



Soroya & 2 others v Saroya (The Personal Representative of Mohamed Yusuf Khan Soroya - Deceased) & another (Environment and Land Appeal E014 of 2023) [2023] KEELC 17999 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E014 OF 2023**

JO MBOYA, J

JUNE 16, 2023

BETWEEN

NAVEED AMIR SOROYA SOROYA 1ST APPELLANT

NABEEL YUNIS SOROYA 2ND APPELLANT

SHAHILA SAMINA SOROYA (THE PERSONAL REPRESENTATIVE OF MOHAMED YUNIS SOROYA - DECEASED) 3RD APPELLANT

AND

MOHAMMED YASIF YUSUF SAROYA (THE PERSONAL REPRESENTATIVE OF MOHAMED YUSUF KHAN SOROYA - DECEASED) 1ST RESPONDENT

SOROYA GROUP LIMITED 2ND RESPONDENT

(Being an Appeal from an order delivered on 10th February, 2015; by Resident Magistrate Honorable T.S. Nchoe in Civil Cause No. 3104 of 2014 at Nairobi, Milimani Law Courts)

JUDGMENT

Background And Introduction

1. This Appeal arises out of and concerns a short, but precipitate Ruling which was rendered/ delivered on the February 10, 2015; and wherein the Learned Magistrate proceeded to and directed the Defendant to the suit before the Subordinate Court, namely, M/s Gikera & Vadgama Advocates; to release all the Documents deposited by his Client, who was the 1st Plaintiff therein to the Depositor forthwith.
2. Interestingly and curiously, the Ruling rendered on the February 10, 2015 related to issues which were neither alluded to nor sought at the foot of the Application dated the June 18, 2014, which was (sic) the subject of determination by the Learned Magistrate.



3. Following the rendition and/or delivery of the impugned Ruling, the Original Appellant namely, Mohamed Yunis Soroya, now Deceased, felt aggrieved and/or dissatisfied and thereafter proceeded to and mounted an appeal vide Memorandum of Appeal dated the March 19, 2015. For good measure, the Memorandum of Appeal was mounted subsequent to Leave being granted by this Honorable court, albeit differently constituted.
4. Furthermore, the Memorandum of Appeal filed by and on behalf of the Original Appellant was thereafter amended culminating into the Amended Memorandum of Appeal dated the August 1, 2022. Notably, the said amendments were precipitated by the death of the original Appellant.
5. Owing to lapse of time between the filing of the Appeal to the date when directions were taken, the Original 1st Respondent also passed on and thus leading to the filing of a Further Amended Memorandum of Appeal dated the February 10, 2023.
6. Instructively, the current appeal is therefore premised and anchored on the Further Amended Memorandum of Appeal dated the February 10, 2023; and in respect of which the Appellants' have raised and enumerated the following Grounds of Appeal;
 - i. That Honourable Magistrate erred in law and in fact by finding that the Defendant/Applicant were entitled to release of Title of suit property into the custody of Plaintiff/ Respondent.
 - ii. That the Honourable Magistrate erred in law and in fact by failing and neglecting to have the Defendant Advocates made aware and informed of Plaintiff's Application proceedings to hearing.
 - iii. That the Honourable Magistrate erred in law and in fact by basing its decision partially to prayers sought in the Defendant/ Applicant's Application dated June 18, 2014 and further disregarding arguments canvassed in its submissions dated August 18, 2014 against release of Title to the Plaintiffs pending full hearing of parties suit on merit.
 - iv. That the said order was manifestly unfair to the Defendants/amended Appellants.
 - v. The Honourable Magistrate erred by proceeding to make his ruling based on a misapprehension of facts and which order would allow Plaintiffs to act carte blanche on receipt of the said property.
 - vi. The Honourable Magistrate erred in law by disregarding the Defendant/Applicants Application dated June 18, 2014, which was on record having being filed on the same date and duly highlighted in the submissions made by the advocate on record.
 - vii. The Honourable Magistrate erred in law by denying the Defendant/Appellants their prayers sought for release of Title for suit property in Court's custody as well as going against the well-laid and long established rules of Natural Justice.
 - viii. That in all instances, the Ruling of the Court is inexecutable in law and acts.

Submissions By The Parties:

- a. Appellants' Submissions:
 7. The Appellants herein filed two (2) sets of written submissions dated the March 22, 2023 and the May 15, 2023, respectively. For good measure, the Appellants have raised four (4) pertinent issues for due consideration by the Honourable court.



