



REPUBLIC OF KENYA



**Muriithi v Tugura (Environment and Land Appeal 12 of 2018)  
[2023] KEELC 15868 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15868 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 12 OF 2018  
EC CHERONO, J  
FEBRUARY 28, 2023**

**BETWEEN**

**CHARLES KIURA MURIITHI ..... APPELLANT**

**AND**

**GRACE WAINOI TUGURA ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Resident Magistrate  
Hon. Y.M. BARASA at Kerugoya dated 26th May, 2017)*

**JUDGMENT**

**Introduction**

1. The appellant, Charles Kiura Muriithi was dissatisfied with the finding and judgment by Hon. Y.M. BARASA, Resident Magistrate at Kerugoya delivered on May 26, 2017 RMCC NO. 205 of 2011. In that former suit, the appellant who was the plaintiff had sued the respondent who was the defendant for *inter-alia* an order of permanent injunction restraining the defendant and/or his servants and agents from trespassing upon lock-up NO. 300 Wang'uru Market.
2. The defendant/respondent filed Defence and counter-claim to the plaintiff's suit on September 2, 2011. The defendant/respondent in Her Defence averred that She bought the suit plot from one Nicasios Mwai Muriithi vide a sale Agreement dated February 11, 2006 and immediately took possession and developed the same by erecting a three double rooms permanent stone building and a three single rooms semi-permanent building. The defendant/respondent further averred that the plaintiff/appellant was aware of his ownership of the suit property as he visited him at the site at least once during the construction period. He averred that the purported purchase of the suit property by the plaintiff/appellant was fraudulent particulars of which She set out in Her Defence and counter-claim.



3. After Judgment was delivered by the trial court on May 26, 2017, the plaintiff was dissatisfied and preferred the present appeal on the following six grounds of Appeal;
  1. The learned Magistrate erred in law and fact after failing to consider that the appellant could not have failed to attend court on May 24, 2017
  2. That the learned Magistrate erred in law and fact by dismissing the Appellant's suit in his absence due to the failure of the advocate
  3. That the learned Magistrate erred in law and fact when he entertained the hearing of the counter-claim ex-parte
  4. That the learned Magistrate erred in law and fact by dismissing the appellant's suit and proceeded to hear the counter-claim in his absence.
  5. That the learned Magistrate erred in law and fact after failing to give the respondent time to invite the appellant so as to take date by consent for hearing of the counter-claim.
  6. That the learned Magistrate erred in law and fact by pronouncing judgment based on the evidence adduced by the respondent alone and her witnesses.
4. It is now settled that the singular responsibility of this court as a first appellate court is to re-evaluate, re-asses and re-analyze the extracts on record and then determine whether the conclusions reached by the trial magistrate are supported by evidence and the law. That was the holding in the case of *Peters v Sunday post Ltd* (1958) EA 424 where the court stated;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”
5. From the extracts on record, the former suit CMCC NO.205 of 2011 came up for hearing before the trial Magistrate on May 24, 2017. Neither the plaintiff nor his advocate were present. Mr Muchiri for the defendant and his client were present. Mr Muchiri, Counsel for the defendant asked the trial Magistrate to dismiss the suit by the plaintiff for non-attendance by the plaintiff and his Advocate and sought to have the counter-claim proceed for hearing.
6. The copy of proceedings shows that the court proceeded to take the evidence of Joseph Wachira Wamae and Julius Kirwa Muga on the defendant's counter-claim. The trial Magistrate thereafter gave judgment for May 26, 2017.
7. The plaintiff/appellant in his grounds of appeal admits that he was absent during the hearing of his case on May 24, 2017 when the trial Magistrate dismissed the same. His complaint is that the trial Magistrate erred both in law and fact by dismissing the suit in his absence due to failure of his advocate and proceeding with the defendant/respondent's counter-claim without inviting him for fixing a convenient hearing date.
8. When this Appeal came up for directions on May 19, 2022, the parties through their Advocates agreed to dispose of the same by written submissions and set timelines within which the submissions were to be filed and served. At the time this court withdrew to write this judgment, none of the parties had filed submissions as agreed by consent. I now consider the six (6) grounds of appeal as follows;



