



**Ngugi v Mwangi (Environment and Land Appeal E004 of 2023)
[2025] KEELC 4671 (KLR) (24 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

MN GICHERU, J

JUNE 24, 2025

BETWEEN

JOHN MWAURA NGUGI APPELLANT

AND

GEORGE WAWERU MWANGI RESPONDENT

JUDGMENT

1. The Appellant seeks the following orders in this appeal.
 - a. The setting aside of the ruling dated 7-7-2023 made by the learned trial magistrate in MCLE Case No. E005 of 2023 at Kenol Senior Resident Magistrate's Court.
 - b. Dismissal of the application dated 4-4-2023/preliminary objection filed by the Defendant.
 - c. The lower Court suit to proceed to hearing.
2. The Appellant has filed three(3) grounds of appeal as follows.
 - i. The learned magistrate erred in law and fact by making a finding of fact that civil case No. 410 of 2017 had been heard and determined when it had not been heard at all. The said case had been dismissed on 21-2-2018 for non attendance of both advocates for the Plaintiff and the Defendant. No hearing took place at all. In law, it is not legal to state hearing took place when neither the advocates nor their respective parties fail to attend.
 - ii. The learned magistrate erred in law in arriving at a finding that issues pleaded for trial were heard and determined in case No. 410/2017 ELC Murang'a. The correct and actual legal and factual position is that, that former suit was dismissed unheard at all. No determination can emanate from an unheard matter.



- iii. The learned magistrate erred in law in coming to a finding of law that the dispute between the parties was res judicata.
3. The record of appeal reveals the following. One, on 14-6-2017, the Appellant filed ELC No. 401 of 2017 at the ELC Murang'a. Two, there is nothing on record to show the outcome of that case. Three, on 27-2-2023, the Appellant filed ELC Case No. 5 of 2023 at the Magistrate's Court at Kenol. Four, on 6-4-2023, the Respondent's counsel filed a notice of preliminary objection dated 4-4-2023 seeking to have the suit struck out for being res judicata as the dispute had been heard and determined in ELC Murang'a case No. 410 of 2017. Five, on 7-7-2023, the learned magistrate found merit in the preliminary objection and dismissed the suit.
4. In the ruling, the learned magistrate referred to an order dated 3-4-2023. This order is not in the record of appeal. The reference to that order is to be found at page 2, paragraph 4 of the ruling dated 7-7-2023. Secondly, at page 3, the last paragraph of the same ruling the learned trial magistrate stated as follows.

“I note that looking through the ingredients of the doctrine of res judicata, the suit is not a new suit that has been instituted. Therefore, res judicata has been sufficiently proved...”
5. Counsel for the parties filed written submission dated 13-12-2024 and 31-12-2024 respectively. The Respondent's counsel identified two issues for determination as follows.
 - i. Whether the Appellant's lower court case No. E005 of 2023 is res judicata.
 - ii. Whether the same suit as in (i) above is an abuse of the court process.

On the other hand, the Appellant's counsel identified the following issues.

 - a. Does the dismissal of a suit amount to a hearing and determination.
 - b. Does the dismissal of an unheard suit vendor it res judicata.
 - c. Was approaching the Kenol Court an act of forum shopping.
6. I have carefully considered the appeal in its entirety including the grounds, the available record, the ruling of the learned magistrate, the reasons for the decision , the written submissions by learned counsel for the parties and the law cited therein.

I agree with the learned counsel for the parties that the issues as identified will determine the dispute.
7. Even though the available record does not show it, the Respondent's counsel has stated as follows at Page 1 line 5 of the written submissions dated 13-12-2024.

“The Appellant failed to prosecute his case and thus it was dismissed for want of prosecution...”

Owing to the inadequacy of the record of appeal, it is not clear to me if the suit in ELC Murang'a No. 410 of 2017 was dismissed under Order 12 or 17 of the Civil Procedure Rules.

If the dismissal was under Order 12 rule (1) of the Civil Procedure Rules, then, the Appellant was right to file a fresh suit. This is because under Order 12 rule 6(1) of the Civil Procedure Rules, it is provided as follows.



6(1)

“Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this order, the Plaintiff may bring a fresh suit.”

Order 12 rule 1 provides as follows.

“If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, neither party attends, the Court may dismiss the suit.”

8. If the dismissal of the ELC Murang’a 410 of 2017 was under Order 17 Civil Procedure Rules, the procedure in Order 12 Civil Procedure Rules would still apply. This is because of Order 17 rule 3 Civil Procedure Rules which provides as follows;

“Where, on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed on that behalf by Order 12, or make such other order as it thinks fit.”

Since the provisions of Order 12 are introduced in Order 17 Civil Procedure Rules, those provisions provide for two scenarios. The first scenario is the filing of a fresh suit if the dismissal is as a result of non-attendance by either party. The second scenario is filing an application to set aside the dismissal under Order 12 rule 7 of the Civil Procedure Rules which gives the court a wide discretion. This particular rule does not envisage the filing of a fresh suit. It provides as follows.

“Where under this Order judgment has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just.”

9. For a suit to be res judicata under Section 7 of the Civil Procedure Act, one of the many conditions listed is...“and has been heard and finally decided by such Court”.

In this case, it has been admitted by the Respondent’s counsel that the suit was dismissed for want of prosecution. Want of prosecution means lack of prosecution. This means that the Plaintiff did not prosecute his claim. If he did not prosecute it, this means that it was not finally heard and determined.

10. From the foregoing, it is clear that it was not proper to strike out a suit that had not been finally heard and determined. Failure to hear the suit and decide it on merit was a derogation of Article 50(1) of the Constitution which provides for the fair hearing of a dispute that can be resolved by the application of the law.

11. For the above stated reasons, I find merit in the Appellant’s appeal which I allow in the following terms.

- a. The ruling in Kenol Magistrate Court in MCELC Case No. E005/2023 dated 7-7-2023 and all consequential orders are hereby set aside.
- b. The notice of preliminary objection dated 4-4-2023 is dismissed.
- c. Kenol Magistrate MCELC Case No. E005/2023 to be heard and determined on merit.
- d. Costs to the Appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 24TH DAY OF JUNE, 2025.



M.N. GICHERU

JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellant’s Counsel – Miss Wacheke – Present

Respondent’s Counsel - Absent

