following grounds in his memorandum of appeal as itemized hereunder: -

> " 1. The learned Magistrate erred in law and in fact in failing to follow the direction early that there were two application that were to be heard simultaneously and purported to deal with one application dated 12th October 2022.

2. The learned Magistrate erred in law and in fact in dealing with the Application dated 12th October 2022 and yet there was no such application on record.

3. The learned Magistrate erred in law and in fact in noting that both parties never filed submissions and yet there were submissions on record from both parties.

4. The learned Magistrate erred in law and in fact by raising his own application and proceedings to address the same and not addressing himself on the applications on record.

5. The learned Magistrate erred in law and in fact by delivering a ruling that had no relationship with the Application on record" (sic)

8. In light of the aforecaptioned itemized grounds, the Appellant seeks before this Court an order to the effect: -

> " ...that the appeal be allowed and the Order of 29th May, 2022 be set aside with costs and interest to the Appellant." (sic)

9. Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered.

Submissions

10. On the part of the Appellant, counsel began his submissions by contending that before the lower Court, what was for determination were two (2) applications, being the ones dated 03.06.2022 and 18.08.2022, however the learned Magistrate in his ruling proceeded to address the purported application dated 12.10.2022 which was not on record. That solely on the premise of the forestated, this Court ought to allow the appeal as lodged. Concerning whether parties filed submissions, it was argued that both parties filed their respective submissions of which were duly on record therefore the learned Magistrate went ahead to write his own ruling meanwhile failed to take notice of the parties' submissions. That the trial Court in proceeding to write the impugned ruling without considering the respective parties' submissions, was akin to condemning the Appellant unheard. Counsel further argued that the latter goes on to compound and demonstrate that the impugned ruling did not relate to the proceedings in the matter as such the same ought to be expunged from the record. Further, by proceeding to deliver the impugned ruling, the learned Magistrate did not address his mind to the issues placed before him hence arriving at an erroneous decision.

11. Counsel further posited that the merits of the Appellant's motion were not addressed in the impugned ruling and in addressing the Respondent's motion, the learned Magistrate went ahead to frame his own issues rather than render a determination on whether the lower Court suit was Res Judicata. That the joint issues presented before the trial Court by dint of the respective parties' applications was whether the Appellant deserved injunctive orders and whether the lower Court suit was Res Judicata therefore the learned Magistrate erred by selectively reading the Court of Appeal decision in Njue Ngai v Ephantus Njiru Ngai & Irene Marigu Ngai [2016] KECA 805 (KLR) and applying the same to dispose of the Appellant's suit. That in any event, the Respondent's action was continuous thus notwithstanding the dismissal order, the same was not a bar to filing of a fresh suit as the defence of Res Judicata had not arisen.

12. While calling to aid the decision in Invesco Assurance Company Limited, Africa Merchant Assurance Company Limited & Directline Assurance Company Limited v Auctioneers Licensing Board &

National Association of Kenya Auctioneers; Kinyanjui Njuguna & Company Advocates & Law Society of Kenya (Interested Parties) [2020] KEHC 3401 (KLR) counsel contended that the lower Court suit had not met the established test on a finding of Res Judicata whereas a suit dismissed for want of prosecution can either be reinstated or instituted by was of a fresh suit. In summation, it was submitted that the trial Court totally failed to address itself to the issues before it and ended up misdirecting itself thus delivering an erroneous ruling that had no relevance to the issues before it. This Court was urged to allow the appeal as lodged.

13. On the part of the Respondent, counsel submissions condensed the Appellant's grounds of appeal into a singular issue for consideration. Submitting on the whether the trial Court having cited the wrong date in respect of the Respondent's motion, warrants the setting aside of the entire ruling, counsel anchored his submissions on the provisions of Section 1A of the CPA and the decisions in City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the estate of Halima Wamukoya Kasabuli v Orient Commercial Bank Limited [2008] eKLR and Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR to argue that the date of the motion as addressed in the impugned ruling was merely a genuine mistake by the learned Magistrate. Further, by dint of the overriding objectives, this Court ought to dismiss the appeal as the same singularly addresses and or is founded on a technicality occasioned by an oversight made by the learned Magistrate meanwhile the Appellant has failed to address the substance of the ruling itself.

