



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

CORAM: SHAH, BOSIRE & KEIWUA, JJ.A

CIVIL APPEAL NO. 224 OF 1999

BETWEEN

CHARLES GITHINJI MUTURI.....APPELLANT

AND

JULIUS NDERITU KABERA.....RESPONDENT

**(Appeal from the orders of summary rejection of Appeal by
the High Court of Kenya at Nyeri (Juma, J) dated 29th July,
1999**

in

H.C.C.APPEAL NO. 68 of 1999)

JUDGMENT OF THE COURT

By a plaint dated 24th November, 1998, *Julius Nderitu Kabera, (the respondent herein)* filed in the Senior Resident Magistrate's court at Nyeri a suit against Charles Githinji Muturi (the appellant herein) seeking an order for the eviction of Muturi from a parcel of land known as plot No. 50 at Chaka in Nyeri District. The appellant duly filed a defence denying the respondent's title and averred that he purchased the said plot from *Joyce Wangechi and Isaac Miano Karuga*, allegedly the beneficiaries of the estate of one Moses Mwangi Kingo'ori which estate allegedly was the owner of the said plot.

The respondent, after close of pleadings in the suit, applied for summary judgment to be entered against the appellant. That Application was brought under Order XXXV Rule 1(b) of the Civil Procedures

Rules . That application which was served on the appellant's advocate on 29th March, 1999 came up for hearing before the Senior Principal Magistrate, Mr. Bauni, on 7th April, 1999. Mr. Wahome who then appeared for the appellant sought an adjournment of the hearing on the ground that he was unable to obtain instruction from his client within the space of eight days. The Senior Principal Magistrate declined to grant the adjournment and proceeded to hear the application. On 30th June, 1999 he made an order for the eviction of the appellant from the said plot.

The appellant lodged an appeal against the decision of the Senior Principal Magistrate. The appeal to the superior court, being Civil Appeal No. 68 of 1999 (at Nyeri) was filed on 13th July, 1999. The appeal was based on the following four grounds:

- “1. The Learned Senior Principal Magistrate, erred in law and fact in not holding that the defence on record disclosed triable issues of law and fact and miscarriage of justice was thereby occasioned.*
- 2. The learned Senior Principal Magistrate erred in law and fact in not holding that the pleadings on record did not disclose a clear and concise case entitling the plaintiff to the remedy of summary procedure. A miscarriage of justice was thereby occasioned.*
- 3. The learned Senior Principal Magistrate erred in law and fact in holding that the Defendant's defence is a mere sham and that he has not shown how he owns the plot in question while in his defence he states that he bought it from JOYCE WANGECHI and ISAAC MIANO KARUGA. A miscarriage of justice was thereby occasioned.*
- 4. The learned Senior Principal Magistrate erred in law and fact in not considering the Defendant's defence and whether the Defendant has a good defence or whether he ought to be permitted to defend the suit as required by law and a failure of justice was thereby occasioned.”*

The superior court (Juma, J) after perusing the memorandum of appeal rejected the appeal summarily presumably under Section 79B of the Civil Procedure Act. We say presumably as the learned Judge does not specifically mention that section.

This appeal is against the summary rejection of the appeal lodged in the superior court and it becomes incumbent upon us to consider the grounds of appeal advanced in that court to see whether the learned Judge properly summarily rejected the appeal.

Miss Mwai who appeared for the appellant took issue with the learned Magistrate not granting an adjournment to the appellant's advocate on 7th April, 1999. She also urged that the defence as it stood raised triable issues and that therefore the learned Magistrate was bound to consider the same to properly decide whether or not the defence raised even one triable issue. Her complaint was that the learned Magistrate did not properly consider the issues raised and erroneously entered judgment against the appellant. These factors, she urged, ought to have been taken into account by the learned judge so as not to summarily reject the appeal. She laid emphasis on the land being agricultural and as such requiring consent of the relevant Land Control Board.

We note that the refusal by the Magistrate to grant an adjournment is not one of the grounds of appeal. Without going into the other issues raised in the memorandum of appeal which was before the learned Judge the matter that weighs on our minds is that the Magistrate had before him an application for summary judgment under Order 35 of the Civil Procedure Rules; yet he proceeded to strike out the defence although the application before him was not based on Order 6 rule 13(1) of the Civil Procedure Rules. Except for this issue the learned Judge did not have before him, say, grounds like the land being

agricultural land and being subject to land control board consent etc.

We think that the learned Judge ought to have considered the effect of striking out the defence as opposed to entering summary judgment. Had he so considered we think he would have admitted the appeal for hearing.

We allow this appeal and direct the superior court to admit the appeal and hear it on merits. As this appeal succeeds on an issue raised by this Court, we make no order as to costs of this appeal.

Dated and delivered at Nyeri this 13 th day of December, 2002.

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

M. Ole KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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