Hassan & another v Welai & 2 others (Civil Appeal E238 of 2022)
[2023] KEHC 2922 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E238 OF 2022

JK SERGON, J

MARCH 31, 2023

BETWEEN

ADAN YARE HASSAN ..... 1ST APPELLANT

FATUMA ABDULKADIR ..... 2ND APPELLANT

AND

HABIBA ALI WELAI ..... 1ST RESPONDENT

BATULA ALI WELAI ..... 2ND RESPONDENT

MUNA ALI WELA ..... 3RD RESPONDENT

(Being an appeal from the Order of the Senior Resident Magistrate, M. W Murage Issued on 8th April,2022 in Chief Magistrate's Court, MCCOMMSU No. E005 of 2022 at Nairobi)

JUDGMENT

1. The appeal herein is against the ruling of the trial court (Hon. M. W. Murage) in Milimani CMCC no. E005 of 2022 wherein the trial court obtained exparte orders issued on 8th April, 2022 ordering the appellants to deposit in court the sum of Kshs.4,681,825.25/= within 7 days vide the application dated 07.04.2022.

2. The appellant being aggrieved preferred this appeal and put

   forward the following grounds:

   a. That the learned Magistrate erred in showing open bias and discrimination against the appellants.

   b. That the learned magistrate erred in fact and in law by denying the appellants their constitutional right to be granted fair trial and hearing.

c. The learned trial magistrate erred in law and fact by proceeding with a matter that she did not have jurisdiction over.

d. The learned trial Magistrate erred in law and fact by issuing ex-parte order without issuing the appellants with a notice of the same and without considering that the appellant's application dated 20th January, 2022 for stay and setting aside was on record and scheduled to be heard on 3rd May, 2022.

e. The learned trial Magistrate erred in law and fact by issuing an exparte order compelling the appellants to pay Kshs.4,681,825.25/= without according them the right to be heard.

f. The learned Magistrate erred in law in ordering the appellants to deposit in court the sum of Kshs.4,681,825.25/= within Seven (7) days. This order has occasioned grave injustice to the appellants.

g. The learned trial Magistrate erred in law and fact by failing to consider that by issuing such order the appellants would be prejudiced when the appellant's application dated 20th January, 2022 challenging the jurisdiction was on record.

h. The learned trial Magistrate erred in law in failing to appreciate and consider that in view of the nature of the case, it was unjust to order the appellants to pay the sum of Kshs.4,681,825.25/= when the appellants are the majority shareholders of the suit premises holding 62.5% shares and the respondents holding 37.5% shares.

i. The learned magistrate erred in law in failing to consider the appellant's application on record where the respondents failed to disclose to the Court the material facts that they have been receiving/collecting rental income from twenty one flats since December, 2019 to date in the sum of Kshs.42,000,000/=.

j. The order of the magistrate was against the weight of evidence on record and was biased against the appellants.

k. That the Learned Magistrate erred in fact and in law by totally disregarding the appellants' pleadings and application on record dated 20th January, 2022 and issuing an exparte order against the appellants without according the appellants a fair hearing.

l. That the learned trial magistrate erred and misdirected herself in failing to appreciate the principle of just and fair hearing.

m. That the learned trial magistrate erred in law and fact in condemning the appellants unheard.

3. Directions were given that the appeal be canvassed by way of

written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions. The issues for determination put forward by both parties aree as follows:

a. Whether the Hon.Magistrate erred in granting the exparte order without hearing the appellants.

b. Who is to bear the costs of this appeal.

4. On the first issue, the appellant submitted that, the exparte orders issued on 8th April, 2022 directing them to deposit in court a sum of Kshs.4,681,825/= within seven days ,without according them a fair hearing and when in fact they had clearly demonstrated in their application that the respondents are yet to account for the rental collection for 21 flats since December,2019 to date amounting to Kshs.42,000,000/=.

5. It is the appellant's submission that the 2nd appellant had put on record evidence to show that the respondents were guilty of concealment of material facts and that the trial magistrate erred in ordering the appellants deposit in court the said sum without according them a fair hearing.

6. The appellants cited the case of Joseph Mbalu Mutava v Attorney General & Another (2014) eKLR the court observed thus:-

> It is now settled that it is a fundamental principle of justice and procedural fairness that no person is to be condemned unless the person has been given prior notice of the allegations made against him or her, and a fair opportunity to be heard. In Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para. 639, it is stated as follows with regard to the right to be heard:
>
> "The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

7. The appellants further argued that rules of natural justice and the obligation to hear the other party is mandatory before making a decision. The appellants cited the case of Central Organisation of Trade Unions Vs. Benjamin K Nzioka & Others Civil Appeal No. 166 of 1993 where the Court of Appeal expressed itself as follows:

> " This principle of law is well settled and was recently reaffirmed in the ruling of this court in Central Organisation of Trade Unions (Kenya) and Benjamin K. Nzioka and Others Civil Application No. NAI 249 of 1993 (108/93) (UR) in the following words:
>
> "As a concept, it is derived from the Latim maxim 'audi alteram partem' which in English means 'hear the other party'. This rule obliges a judges or an adjudicator faced with the task of making a choice between two opposing stories to listen to both sides. He should not base his decision only on hearing one side. In the case of a judge he should give equal opportunity to both parties to present their cases or divergent viewpoints. And in doing so, should hold the scales fairly and evenly between them".

