



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. NO. 48 OF 2010**

**GERALD NYUMU.....APPELLANT**

**VERSUS**

**RAPHAEL MULI MATIVO.....RESPONDENT**

**(Being an appeal from the Ruling of Honourable Mr. S. Mungai, Senior Principal Magistrate, Machakos in Machakos C.M.C.C No. 457 of 2007 delivered on 6<sup>th</sup> April, 2010).**

**JUDGMENT**

By way of a Plaint dated 28<sup>th</sup> April, 2007, the Respondent sued the Appellant in the lower court claiming for a permanent injunction restraining the Appellant from interfering with plot number 14, Kwa Mwaura Trading Centre and for general damages.

On 20<sup>th</sup> June, 2009, the matter proceeded for hearing in the absence of the Appellant and his counsel.

After hearing the Respondent (PW1, PW2, and PW3), the learned Magistrate allowed the Respondent's claim in the following words:-

**“I am therefore satisfied that the Plaintiff's evidence stand unchallenged and suffices to prove that the suit plot belongs to him .....**”

The learned Magistrate also awarded the Respondent general damages of Kshs. 20,000/- together with costs.

The Appellant has challenged the said judgment on the following grounds:-

- (a) That the learned Magistrate erred in not finding that the Appellant had not been served with reasonable notice to attend court.
- (b) That the Magistrate misdirected himself by considering matters which he should not have considered.
- (c) That the Magistrate erred in failing to find that the Appellant had raised the issue of jurisdiction and
- (d) That the Magistrate misdirected himself on issues of law and fact and arrived at a wrong finding.

The Appeal proceeded by way of submissions. Although the Respondent's Advocate was served with the Record of Appeal and the hearing notice, he did not file his submissions.

In his submissions, the Appellant's Advocate submitted that the jurisdiction of the subordinate court to hear and determine the suit was contested by the Appellant from the onset; that Section 12 of the Civil Procedure Act provides that a suit be instituted where the subject matter is situated and that the suit property is situated in Kangundo which is beyond the territorial jurisdiction of the Chief Magistrate's Court at Machakos.

Counsel submitted that the suit proceeded ex-parte on account of the hearing notice being served late; that the period of five days is a very short notice for hearing of a suit and that the Defendant ought to have been afforded an opportunity to be heard.

Counsel relied on numerous authorities of this court and the Court of Appeal which I have considered.

The record shows that on 20<sup>th</sup> June 2007, the Appellant filed a Notice of Preliminary Objection in which he averred that the lower court lacks the jurisdiction to hear and determine the suit.

On 7<sup>th</sup> July, 2007, the learned Magistrate delivered a short Ruling in which he dismissed the preliminary objection and directed that the suit be set down for hearing.

Having found and held that the court had the jurisdiction to hear the suit in the Ruling of 4<sup>th</sup> July, 2007, and in view of the fact that the Appellant did not appeal against the said Ruling, the Appellant cannot raise the issue of whether the court had jurisdiction after the Judgment of 3<sup>rd</sup> July, 2009.

Indeed, when the matter proceeded for hearing on 2<sup>nd</sup> June, 2009, the issue of whether the court had jurisdiction or not had already been determined and for that reason, that issue was not considered in the Judgment.

The Appellant's advocate has admitted in his submissions that he was notified of the hearing date of 2<sup>nd</sup> June, 2009.

The record shows that when the matter came up for hearing on 2<sup>nd</sup> June, 2009, Mr. Nyambali held brief for Mr. Kibera for the Defendant (Appellant).

There is no indication that the Defendant's counsel applied for adjournment on that day. All the court ordered was that "Court adjournment fees to be paid first".

When the court resumed later, it is only the Plaintiff's (Respondent's) counsel who was in court. The court proceeded to hear PW1, PW2 and PW3 and reserved its Judgment for 3<sup>rd</sup> July, 2009. On the said date, the court allowed the Plaintiffs claim after it was satisfied with the evidence that was produced by the Plaintiff.

Indeed, the learned Magistrate considered the evidence that was produced by the Respondent and his witnesses. This is what the court said:-

**"The Plaintiff buttressed his evidence by producing the allotment letter for the suit plot, receipts by Masaku County Council showing that he paid for its registration and rates for the same and an approved building plan by the Council. The defendant did not offer any challenge or any evidence to rebut or deny the Plaintiff's evidence".**

The Defendant (Appellant) was given notice of the hearing of 2<sup>nd</sup> June, 2009 but failed to turn up on the said date.

Indeed, the Appellant's advocate was in court on the said date and did not offer any explanation as to why

he would not proceed with his case. The learned Magistrate was therefore entitled to proceed with the hearing of the case in the manner that he did.

Having considered the evidence that was tendered by the Plaintiff and his witnesses, which I have re-evaluated, I do not have any good reason to over turn the said Judgment.

Indeed, the Respondent produced in evidence documents showing that he acquired the suit property from the County Council and proceeded to develop it. That evidence was not challenged at all.

For those reasons, I dismiss the Appellant's Appeal with costs to the Respondent.

It is so ordered.

**Dated and Delivered at MACHAKOS this 27<sup>TH</sup> day of JANUARY, 2017.**

**O. A. ANGOTE**

**JUDGE**