**1. The learned Magistrate erred in law and fact after failing to consider that the appellant could not have failed to attend court on May 24, 2017.**

The appellant is accusing the trial Magistrate for failing to consider that he could not have failed to attend court when the former suit came up for hearing on May 24, 2017. The extract of the court record indicates that the hearing date was taken in the presence of the advocates for both the plaintiff/appellant and the defendant/respondent on February 8, 2017. The Advocates are the principal agents of their clients and any action or inaction committed by the agent is deemed as that of his client. The appellant cannot distance himself from the action and inactions committed and/or omitted by his authorized agent. The appellant is the one who appointed the firm of Igati Mwai & Company Advocates to act for him. If the plaintiff/appellant's lawyer whom He appointed voluntarily failed to inform him of the hearing date which was taken by consent, his remedy in my view lies in suing the lawyer for professional negligence and not blaming the trial Magistrate

**2. That the learned Magistrate erred in law and fact by dismissing the appellant's suit in his absence due to failure of the advocate**

It is clear from the extract of the record from the former suit that a hearing date was taken by consent of both Advocates for the plaintiff/appellant and the defendant/respondent on February 8, 2017. When the case was called out during the hearing date on May 24, 2017, neither the plaintiff nor his Advocate was present. The plaintiff/appellant did not make any application before the trial magistrate for review of the impugned Judgment giving reason(s), if any, for failing to attend court during the hearing on May 24, 2017. As we speak, the trial court was not told why the plaintiff/appellant failed to attend court during the hearing of the case. The trial Magistrate could not therefore be faulted for dismissing the plaintiff's / appellant's suit on May 24, 2017 and proceeding with the defendant's/respondent's Counter-Claim.

**3. That the learned Magistrate erred in law and in fact when he entertained the hearing of the counter-claim ex-parte.**

Order 12 Rule 3 [CPR](#) provides the courts how to conduct court business during hearing of cases and the parties fail to attend. The law provides as follows;

12 If on the day fixed for hearing, after the suit has been called on for hearing outside the  
Rule court, only the defendant attends and he admits no part of the claim, the suit shall be  
3(1) dismissed except for good cause to be recorded by the court. ----

12 If the defendant has counter-claimed, he may prove his counter-claim so far as the  
Rule burden of proof lies on him”  
3(3)

The proceedings and extract from the trial court shows that the trial Magistrate acted in fidelity to the procedural law in dismissing the plaintiff's/appellant's suit and proceeding to hear the defendant's/respondent's counterclaim.

**4. That the learned Trial Magistrate erred in law and fact by dismissing the appellant's suit and proceeded to hear the counter-claim in his absence**

This ground is related to ground No.3 above. I therefore find that the trial Magistrate proceeded with the hearing of the counter-claim ex-parte in accordance with the law.



**5. That the learned Magistrate erred in law and fact after failing to give the Respondent time to invite the Appellant so as to take date by consent for hearing of the counter-claim**

The advocates for the plaintiff/appellant and the defendant/respondent took the hearing of the former suit by consent. During the hearing of the suit, the plaintiff/appellant and his Advocate did not attend nor sent an Advocate to hold his brief. No explanation was given why there was no attendance. The trial Magistrate cannot be faulted for proceeding *ex-parte* with the hearing of the counter-claim since no application was made for adjournment during the hearing date. The trial Magistrate could not have adjourned the case without any prompting by any party.

**6. That the learned magistrate erred in law and fact by pronouncing judgment based on the evidence adduced by the respondent alone and her witnesses**

After dismissing the plaintiff's/appellant's suit under Order 12 Rule 3(1) [CPR](#), the trial Magistrate proceeded *ex-parte* with the hearing of the defendant's/respondent's counter-claim under order 12 Rule 3(3) [CPR](#). I find that the trial Magistrate properly directed himself in arriving at His decision in the impugned judgment.

The upshot of my re-analysis and re-evaluation of the judgment by the trial magistrate delivered on May 26, 2017 is that this appeal lacks merit and the same is hereby dismissed with costs.

**READ, DELIVERED AND SIGNED VIRTUALLY THIS 28<sup>TH</sup> DAY FEBRUARY, 2023**

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of;**

1. Appellant/Advocate—absent
2. Respondent/Advocate---absent
3. Joy C/A

