



**Mukorwe v John & another (Environment and Land Appeal
E012 of 2023) [2024] KEELC 5944 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 5944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E012 OF 2023**

**A KANIARU, J
APRIL 23, 2024**

BETWEEN

JOHN NTHIGA MUKORWE APPELLANT

AND

CATHERINE WAWIRA JOHN 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

*(Being an appeal from the ruling of the Hon Nyakweba SPM delivered on
02.03.2023 in Embu Chief Magistrate's court CM ELC No. 92 of 2018)*

RULING

1. The suit herein was as a result of consolidation of two suits, civil suit no. 14 of 2016 where the 1st respondent – Catherine Wawira John - was the plaintiff and the appellant – John Nthiga Mukorwe and another party - Daniel Gachoki Ileri - were the defendants, and Embu High Court ELC 12 of 2016 in which John Nthiga Mukorwe was the plaintiff and Catherine Wawira John the defendant. The two suits were consolidated to form ELC case no. 92 of 2018 - John Nthiga Mukorwe vs Catherine Wawira John - in the Chief Magistrates Court at Embu.
2. John Nthiga Mukorwe in his suit was praying for Catherine Wawira to be evicted from the suit land, which was Ngandori/Kirigi/T. 100 and for her to be ordered to pay mesne profits arising out of the use and cultivation of the land. John Nthiga Mukorwe alleged that he was the registered proprietor of the land. On the other hand, Catherine was in her suit alleging that she had purchased the suit land from Daniel Gachoki who had instead unlawfully and wrongly transferred it to John Nthiga. She was praying that Daniel Gachoki be ordered to transfer the suit land to her or in the alternative that she be refunded the sum of Kshs. 924,000/= which was what she had paid as the purchase price. From the record, ELC Case no. 92 of 2018 proceeded for hearing *ex-parte* in the absence of the appellant –



John Mukorwe - on 16.11.2020 and the court entered an *ex-parte* judgement on 25.01.2021 in favour of the 1st respondent.

3. On 29.01.2021, the appellant made an application for stay of execution and setting aside of the *ex-parte* judgement which application was vide a ruling delivered on 31.05.2021 dismissed. The court assessed the bill of costs at Kshs. 63975/= on 01.07.2021. The 1st respondent commenced execution proceedings which the appellant countered by filing an application to lift the attachment by auctioneers which application was allowed on interim basis pending hearing of the application.
4. On the day that the application had been set down for hearing on 14.12.2021, it appears that the court instead allowed another application that had been filed on 24.09.2021 by the appellant, by consent of the parties, which application was seeking to set aside the *ex-parte* judgment and to bring on board another advocate. This seems to have been irregularly done. This is because, the court had already made a determination dismissing a similar application seeking to set aside the *ex-parte* judgement on 31.05.2021. To that extent the court had already become functus officio on the issue of setting aside the *ex-parte* judgement as at 14.12.2021.
5. The matter nevertheless proceeded on this basis where an application was made to join the 2nd respondent in the suit, which application was allowed. The matter was then set down to take pre-trial directions on 11.10.2022 and parties agreed by consent to fix the matter for pre-trial on 31.10.2022. On that day, the court instead gave directions for hearing of an application dated 28.10.2022 for the 1st respondent to lodge a counterclaim out of time. The application was to be heard on 05.12.2022. The matter was mentioned on that day and on 24.01.2023 the said application was withdrawn. The court directed that the matter be mentioned again on 14.02.2023 and by consent parties agreed to mention the matter on 02.03.2023 for pre-trial. The court then directed that the parties come up with issues for determination. It is on this day that the court delivered a ruling striking out the suit for failure to comply with pre-trial directions.
6. The court reasoned as follows: “this matter was filed in the year 2016. Until now, pre-trial case conference has not been done. The parties were required to comply by today and file the issues for determination. This has not been done. As a consequence, the pleadings as filed are hereby struck out in accordance with the provisions of Order 11 rule 3(2)(d) [civil procedure rules 2010](#) for failure to comply with pre-trial directions as directed several times previously and more particularly on 14.02.2023.” That outcome is what triggered the appeal now before me. The memorandum of appeal came with four (4) grounds as follows:
 1. The learned trial magistrate erred both in law and fact in dismissing the plaintiff’s suit on a mention date.
 2. The learned trial magistrate erred in both law and fact by failing to apply the principles set out in guiding courts while considering a pre-trial conference.
 3. The learned trial magistrate erred in both law and fact by failing to consider that the plaintiff had complied with the pre-trial conference requirements.
 4. The learned trial magistrate erred in both law and fact by dismissing the suit which action is not provided for by order 11 of the [civil procedure rules](#).

