



**Mwangi & another v GKM (Suing Through the Father and Next of Friend AMM)
(Civil Appeal E133 of 2023) [2023] KEHC 26789 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E133 OF 2023
TA ODERA, J
DECEMBER 20, 2023**

BETWEEN

MARGARET WANGARI MWANGI 1ST APPELLANT

GEORGE OMBIRA OBARE 2ND APPELLANT

AND

**GKM (SUING THROUGH THE FATHER AND NEXT OF FRIEND
AMM) RESPONDENT**

RULING

1. By a Notice of Motion filed under Certificate of Urgency and dated November 24, 2023 and filed through the firm of Kimondo Gachoka & Company Advocates and under section 3, 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, order 42 rule 6, order 50 rule 5, order 51 rules 1 & 3, order 22 rule 22 of the [Civil Procedure Rules](#), the appellants/ applicants herein seek the following orders:-
 1. Spent.
 2. That this Honourable Court be pleased to grant a stay of execution of the judgment/decree in Kisii Civil Suit No. 502 of 2021 delivered on October 31, 2023 pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to grant a stay of execution of the judgment/decree in this matter delivered on October 31, 2023 pending the hearing and full determination of the appeal in Kisii High Court Civil appeal No. E133 OF 2023.
 4. That upon grant of prayer No. 3 above, as a condition for stay of execution pending the hearing and determination of the appeal, the applicant/ appellant be and is hereby ordered to provide/issue security for the entire decretal sum/ amount in form of a Bank Guarantee to be issued by Family Bank Limited to secure the Judgment herein of KShs.254,500/=.



5. That costs of this application be in the cause.
2. The grounds on the face of the application are that Judgment was entered against the appellants in the sum of KShs.254,500/=. The appellants had since lodged an appeal Kisii High Court Civil appeal No. E133 of 2023. The applicants expressed apprehension that they would not be able to recover the decretal sum should the appeal succeed hence render the appeal nugatory. They stated that the respondent was a person of straw and would not be able to refund the decretal sum. They stated that they were ready and willing to furnish security in the form of a bank guarantee as security for the whole decretal sum.
3. The application was supported by an Affidavit sworn by the 2nd appellant on November 24, 2023. He deponed that Judgment was entered against the Appellants in the sum of KShs.254,500/=. He deponed that they were aggrieved by the said Judgment and hence filed Kisii High Court Civil Appeal No. E133 of 2023 which they posited had high chances of success. He further deponed that the decretal sum was of a substantial sum for which they expressed fear that they would not be able to recover from the respondent. He deponed that they would suffer substantial loss if the orders sought were not granted and the appeal would be rendered nugatory. He deponed that the respondent would not be prejudiced as the appellants were ready and willing to provide a bank guarantee for the whole decretal sum.

Determination

4. I have considered the application herein. I note that the respondent did not participate in the proceedings and so, the application is unchallenged.
5. The main issue for determination is whether the appellants/ applicants have put forth a strong case for stay of execution pending appeal.
6. However, while considering the application, I stumbled upon an issue that requires attention before we move to the issue of stay, and I shall shortly show why this Court cannot interrogate the prayer for stay at this juncture.
7. The appellants informed the Court that they effected service upon the respondent's Counsel on December 4, 2023. I have considered the Return of Service filed.
8. I note that the process server effected service through email, that is, to xxxx.com. However, looking at the email extract attached to the Affidavit of Service, it reads thus: Kindly find the attached applications (sic) dated November 23, 2023 for service upon yourselves. The same scheduled for interparte hearing on 13/2/24.
The same is electronically served upon you pursuant to order 5.
9. Several issues come to the fore. One, the application is dated November 24, 2023 and not 23.11.2023 as indicated in the email. Secondly, and most importantly, the application came up for hearing on 13.12.2023. The email communication reads that the application would be heard on 13/2/24 which I take to mean 13th February 2024. As it stands, did the respondent then have adequate notice of the application? I think not.
10. Proper service goes to the heart of a fair hearing. Therefore, where there is no proper service, then the Court is bound to find that the other party was indeed unaware of the proceedings and the Court cannot proceed with the said matter until service, and proper service, is affected. The *Civil Procedure Rules*, 2010 elaborately provide for what entails proper service under Order 5. The same was amended to ease the process of service and to embrace the digital age we are in.



