



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E032 OF 2024

EDWIN RUBANDI KUNJUGAPLAINTIFF
VERSUS
HUMPHREY KANGARU.....DEFENDANT

(Being an Appeal from the ruling of Hon. Peter Ndwiga Chief Magistrate delivered on 20th June 2024 in MCELC/14/2020)

JUDGMENT

(1) In the Memorandum of appeal dated 19-7-2024 the Appellant prays for the following single order.

(1) The trial magistrate's ruling or order be set aside and the Applicant's application dated 4-3-2024 be allowed and the suit be reinstated for hearing and determination on merits.

(2) There are seven(7) grounds of appeal as follows.

The trial Magistrate /Court erred in law and in fact in,

- (i) dismissing the Applicant's application as draconian and oppressive,**
- (ii) not appreciating that the Applicant's Counsel had logged in through the virtual platform clearly displayed in the cause list of 22-11-2023 when he was not admitted for hearing leading to his absence against the clear request that the case will be conducted virtually at 11.30 am,**
- (iii) not appreciating that the virtual link displayed on the cause list of 22-11-2023 was a clear representation that the matter would be heard virtually,**
- (iv) being deliberately and willfully biased against the Applicant in his ruling which was not opposed, without any justification,**
- (v) not appreciating the clear principle of Article 159(2) (d) of the Constitution and ended up causing injustice to the Applicant,**
- (vi) dismissing the suit at the pretrial stage and**

(vii) not appreciating that there was no notice of disuse of the virtual link unless the same had been displayed on the cause list misleading court users.

(3) The facts of the case are as follows.

Firstly, the Appellant filed the lower Court suit on 21-7-2020. Secondly, the Respondent filed a written statement of defence on 4-8-2020 together with the accompanying material. Thirdly, the Respondent filed a notice of preliminary objection dated 3-12-2021. Fourthly, on 11-10-2023, the court directed that there be a pretrial conference on 22-11-2023 virtually at 11.30 am. On that date, the Appellant's counsel did not appear. The Respondent's counsel asked the Court to deal with the preliminary objection. The Court said that the notice to show cause was still in force and proceeded to dismiss the suit for want of prosecution under Order 17 of the Civil Procedure Rules. Fifthly, the Appellant filed a notice of motion dated 4-3-2024 seeking the setting aside of the order dismissing the suit. The motion was not even opposed but the court dismissed the said motion. The reasons for dismissal of the motion was failure to prosecute the case over an extended period and failure to file the motion in good time.

(4) Counsel for the parties filed written submissions dated 15-9-2025 and 18-8-2025 respectively. None of them identified the issues for determination in this appeal. In the absence of any issues, I will treat the grounds of appeal as the issues.

- (i) Whether the dismissal of the motion dated 4-3-2024 was draconian and oppressive.**
- (ii) Whether there was failure on the part of the court for not admitting the Appellant's Counsel to the Court's virtual platform.**
- (iii) Whether there was a problem with the virtual link for the court on 22-11-2023.**
- (iv) Whether the trial magistrate was biased against the Appellant.**
- (v) Whether a suit can be dismissed at the pretrial stage.**

(5) I have carefully considered the appeal in its entirety including the record, the grounds and the written submissions by learned counsel for the parties. I make the following findings on the issues for determination.

(6) On the first ground, I find that the dismissal of the motion dated 4-3-2024 was a bit harsh because on 11-10-2023 the Court had found that cause had been shown why suit should not be dismissed. It is recorded as follows.

“ Cause shown why suit should not be dismissed. Counsel granted 30 days to prosecute the suit. Suit set down for pre-trial conference. Mention on 22-11-2023 virtually at 11.30am. “

The Court did not issue any fresh notice to show cause and it was not correct to say like the Court did on 22-11-2023, that the show cause order was still in force. The Court said,

“ The show cause under Order 17 Civil Procedure Rules is still in force. The suit is now dismissed under Order 17 Civil Procedure Rules for want of prosecution.”

There was clearly no new notice to show cause issued afresh. The case was coming up for a pretrial conference and not notice to show cause. It was not proper to dismiss the suit without compliance with **Order 17 rule 2(1)** Civil Procedure Rules which provides as follows.

“ In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not show to its satisfaction, may dismiss the suit.”

A year had not elapsed since the matter had been in Court. There was a period of about 40 days between 11-10-2023 and 22-11-2023.

(7) On the second ground, I find that the Court did not deal with the issue of connectivity on 22-11-2023. This issue was at the heart of the motion dated 4-3-2024. The ruling of 20-6-2024 should have addressed this issue of the link for its virtual proceedings. Since the case was to be mentioned at 11.30 am, the proceedings of 22-11-2023 should have indicated the time at which the case was called. Without time indication, it could as well be that the case was called earlier than 11.30 am or even later. This finding covers the 3rd issue.

(8) There is no evidence that the trial magistrate was biased against the Appellant. The proceedings of 11-10-2023 show that the court gave the Appellant a chance to prosecute his case. No bias has been proved or demonstrated at all.+

(9) It would seem to me that under **Order 11 rule 3(2) (0) (i)** of the **Civil Procedure Rules**, a Court may strike out an action or defence at the pretrial stage.

It provides as follows.

**(2) “In addition to any other general power the Court may at the case conference –
(0)make any such orders as may be appropriate including
(i) striking out the action or defence.”**

What happened on 22-11-2023 was not striking out but dismissal. The trial magistrate erred in dismissing the suit on the date set for the pretrial conference.

(10) For the above stated reasons, I find **merit** in the Appellant’s appeal and I allow it and order as follows.

(a) The trial magistrate’s ruling dated 20-6-2024 is hereby set aside and the application by the Applicant dated 4-3-2024 is allowed and the suit is reinstated for hearing and determination on merit.

(b) Costs of this appeal to the Appellant.

It is so ordered.

Dated, Signed and Delivered virtually at Murang’a this 11th day of March, 2026.

**M.N. GICHERU
JUDGE.**

**Delivered online in the presence of; -
Court Assistant – Jackline
Appellant’s Counsel – Mr Morigori
Respondent’s Counsel – Mr Kimemia**