



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: KWACH, SHAH & KEIWUA, JJ.A**  
**CIVIL APPEAL NO. 180 OF 1999**

**BETWEEN**

**CHARLES GICHINA MWANGI ..... APPELLANT**

**AND**

**HENRY MUKORA MWANGI ..... RESPONDENT**

**(Being an Appeal from the Judgment of the  
High Court of Kenya at Nairobi (Hon. Lady  
Justice Owuor) dated 25th June, 1998  
in  
H.C.C.C. NO. 128 OF 1992)**

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**JUDGMENT OF THE COURT**

This is an appeal from the decision of *Owuor J (as she then was)* dated 25th June, 1998 by which she dismissed an appeal brought by *Charles Gichina Mwangi (the appellant)* .

*Henry Mukora Mwangi (the respondent)* filed a suit against the appellant in the Senior Resident Magistrate's Court at Thika in 1991 seeking a declaration that the appellant held 15 acres which form part of the appellant's plot Land Parcel Loc 16/KIGORO/197 in trust for him. The appellant and the respondent are brothers. The disputed piece of land was once part of a much larger parcel of land (75 acres) owned by their late father. It would appear that during land consolidation the appellant allocated to himself 45 acres leaving only 30 acres for the respondent. He said he was entitled to a lion's share of their father's land because he was the eldest son. In his defence the appellant denied the respondent's claim and pleaded that the respondent's claim was *res judicata* .

The learned Magistrate rejected the appellant's plea of *res judicata* and ordered that the 15 acres be shared between the appellant and the respondent. This would give each party 7½ acres. It was against this decision that the appellant appealed to the Superior Court.

In her short judgment dated 25th June, 1998 the learned Judge rejected the appellant's plea of *res judicata* and dismissed his appeal. She was of the opinion that the relevant proceedings on which the plea of *res judicata* was based had not been produced in evidence. If that was the only issue in this appeal, we would have had no difficulty in arriving at a decision on the point. When the appeal came up for hearing before the learned Judge on 15th July, 1996 the following order was made by consent-

*“By consent appeal be argued by way of written submissions. Mr Mutunga to hand over his written submissions to Mr. Njuguna on or before 30th July, 1996. Mr Mutunga do repay and hand over his written submission to on or before 15th August, 1996. Mr Mutunga be at liberty to reply. Mention on 17th September, 1996 when judgment date will be set.”*

The decision by the learned Judge that the appeal be argued by way of written submissions constituted a serious breach of the rules of procedure. There is no provision in the Civil Procedure Rules which permits the Court to hear an appeal by way of written submissions. Order XL1 rule 13 of the Civil Procedure Rules provides-

*“13 (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.*

*(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.”*

The rule is simple and clear and leaves no room for hearing of an appeal by written submissions. The fact of the matter is that the learned Judge never heard the appeal. What she wrote was not a judgment because she could only write a judgment after hearing the appeal, which she did not. In the circumstances it would be a travesty of justice to allow her decision to stand. It must be set aside.

In the result we allow this appeal and set aside the judgment and decree of Owuor J (as she then was) dated 25th June, 1998 and order that the appeal lodged in the superior court by the appellant namely H.C.C. Appeal No 128 of 1992 be heard de novo by any Judge. As the point upon which this appeal has been decided was abandoned by counsel for the appellant, we make no order as to costs.

**Dated and delivered at Nairobi this 12th day of May, 2000.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

**M. OLE KEIWUA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**