14. Counsel went on to submit that the Court is not hamstrung where circumstance so demand to invoke its inherent jurisdiction to dismiss the appeal and direct the lower Court to review its ruling so as to reflect the correct date of the subject application, as the substance of the ruling is not in dispute save for the error apparent on the face of the record. The provisions of Article 165(6) & (7) of *the Constitution*, Section 3A, 18(1) & 80 of the CPA and decision in National Bank of Kenya Ltd v Ndungu Njau (1995-98) 2EA 249 were relied on in the forestated regard. Penultimately, counsel pointed out that the Appellant's grounds of appeal failed to address the substantive issue of Res Judicata and the injunctive orders being sought before the trial Court as such there exist no ground in the appeal warranting the upsetting or reversing the decision of the trial Court. In conclusion, counsel relied on the decisions in Stanley Kaunga Nkarichia v Meru Teachers College & Another [2016] eKLR and Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR, to urge this Court to dismiss the appeal with costs.

Disposition and Determination

15. At this juncture, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original lower Court record did not form part of the record before this Court. Nevertheless, the Court has duly considered the Record of Appeal as well as the respective parties' submissions.

16. Having stated the above, it is trite that the duty of this Court as a first appellate Court is to re-evaluate the evidence adduced before the trial Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123.

17. The Court of Appeal in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR stated that: -

> " This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine

whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

18. However, as a priori, it would be pertinent to address the preliminary issue agitated by the Appellant, concerning which application was coming up for determination before the learned Magistrate. By the Appellant's grounds of appeal and submissions, he has made heavy weather of the fact that what was for determination before the trial Court were two (2) applications. The one dated 03.06.2022 as filed by the Appellant seeking among others injunctive reliefs; and the other dated 18.08.2022, its gist of which has earlier been captured in this judgment.

19. Firstly, this Court having keenly scrutinized the certified record of proceedings before the lower Court, as presented in the Record of Appeal, it can be noted therefrom that the parties attended to the lower Court matter between 07.07.2022 until 29.05.2023, when the impugned ruling was eventually delivered. That said, during the respective dates when the matter came up, specifically on 07.07.2022, 25.05.2022, 12.09.2022, 24.11.2022, 25.01.2023 and 29.05.2023, the proceedings do not capture the specific applications that was designated for disposal. Whether the same was an oversight and or inadvertent omission by Hon. Nyaga (CM) and later Hon. Opande (PM), both of whom the matter came up before, this Court is at a disadvantage of deducing the same from the record before it. Thus, in the absence of any evidence to the contrary, for all intents and purposes what was uniquely for determination before the learned Magistrate was the Respondent's motion. This Court will further address itself to the issue later in this judgment.

20. Secondly, the Appellant has equally accentuated the argument that the trial Court addressed itself to the wrong motion and particularly considered a motion that was not before it. The contestation appears to be premised on the ruling itself, of which this Court finds it useful to quote relevant facets of the same ad verbum, in order to contextualize the Appellant's protest. The learned Magistrate in his ruling stated as follows: -

> "Before this Court for determination is a notice of motion application dated 12th October 2022. The notice of motion application is brought pursuant to Section 7 of the *Civil Procedure Act* and Order 2 Rule 15 and Order 51 Rule 1.
>
> The Applicant has moved this Court seeking the following orders:
>
> a. Spent.
>
> b. Spent.
>
> c. That the Plaintiff's plaint dated 3rd June 2022 and the notice of motion application dated on the even date be struck out with costs.
>
> d. That this honorable Court be granted any other order it deems fit.
>
> e. That the costs of this application be provided for.
>
> ....
>
> a. The Notice of motion application dated 12th October 2022 is allowed as prayed" (sic)

21. Palpably, from the record of appeal, there only appears to be two (2) applications that were pending before the lower Court, as earlier identified, the one dated 03.06.2022 and the other dated 18.08.2022. Therefore, as rightly agitated by the Appellant the record does no bear any evidence of an application dated 12.10.2022 that was for consideration before the learned Magistrate. That said, juxtaposing

the impugned ruling and the Respondent's motion dated 18.08.2022, it would seem that it was the trial Court's intention to position the Respondent's motion for determination rather than the purported motion dated 12.10.2022, as assailed by the Appellant. The foregoing is shored up by the fact that, having reviewed the reliefs as captured verbatim by the learned Magistrate and his ensuing determination, it would appear that the date of the motion as captured in the impugned ruling must have been an inadvertent and or an erroneous typographical omission.