8. The appellants also relied on the case of MMO V FAH (2017) eKLR in which the court held that:

> Having perused and considered the proceedings myself, I am of the view that they were not conducted fairly and in accordance with the law that it *Civil Procedure Act*(Cap 21) and the Civil Procedure Rules.
>
> In allowing the appeal I am mindful of the fact that it is because of a technicality of a mistrial as the court proceedings were irregular. This is also a family matter where the marital relationship of two persons is at issue.

9. In response, the respondents submitted that the court is bestowed with the power to set aside exparte orders and the courts discretion should be exercised judicially and not arbitrary. On this the respondent relied on the case of Captain Philip Ongom v Catherine Nyero Owota SCCA 14.2/2001(2003) KALR, the court held inter alia that the court must be satisfied about one of the two things namely:-

    a. Either that the defendant was not properly served with summons;

    b. Or that the defendant failed to appear in court at the hearing due to sufficient cause.

10. It is therefore the respondents' submissions that the appellants have not satisfied the threshold for setting aside exparte orders as they were duly served with the application for them to file their responses and have the said application heard on the 14th April, 2022 and that they did not dispute service of the application and orders issued.

11. The respondents also contend that the exparte interim orders had been issued when the application dated 7th April, 2022 was made however that does not mean that the orders could not be reversed as they were interim orders issued pending hearing and determination of the application.

12. The respondents stated that the court went further and issued a hearing date for the application as is the norm that both parties in a suit have to be accorded a chance to be heard, therefore the allegation that the appellants were not accorded an opportunity to be heard is unfounded.

13. The respondents cited and placed reliance on Civil Appeal No.77/2003 in Court of Appeal Judicial Commission of Inquiry to the Goldenberg Affair & Others v Job Kilach .The Court of Appeal referring to the case of Ex-parte Harbage and the words of MAY L. J. quoted a passage on page 14 thus:-

A "The next point to make is that although appeal does lie to this court against an ex-parte order made by a judge of High Court.....nevertheless in his judgment in that case Sir Donalds on MR [1983] 3 All E.R. 589 at page 593 said:

"I have said ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case it is difficult if not impossible to think of circumstances in which it would be proper to appeal to this court against an ex parte order without just giving the High Court judge an opportunity of reviewing it in light of argument from the defendant and reaching a decision."

14. I agree with the appellants that indeed the learned magistrate erred in law in ordering them to deposit in the court the sum of Kshs.4,681,825.25/= which is a large sum amount of money without hearing them first.

15. The trial court should have given the appellants an opportunity to explain themselves since according to them the respondents failed to disclose to the court the material facts which would have shed more light before giving such orders.

16. *The Constitution*, at Article 50(1), provides for fair hearing with regard to any dispute that has to be resolved in accordance with the law. It states as follows:

> " 50.
>
> (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

17. The remainder of Article 50 of *the Constitution*, especially Sub-Article (2), is devoted to what are generally referred to as fair trial principles. The constitutional provisions on fair trial appear to be limited to criminal trials, but the spirit cuts across the board, especially with respect to pretrial disclosure of evidence. The days of trial by ambush are behind us. It is to be expected in all trials, be they civil or criminal, that there would a fair amount of disclosure of the opponent's case, through the pleadings, the documents proposed to be relied upon, the witnesses proposed to be presented, among others. In civil trials the spirit of pretrial disclosure is captured in Order 7 of the Civil Procedure Rules.

18. The court, in Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR, had the following to say on Article 50 with respect to fair trial principles in civil cases:

> " While the wording of Article 50 of *the Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time."

19. In the end I do find that the trial court erred in law by condemning the appellants without according them an opportunity to be heard and more especially where there are orders on a substantial a large amount of money and without disclosure of full information from both ends.

20. It would also be the case where the trial court failed to allow a party a chance to be heard on their defence as that would amount to a miscarriage of justice and a mistrial, and such would be a proper case to remand the matter to the trial court for the party to be properly heard (See Jane Murugi Karanu vs. Gabriel Gikonyo Ndirangu [2008] eKLR). Where a trial court or tribunal determined a matter without giving an opportunity to either party to be heard (See Duncan Kamau Kiriro vs. Japheth P. Kimotho [2013] eKLR.)

21. In the end, I find the appeal to be meritorious. It is allowed. Consequently, the orders issued exparte on 8th April, 2022 vide Chief Magistrate Court, MCCOMMSU No. E005 of 2022 and all consequential orders are hereby set aside.

22. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 31ST DAY OF MARCH, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

.....for the 2nd Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent