



**REPUBLIC OF KENYA**

**High Court at Embu**

**Civil Appeal 41 of 2011**

**BEATRICE WAMBUI MUKUNYI..... APPELLANT**

**VERSUS**

**DANSON MAINA NJUGUNA..... 1<sup>ST</sup> RESPONDENT**

**JOHN MUTURI MAINA ..... 2<sup>ND</sup> RESPONDENT**

**REUBEN KIMANI MUIRURI ..... 3<sup>RD</sup> RESPONDENT**

**GACHOKI MURAGE ..... 4<sup>TH</sup> RESPONDENT**

**MICHAEL MAMUCHERE .....5<sup>TH</sup> RESPONDENT**

**(An Appeal from the Judgment of E.M. NYAGA– Senior Principal Magistrate sitting at KERUGOYA  
in Civil Suit No. 112/2010 delivered on 15/3/2011).**

**J U D G M E N T**

BEATRICE WAMBUI MUKUNGIthe Appellant herein was the Defendant in the Court below while DANSON MAINA NJUGUNA and others who are the Respondents were the Plaintiffs in the Court below.

The matter was heard ex parte and Judgment delivered against the Appellant. She is therefore appealing against that Judgment and the consequential Ruling and Orders of 15/3/2011. The Appellant filed the following grounds of appeal;

- 1. That the trial Court erred in law and fact by misapprehending the facts applying wrong legal principles and arriving at wrong decisions.**
- 2. That the trial Court erred in law by resolving that the service was regular when there was no clear evidence placed before him indicating that the Appellant was indeed properly served.**
- 3. That the trial Court erred in law by resolving that there were structures on the suit properly when indeed there is a permanent house built in 1970s.**

- 4. That the learned Magistrate erred in law and fact in dismissing the application dated 1/3/2011 and thus giving effect to the ex-parte Judgment and decree dated 27/7/2010, Ruling and order dated 20/1/2011, (S.N. Ndegwa) Senior Resident Magistrate and the Ruling and Order dated 15/3/2011 (E.M. Nyaga) without judicial adjudication to substantial issues of law and fact raised by the Appellant in her statement of defence.**
- 5. That trial Court erred in law by failing to appreciate that the defence raised triable issues and it was in error to deny the Appellant her right to defend herself.**
- 6. That the trial Court erred in law and fact by denying the Appellant the right to be heard contrary to article 50 of the Constitution of Kenya.**
- 7. That the trial Court misdirected himself contrary to the principles of law by condemning the Appellant unheard.**
- 8. That the trial Court erred in law and fact when he dismissed the facts of the Appellant without granting him an opportunity to be heard.**
- 9. That the trial Court erred in law and fact by relying on fraud and misrepresentations to issue orders.**
- 10. That the trial Court erred in law by ceasing to be independent and impartial to the prejudice of the Appellant.**
- 11. That the trial Court erred in law by issuing orders to cancel title No. L.R.NO.MUTIRA/KANGAI/1634 which was subdivided into LR NO.MUTIRA/KANGAI/701 and LR NO.MUTIRA/KANGAI/702 in 1973.**
- 12. That the trial Court was influenced by corrupt dealings rendering the Judgment, Decree, Ruling and Orders illegal, null and void.**
- 13. That the entire process was riddled with falsehoods, corruption, misrepresentations and fraud.**
- 14. That the Court erred in law and fact by failing to appreciate that Reuben Kimani Muiruri was a lawyer and had privileged information as Counsel in succession cause No.10 of 2006 in the Principal Magistrate's Court at Muranga which he never disclosed when he funded the Plaintiff case.**
- 15. That the trial Court erred in law by failing to appreciate the fact that two Plaintiffs were already deceased. Gachoki Murage and Michael Kamuchere.**

Prior to the admission and taking directions in this appeal there was an application for leave to file the record of appeal out of time which was not decided on. Both Counsels however entered into a consent which was adopted by this Court on 6/11/2012. This consent covered that element of the record and admission. They also agreed to file written submission in disposing of the appeal.

In his submissions Mr. Ondieki for the Appellant gave some historical background to this property which actual evidence rotates around LR NO.MUTIRA/KANGAI/634 measuring ten (10) acres of land where the Appellant who is in possession of titles NO. LR/MUTIRA/KANGAI/701 & 702 resides since 1973. And in Kerugoya SPMCC No.112/2010 an ex-parte Judgment was delivered without knowledge of the Appellant. He submitted that the affidavit of service sworn by the process server was full of falsehoods as the Appellant resides in Kangai on the suit property and not at Kangichiri village. He also cites other related matters in which an advocate the 3<sup>rd</sup> Respondent has benefited from this land.