22. Beknown to counsel, an adversarial legal system such as ours, has the propensity of deluging Courts with enormous number of caseloads. Despite this fact, judicial officers are enjoined to be keen-eyed, exercise a higher degree of particularity, accuracy and precision while rendering their decision. Nevertheless, judicial officers are not infallible to mistakes in the course of discharging their duties. The latter of which exemplifies the rationale, predication and existence of review and appellate jurisdiction. Therefore, on occasion mundane mistakes such as typographical errors are likely to occasion when judicial officers discharge their duty. Just like judicial officers, counsel and litigants alike are equally not immune to mistakes in the course of presenting their pleadings hence the codification of Article 159(2)(d) in our Constitution and Section 1A of the CPA. It is on the pretext of the former provision, that Courts have on occasion been urged not to "throw the baby out with the bathwater". Plainly, Courts are enjoined to do substantive justice by examining the substance and not to strictly adhere to technicalities.

23. The essence of the foregoing being, despite the learned Magistrate having erroneously set out the wrong date of the motion that he deemed was for consideration, he proceeded to address the substance of the Respondent's motion that was on record. It would have been odd, if the trial Court had proceeded to render itself on an entirely different application that was not on record. Consequently, the Appellant's exhortation the he was condemned unheard and that the entire ruling ought to be expunged, would manifestly be an affront to the provisions of Article 159(2)(d) of *the Constitution* as read with Section 1A of the CPA. In any event, if this Court were to adopt the approach urged on by the Appellant, then the competency of the instant appeal would equally be called into question itself. This Court similarly believes that the Appellant having sought in his memorandum of appeal "...that the appeal be allowed and the Order of 29th May, 2022 be set aside ...." was an inadvertent omission on his part that ought not to be fatal to the appeal. Given that, what is question before this Court, is this learned Magistrate's order dated 29.05.2023 and not 29.05.2022. Accordingly, in determining the forestated addressed issues, grounds 1, 2 and 4 in the Appellant's memorandum of appeal cannot sustain and or issue in the circumstance.

24. Having settled the above, the Court proposes to contemporaneously address grounds 3 and 5 in the Appellant's memorandum of appeal. The Respondent's motion before the lower Court, by presentation, raised a preliminary question that perpetually would to have been determined as priority to the Appellant's motion dated 03.06.2022. The Respondent's motion was saliently expressed to be brought pursuant to Section 7 of the CPA and Order 2 Rule 15 of the CPR. The trial Court in allowing the said motion stated in part that; -

> " In response to the notice of motion application, the Respondent filed a replying affidavit and a further affidavit respectively sworn on 21st October 2022 and 21st February, 2023. Both parties never file their submissions. I have considered the aforementioned and upon such consideration, find the issue for determination;
>
> Whether the Respondent ought to have sought for an order seeking reinstatement or setting aside of the order dismissing the previous suit, rather than filing a fresh case

The Court of Appeal has answered the question on more than one occasions the latest being in Njue Ngai v Ephantus Njiru Ngai & Another [2016] eKLR

"18. Another………"

The judgment of the Court of Appeal is elaborate and I do not see the need to reinvent the wheel. The Respondent options were to either seek the setting aside or reinstatement of the order dismissing the suit for want of prosecution. In the end, it is hereby order that.

a. The Notice of motion application dated 12th October 2022 is allowed as prayed" (sic)

25. Section 7 of the CPA provides 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 or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

26. Whereas Order 2 Rule 15 of the CPR states that: -

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

27. The doctrine known as Res Judicata is codified in Section 7 of the CPA. In the case of John Florence Maritime Services Ltd and Another v Cabinet Secretary for Transport and Infrastructure and 3 Others [2015] eKLR, the Court of Appeal considered in extenso the application of the doctrine of Res Judicata generally, and to constitutional petitions specifically. The Court had this to say;

" The doctrine of res judicata in Kenyan law is embodied or anchored on Section 7 of the *Civil Procedure Act*. It is in these terms: -

"7. Res judicata

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 or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally. (see Karia & Another v the Attorney General and Others [2005] 1 EA 83).

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

> "…..where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time…."
>
> See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.
>
> The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger

of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application, ...

....

The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

See also Gurbacham V. Yowani Ekori [1958] EA 450; George Kihara Mbiyu V. Margaret Njeri & 15 Others [2018] eKLR.

28. At the risk of repetition, the gist of the Respondent's motion before the trial Court quintessentially contended that the Appellant had earlier instituted a similar suit, Nairobi HCCC No. 145 of 2017, which suit was dismissed on 04.11.2021 for want of prosecution and rather than have the dismissed suit reinstated, the Appellant opted to file the lower Court suit, therefore the lower Court matter was Res Judicata. The Appellant's retort to the forestated was two (2) pronged, firstly, due to non-service, Nairobi HCCC No. 145 of 2017 was dismissed for want of prosecution without his knowledge and or that of his counsel; and secondly, in spite of the dismissal, the latter was not heard on merit therefore the lower Court suit cannot be cited for being Res Judicata.

29. The Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR succinctly distilled the constituent ingredients for plea on Res Judicata to succeed. It observed that: -

" Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010.

"No Court......"

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

30. This Court while applying its mind to the dicta in John Florence Maritime Services Ltd (supra) and Independent Electoral & Boundaries Commission (supra) meanwhile contrasting the same alongside the Respondent's affidavit material before the trial Court (Annexure PMM-1), it would appear that ingredients (a), (b) & (c) were met. Further, this Court reasonably believes the learned Magistrate in rendering his decision specifically addressed himself to ingredients (d) & (e) above, hence his reliance on the Court of Appeal decision in Njue Ngai (supra). Evidently, the Appellant in his affidavit material accedes to the fact that Nairobi HCCC No. 145 of 2017 was dismissed for want of prosecution. As to propriety of the said dismissal, the same was not a preserve of the trial Court whereas if the Appellant was aggrieved with the order of dismissal, he ought to have appropriately move the Court that dismissed the said suit.

31. Thus, what this Court ought to determine at this interval is whether the trial Court erroneously arrived at the determination it did in respect of the Respondent's motion. Having reviewed the decision in Njue Ngai (supra) and the constituent affidavit material placed before the learned Magistrate, this Court cannot fault him for arriving at the decision he did. The Appellant's suit having been dismissed for want of prosecution, a final determination or order by way of dismissal rendered the suit concluded by as competent Court. Further, Nairobi HCCC No. 145 of 2017 was dismissed pursuant to Order 17 Rule 2 of the CPR on 04.11.2021. As at 2020, Order 17 Rule 2 was amended to include Rule 2(6) that provided recourse to a party who had their suit dismissed to move the Court under the same rule. Rather than the Appellant opting to apply himself to the said provision he decided to file the lower Court suit therefore the trial Court cannot be faulted for arriving at the determination it did.

32. Lastly, on the question of submissions, it is evident from the impugned ruling that the learned Magistrate stated that "…..Both parties never filed their submissions.." The Appellant has argued that the trial Court having failed to consider his submissions, the same being akin to condemning him unheard. Earlier, this Court noted that it did not have the benefit of the original record. However, the Appellant in his record of appeal has attached thereto submissions dated 13.03.2023 of which he contends the trial Court failed to consider. The Appellant fell short of attaching to the said submissions a receipt evincing when the submissions were filed, for the benefit of this Court.

33. Regardless of the date captured in the submissions and relating the same to when the impugned ruling was delivered, this Court does not have the benefit of knowing when the submissions were actually filed to conclusively arrive at a determination that the trial Court failed to consider the Appellant's submissions. As it were, it would not be farfetched to equally conclude that the learned Magistrate did not have the benefit of the Appellant's submissions prior to delivery of the impugned ruling. Consequently, the ground of appeal on the issue equally lacks in merit.

34. In view of the foregoing, it would be difficult in the circumstance to find that the trial Court erred in its finding notwithstanding the manner in which it arrived at its conclusion. Thus, it is my considered inference that the trial Court appropriately addressed itself to the questions before it.

Determination

35. For all the preceding reasons, the Court finds no merit to this appeal and will dismiss it with costs to the Respondent.

    i. This Appeal is dismissed.

    ii. Costs are awarded to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF NOVEMBER, 2024

ROA 14 days.

HON. T. W. Ouya

JUDGE

For Appellant Oonge

For Respondent Kinchwani

Court Assistant Martin