11. I am persuaded by the decision in the case of *Omar Shallo v Jubilee Party of Kenya & Another* [2017] eKLR, where the Court, in holding that procedure for service as mere technicalities, cited the case of *Law Society of Kenya v Martin Day & 3 Others* [2015] eKLR, where it was held as follows: -
- “ 33. The question is whether failure to adhere to such clear elaborate procedural requirements of the Civil Procedure rules on the validity of and service of summons outside the jurisdiction of this court are mere procedural technicalities that can be sacrificed at the altar of substantive justice.
34. In my humble view, those rules of engagement that prompt the hearing and disposal of a suit cannot be mere procedural technicalities contemplated by Article 159(2)(d) of the *Constitution* of Kenya, 2010 and or the overriding objectives espoused in section 1A and 1B of the *Civil Procedure Act*.
35. As was held in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others* [2013] eKLR, by Kiage JA, Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even-handed....” The Supreme Court in the case of *Raila Odinga & 5 Others vs IEBC & 3 Others* Petition 5/2013 eKLR, also held that Article 159(2)(d) of the *Constitution* is not a panacea for all procedural shortfalls.....it is plain to us that Article 159(2)(d) is applicable on a case to case basis.”
38. A summons is a judicial document calling upon the defendant to submit to the jurisdiction of the court and if the party is not given that opportunity to so appear and either defend or admit the claim, how else would that party would submit to the jurisdiction of the court particularly when that defendant is a foreigner residing outside the jurisdiction of the court.”
14. Essence of service is to notify a party of a case against him in order to respond appropriately and defend himself. It is premised on the right of every person to be heard.
12. In the case of *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others*, Petition No, 18 of 2014 as consolidated with petition No. 20 of 2014 [2014] eKLR, Lady Justice Njoki Ndung’u in a concurring opinion explained in great detail what a fair hearing is all about.
- 256.... Therefore, the principles are binding upon Article 2(5) and (6) of the *Constitution*, and include the following:
-
2. Fair hearing
-
- (e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
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257. Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against



bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contests remain unsettled.”

258. What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & Others v. Union of India & Others*, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others*, AIR 1962 Cal. 460).
259. That Court in *Union of India v. J.N. Sinha & Another*, 1971 SCR (1) 791 and *C.B. Boarding & Lodging v. State of Mysore*, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In *Mineral Development Ltd. v. State of Bihar*, 1960 AIR s468, 160 SCR (2) 909 the Court further observed that the concept of fair hearing is an elastic one and “is not susceptible of easy and precise definition.”
260. The Court of appeal at Kampala in Uganda in *Obiga v. Electoral Commissions & Anor.*, Election appeal No. 4 of 2011 [2012] UGCA 29 (Obiga) held that in order to determine whether a party received a fair hearing, the Court has to look back to the statutes, case laws, and regulations that govern the decisions that the Court made.
261. It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court. (See *Steel and Morris v. United Kingdom*, [2005] ECHR 103, paragraph 59).

It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court. (See *Steel and Morris v. United Kingdom*, [2005] ECHR 103, paragraph 59).

13. In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* Petition 7 of 2018 consolidated with Petition 9 of 2018 [2018] eKLR, the Supreme Court held as follows:

86. We are also minded that the interests of justice dictate that this court ensures that all parties to a dispute are accorded a fair hearing so as to resolve the dispute judiciously. This is particularly so because what is at stake is the appellants’ right to a fair election as well as the right of the voters to non-interference with their already cast votes, the will of the people, so to speak. It is



on this breath that we must consider whether the appellants' right to a fair hearing and trial will be infringed upon by the denial of admission of new evidence.

87. In the circumstances, was there a reasonable opportunity of hearing given to the appellants? In this regard, what then are the norms or components of a fair hearing? In the matter of *Indru Ramchand Bharvani & Others v Union of India & Others*, 1988 SCR Supl (1) 544, 555, the Supreme Court of India, found that a fair hearing has two justiciable elements:

- (i) an opportunity of hearing must be given; and
- (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs, Calcutta & Others*, AIR 1962 Cal 460).

It is important to restate that a literal reading of the provisions of the [Constitution](#) of Kenya shows that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that:

“it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” (See *Steel and Morris v. United Kingdom*, [2005] ECHR 103, paragraph 59).”

14. In light of the foregoing, I find that the respondent herein has not been accorded an adequate opportunity to participate in these proceedings. Considering the instant application in the circumstances would amount to condemning the respondent unheard and denying him an opportunity to present his case effectively.

15. In the circumstances, I hereby direct that the application to be served upon the respondent within the next 14 days of the date of this Ruling. The application shall be heard on .

16. I make no order as to costs. Mention on 11.3.24.

DATED, DELIVERED AND SIGNED AT KISII THIS 20TH DAY OF DECEMBER 2023.

TERESA ODERA

JUDGE

In the presence of:

N/A for the appellants/ applicants

N/A for the respondent

Mwita: Court Assistant