In support of this submissions he cites Article 56 and 57 of the Constitution, Registered Land Act (repealed) and the case of *KURIA GREENS LTD -VS- REGISTRAR OF TITLES AND ANOTHER*

**PETITION NO.107 OF 2010.**

Mr. Ngigi Gichoya for the Respondents in his submissions has raised issues about the decree and orders complained of were issued. He also says Mr. Ondieki was not properly on record which is a violation of Order 9 rule 9 Civil Procedure Rules. He submits that the Appellant had a chance of cross-examining the Process Server which he did not. The exparte Judgment was therefore properly entered. He relied on the cases of;

**1. UNION INSURANCE COMPANY OF KENYA LTD -VS- RAMZAN DHANYI COURT OF APPEAL NO.179/96 NAIROBI**

**2. NJAGI KANYUNGUTI *alias* KARINGI KANYUNGUTI & 3 OTHERS -VS- DAVID NJERU NJOGU, COURT OF APPEAL NO.101/94 NAIROBI.**

His argument is that the Appellant was undeserving of the exercise of discretion on her favour in setting aside of the Judgment. He also submitted that the Court below was only dealing with land number LR MUTIRA/KANGAI/634 and no other. And that issues involving Murang'a Succession Cause could not be dealt with in this appeal.

This is a first appeal and this Court is enjoined to reconsider and reevaluate the evidence and arrive at its own conclusion. I am guided by the following cases;

**1. SELLE & ANOTHER -VS- ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123**

**2. MWANGI & ANOTHER -VS- WAMBUGU [1984] KLR 453**

**3. SUMARIA & ANOTHER -V- ALLIED INDUSTRIES LTD [2007] 2 KLR 1**

The record is that a plaint was filed by the Respondents in the Senior Principal Magistrate's court Kerugoya as SPMCCC NO.112/10 on 15/4/2010. It concerned land No.LR MUTIRA/ KANGAI/634 which the Respondents said belonged to them and they sought a permanent injunction to restrain the Appellant from trespassing thereon. Secondly they wanted the Appellant ordered to remove structures from the land failing which she should be evicted therefrom.

After satisfying himself that the Defendant had been duly served and an interlocutory Judgment had been entered on 12/5/2010 the learned trial Magistrate proceeded with formal proof. On the day of hearing one John Muturi Maina a pastor testified saying he co-owned the suit land with the other Plaintiffs. He produced search certificates to prove their ownership (PEXB1). The land is 10 acres. He told the Court that the Defendant had entered the land and put up structures so he prayed for the prayers as sought in the plaint. The Judgment was as brief as the evidence of John Muturi Maina. The Judgment granted the prayers sought. Judgment was delivered on 29/7/2010. A decree was issued on 2/8/2010. Thereafter an application dated 16/9/2010 was filed by the Respondents asking for the forceful eviction of the Appellant. This application was again heard exparte and orders of eviction issued on 2/12/2010.

A further application dated 6/1/2011 was filed by the Appellant. This application sought to set aside the Judgment entered on 29/7/2010 and the orders of 2/12/2010. Mr. Maina for the Appellant extensively argued the application. Finally the Court delivered a Ruling on 2/2/2011 and dismissed the application.

Again another application dated 3/2/2011 was filed by the Appellant seeking stay of execution. It was dismissed hence this appeal with the grounds raised. The Respondents' Counsel has raised an issue about violation of Order 9 rule 9 Civil Procedure Rules. I would wish to deal with that issue first.

The record herein shows that the case in the Court below was heard and determined exparte. By the time Maina and Partners came on record there was already a Judgment on record. They did not appear for the Appellant prior to the Judgment. Order 9 rule 9 Civil Procedure Rules provides;

***“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court;***

***a) Upon an application with notice to all the parties or***

***b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.***

The scenario presented by the Respondents is quite different. They were represented by Mr. Kimani from the beginning upto Judgment stage. Mr. Ngigi took over from Kimani who had been conducting the case upto and after Judgment and so had to comply with Order 9 rule 9 Civil Procedure Rules. However Maina & Partners did not represent the Appellant before Judgment as the matter proceeded exparte. Therefore when Mr. Ondieki took over from Mr. Maina had he to comply with Order 9 rule 9 Civil Procedure Rules? Maina did not handle any Judgment and neither did Mr. Ondieki. He came on record on 3/2/2011 and did argue an application in the lower Court. My finding is that since the two firms of advocates i.e Maina & Partners and M/s Ondieki and Ondieki advocates came on record after Judgment, they are not subject to Order 9 rule 9 Civil Procedure Rules. I therefore find that M/s Ondieki advocates are properly on record.

