



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

CORAM: SHAH, BOSIRE & O'KUBASU, J.J.A.

CIVIL APPEAL NO. 352 OF 2000

BETWEEN

SUSAN MUTHONI KAMAU APPELLANT

AND

PETER KANYUA RESPONDENT

**(An appeal from the Judgment of the High Court of Kenya
at Nyeri (Hon. Mr. Justice Juma) dated 17th November,
1999**

in

H.C.C.C. NO. 86 OF 1991)

JUDGMENT OF THE COURT

This is an appeal against the judgment of the superior court (Juma, J) delivered on 17th November, 1999 whereby the learned Judge allowed an appeal brought in that court by the present respondent against a decision of the Resident Magistrate at Murang'a.

The appellant Susan Muthoni Kamau filed a suit in the Magistrate's Court at Murang'a seeking a declaration that she owned a half share in a parcel of land known as T.P. No. 25 in Murang'a town. The suit was against the present respondent, Peter Kanyua . The appellant claimed that she had orally agreed with the respondent that she would own one-half of the said property while the other half would remain with the respondent; and that such joint ownership would be effective upon her providing a sum of Shs. 5,000/= as deposit and Shs. 215/= for purchase of some forms. She claimed further that the respondent refused to abide by the terms of the agreement and was collecting and retaining all the rent earned from the said property instead of sharing the same with her. She sought an account of rent so collected. In the alternative she claimed a refund of the money she paid, with interest.

The suit in the Magistrate's Court was set down for hearing on 1st February, 1990 by consent of the parties. The respondent did not attend the court on that day. The learned magistrate proceeded to hear the suit ex-parte. She reserved judgment till 1st March, 1990, and on that day entered judgment for the appellant declaring her to be the owner of one-half of the property and, also, ordered the respondent to render due account of the rent collected by him. The alternative claim for the refund of Shs. 5,215/= was not pursued. The respondent sought to have the ex-parte judgment set aside, on

the ground that he did not attend the court on 1st February, 1990 as he was given to understand by the appellant that she would drop her main claim and accept a refund of Shs. 5,215/=. The application to set aside the ex-parte judgment was heard on 19th November, 1991 and by a ruling delivered on 3rd December, 1991, the learned Magistrate declined to set aside the judgment as she was not satisfied that the appellant had advanced genuine grounds to enable her to set aside the judgment.

The appellant was dissatisfied with that ruling and he appealed against it. The memorandum of appeal lodged by him in the superior court specifically stated that the appeal was against the decision of 3rd December, 1991. However, in the grounds of appeal, the appellant complained, among other things, that the learned magistrate had failed to consider all the evidence at the trial. The memorandum of appeal did in fact allege that the learned magistrate did not exercise her discretion judicially when she declined to set aside the exparte judgment.

The superiot court (Juma, J.) said in his judgment:

"This is an appeal against the decision of the Resident Magistrate at Murang'a where she entered judgment for the respondent against the appellant. It is not clear from the record of appeal whether the appellant is appealing against the dec ision of the Resident Magistrate's Court in refusing to set aside the ex -parte judgment or whether he is appealing against the judgment itself."

Having said so the learned Judge proceeded to consider the judgment delivered on 1st March, 1990 and held that the learned trial magistrate erred by declaring the respondent in that appeal, who is the appellant here, to be the owner of ½ share of the suit premises and that she also erred in giving an order for the accounts to be taken in respect of the rent. He added that the best course she should have taken on the evidence before her at the time was to enter judgment for the respondent in her alternative prayer for the refund of her KShs.5,215/= plus costs and interest at court rates. It is clear therefore, that the learned Judge considered the appeal before him as an appeal against the judgment of the learned magistrate and not against her ruling whereby she declined to set aside that judgment. In doing so the learned Judge erred. There was no appeal against the judgment of 1st March, 1990. Time for lodgement of such appeal had long passed. We have considered the respondent's appeal to the superior court and to our minds there is no basis upon which the respondent would be entitled to judgment in his favour. The appellant clearly denied that she ever told the respondent that she intended to discontinue her suit. In the circumstances there was no material upon which the learned trial magistrate would have exercised her discretion in the respondent's favour.

In those circumstances we are left with no alternative but to allow this appeal, with the result that the judgment of the superior court dated 17th November, 1999 is set aside and the ruling of the learned magistrate delivered on 3rd December, 1991 is restored. The appellant will have costs of this appeal as well as the costs of the appeal in the superior court.

Dated and delivered at Nyeri this 10th day of May, 2002.

A. B. SHAH
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JUDGE OF APPEAL

S. E. O. BOSIRE
.....

JUDGE OF APPEAL

E. O. O'KUBASU
.....

JUDGE OF APPEAL

I certify that this is a true
copy of the original.

DEPUTY REGISTRAR