The court was urged to set aside the decision of the lower court, allow the appeal and the suit be reinstated and proceed to trial. That costs of the lower court and the high court be awarded to the appellant



7. It was agreed that the appeal be disposed of by way of submissions. The appellant filed submissions on 18.01.2024, the 1st and 2nd respondents filed their submissions on 24.01.2024 and 31.01.2024 respectively.
8. The appellants submitted that the appeal arises from an order made in the chief magistrate's court when the matter came up for mention for pre-trial conference on 02.03.2023 which struck out the suit by virtue of Order 11 Rule 3(2)(d) of the Civil Procedure Rules for failure to comply with pre-trial directions. That the suit had been listed for mention on the said date for pre-trial conference and the appellant had long complied save for the matter of agreed trial issues which had not been filed by the parties. That the appellant had filed witness statements and list of documents which was the same case for the 1st respondent. That as such, the suit was ready for hearing thus dismissing the suit while the same was coming up for mention was rather harsh.
9. That the lower court while dismissing the suit invoked the provisions of Order 11 Rule 3(2)(d) of the civil procedure rules which does not give the court the power to dismiss a suit. The provisions of Order 11 Rule 7(2) and (3) were cited and it was submitted that the powers granted by the court in the said order are discretionary and have to be exercised judicially, fairly and not capriciously. That the same is amplified by the provisions of article 159 of the Constitution of Kenya. The case of Fran Investment Limited v G4S Security Services Ltd (2015) Eklr was also cited to support the said submissions. It was further submitted that the dismissal of the suit solely because the parties had not agreed on trial issues was unjust and unfair. It was urged that the appeal be allowed.
10. The 1st respondent on her part submitted that the appellant is an indolent litigant who has on several occasions delayed the conclusion of the suit as can be seen from the proceedings of the court. That Order 11 rule 3 of the civil procedure rules gives the court power to strike out a suit for failure to comply with pretrial directions. That under the said provision of law, the trial court lawfully exercised discretion in striking out the appellant's suit. That the appellant's suit that was dismissed has no merit and is fatally defective. It is urged that this court upholds the orders of the trial court issued on 02.03.2023 and dismiss the appellants appeal with costs.
11. The 2nd respondent on the other hand gave a brief background of the case. He submitted that the provisions of Order 11 Rule 3(2) (f, j and o) support the ruling by the lower court. The cases of Njoroge Baiya v Standard Group Ltd (2015) Eklr, James Kagia v Two Rivers Development Ltd (2021) Eklr were cited in support of the submissions. The court was urged to dismiss the appeal for lack of merit with costs and the ruling of the trial court be upheld.
12. I have considered this interlocutory appeal which requires this court to determine whether the trial courts discretion was exercised judicially. If it was, this court has no business interfering with the decision. Conversely it will do so if it finds that there was either an error in principle or that the trial court was plainly wrong
13. As observed above, the suit as at the time the trial court issued its ruling striking it out was already irregularly before it as the order dismissing the appellant's application to set aside the *ex-parte* judgement was never appealed from. There is still now on record a valid and enforceable judgment which has never been appealed from or set aside. The only way that the judgment could be invalidated was by setting it aside, which cannot be done in the manner the trial court purported to do. It could only happen if the appellant filed an appeal on the *ex-parte* judgment or successful appeal of the lower court's ruling which dismissed his application to set it aside. There were no such appeals. The trial court instead opted to disregard its own orders and allow an application that had already been dismissed. These actions amount to sitting on appeal of its own orders, which is not provided for in law.



14. The fact that there is a valid judgment means that the suit was finalized and therefore the court could not re-open it. The court could not try the same issues that were already determined. That would be irregular. In my view any proceedings that are said to have taken place from 14.12.2021 onwards and any pleadings filed thereafter were *void ab initio*. This therefore means that the proceedings and pleadings filed from 14.12.2021 onwards are struck out for being irregular. The logical consequence of this is that there is no proper appeal before me based on the struck out proceeding and pleadings. I hereby therefore dismiss the appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF APRIL, 2024.

In the presence of Mutua for Mwatsuma for 2nd respondent.

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC - EMBU

23.4.2024