Judgment in the Court below was entered on 29/7/2010 as the record shows. The wrong dates reflected in the Memorandum of Appeal are typographical errors, which do not change the records.

I have looked at the grounds of appeal and the submissions filed herein. I have condensed all these grounds and come up with just one issue which this Court should consider. And the issue is whether the overriding objective of the Civil Procedure Act was achieved through what transpired in the Court below. The overriding objective of the Civil Procedure Act is found in section 1A(1) of the said Act.

***“To facilitate the just expeditious proportionate and affordable resolution of the civil disputes governed by the Act”.***

The claim herein involved 10 acres of land whose value would on the lowest be 1.5 million shillings. The Principal Magistrate who dealt with this matter neither had jurisdiction under the law nor even under enhanced jurisdiction.

Besides the want of jurisdiction I have looked at the process. It is true there is a Judgment that was entered based on evidence of one Respondent. This evidence is made up of seven (7) lines. All that the said Respondent did was to show the Court a certificate of search. There was no title deed nor copy of register (Green card) produced to satisfy that the Respondents were the duly registered owners of this land. Was this sufficient evidence even if the matter proceeded exparte? The most disappointing thing that ever happened was that though the Court found that the Appellant had been served it completely/totally refused to give her an opportunity to be heard. The Appellant came knocking on the door of the Court on 6/1/2011 begging for an opportunity to present her defence. The reasons for this were all in her supporting affidavit. I do note that there was no emergency or anything at stake that could not wait. And this application had been made within five months of the Judgment. Even though the Appellant did not annex a draft defence she filed a detailed affidavit explaining why she ought to be given her day in Court. She indicated that the parcels of land of Mutira/Kangai/701 and 702 on which she resides originated from LR MUTIRA/KANGAI/634 which the Respondents claimed. It would have been prudent for the Court to know when the sub-division if any was done and when the Respondents became registered owners if it was true. And the Court could only have determined that very important issue by giving the Appellant an opportunity to be heard.

In the case of ***PETER WEKESA -V- PETER WANGUSI CIVIL APPEAL NO.62/03*** a Ruling delivered on 23/2/2006 by Honourable Justice Tunoi, Okubasu & Waki held as follows;

***“In applications for setting aside exparte Judgments, the defence of the Applicant if any is***

**presented in draft ought to be considered and where the dispute relates to land, special caution must be exercised to avoid determination of the dispute on pure technicalities.**

Article 159(2)(d) of the Constitution provides that while dealing with issues in Court, the Court should ensure that justice is administered without undue regard to procedural technicalities. Had the Court been concerned with doing justice to all parties herein the learned trial Magistrate could have set aside the ex parte Judgment and given a chance to the Appellant to file her defence and have her day in Court. It is indeed a human right for every person to be heard. This right can only be curtailed in the most of deserving cases. I do find that this was not one of such deserving cases. The other issues which Mr. Ondieki raised in his submissions are matters of evidence which I will not delve into. My answer to the issue I raised above is that the overriding objective of the Civil Procedure Act was not achieved. The denial to accord the Appellant a right to be heard in circumstances that dictated that such an opportunity be granted to me is not a just way of determining issues. I therefore allow the appeal. The Judgment of 29/7/2010 and all other consequential orders are set aside. I also set aside the proceedings of 15/3/2011 and order that the matter be heard afresh.

I also grant the Appellant leave to file and serve her defence within 21 days from today. And having found that the learned trial Magistrate had no jurisdiction I hereby transfer the civil suit Number Kerugoya SPMCC NO.112/10 to the Kerugoya High Court (Environment and Land Court) for hearing and determination. Each party will bear his/her own costs both of the lower Court and the appeal.

I also direct that the Magistrates who handled the lower Court suit i.e. Mr. S.N. Mbungi, Miss H. Ndungu and E.M. Nyaga must be served with a copy of this judgment.

**DATED AND DELIVERED AND SIGNED AT EMBU THIS 2<sup>ND</sup> DAY OF MAY  
2013**

**H.I. ONG'UDI  
J U D G E**

**In the presence of:-  
Ms Kaburu for Ondieki for Appellant  
Njue – C/c**