8. Firstly, Learned counsel for the Appellants has submitted that the Ruling and the resultant order rendered on the February 10, 2015; and which is the subject of the Appeal herein, was made without taking into consideration the salient and pertinent issues, which could have been important in determining whether or not the Applicant in whose favor the orders were granted, was in any event entitled to the impugned orders.
9. Additionally, Learned counsel for the Appellants' has submitted that the orders which were granted were granted without proof and demonstration that the Applicant, who was the beneficiary of the impugned orders, had established and demonstrated the existence of a Prima facie case or at all.
10. Secondly, Learned counsel for the Appellants has further submitted that the orders which were granted at the foot of the impugned Ruling were diametrically at variance with and outside the scope of the Application dated the June 18, 2014, which was the subject of determination before the Learned magistrate.
11. Furthermore, Learned counsel for the Appellants has submitted that in granting prayers/reliefs, which were neither sought for nor contained at the foot of the Application dated the June 18, 2014, the Learned magistrate breached and violated the Doctrine of Departure, which prohibits and precludes both the Parties and the court from ventilating on issues which are outside the scope of the pleadings filed.
12. Thirdly, Learned counsel for the Appellants has submitted that in any event; the impugned orders which were granted by the Learned magistrate were precipitate and substantive and amounted to granting final orders, albeit at an interlocutory stage. In this regard, Learned counsel pointed out that the orders granted at the foot of the impugned ruling are substantially the same as the prayers sought at the foot of the Plaint dated the May 30, 2014, which had been filed by the Plaintiff.
13. It was the further submissions of Learned counsel for the Appellants that by granting the impugned orders at the foot of the Ruling, the Learned magistrate disposed of and determined the Substantive suit, albeit without a plenary hearing or otherwise.
14. Fourthly, Learned counsel for the Appellants has also submitted that it was improper and a miscarriage of justice for the Learned magistrate to proceed and grant precipitate orders affecting the rights and interests of the Appellants and in particular , the original Appellant, albeit without affording same an opportunity to be heard.
15. Consequently and in the premises, Learned counsel for the Appellants has contended that the impugned Ruling constituted and/or amounted to a gross violation of the Right to Fair hearing as espoused and entrenched in Article 50(1) of the Constitution, 2010; as well as the doctrine of Natural Justice.
16. In view of the foregoing, Learned counsel for the Appellants has submitted that premised on the foregoing submissions, the Appellants herein have been subjected to a miscarriage of Justice and hence the impugned Ruling ought to be vacated, rescinded and/or quashed.
 - b. Respondents' Submissions:
17. The Respondents herein filed written submissions dated the May 3, 2023 and in respect of which same have raised, highlighted and amplified four salient issues for due consideration and determination by the Honourable court.
18. First and foremost, Learned counsel for the Respondents has submitted that the Ruling rendered on the February 10, 2015 was lawful and legitimate, insofar as the orders that were granted were



- discretionary in nature. Instructively, Learned counsel has contended that the Learned magistrate was within his mandate to grant the Mandatory Injunction directing the release of the various documents to and in favor of the Plaintiff/Applicant (now 1st Respondent).
19. In addition, Learned counsel for the Respondents has submitted that as at the time when the Learned magistrate rendered the impugned Ruling, the Application which was the subject of determination had not been opposed vide any Replying affidavit or Grounds of opposition or at all.
 20. Furthermore, Learned counsel for the Respondents has submitted that insofar as the Application dated the June 18, 2014, had not been controverted and/or otherwise opposed, the Learned magistrate was therefore within the parameters of the law in granting the impugned Ruling.
 21. Secondly, Learned counsel has submitted that despite the delivery and rendition of the impugned Ruling the firm of M/s Gikera & Vadgama Advocates, who were ordered to release the assorted Documents touching on and concerning the Suit property, has since failed and declined to comply with the terms of the ruling.
 22. Furthermore and premised on the foregoing, Learned counsel for the Respondents has therefore submitted that the firm of M/s Gikera & Vadgama Advocates have disregarded, the Lawful Court Orders and are therefore in contempt of lawful and valid court orders, which have neither been vacated nor discharged.
 23. Consequently and in this regard, Counsel thus contended that the Law firm of M/s Gikera & Vadgama Advocates; are therefore in Contempt of lawful court orders and thus same ought to be punished by the Honourable Court.
 24. Thirdly, Learned counsel for the Respondents has submitted that even though the suit in the subordinate court was filed on the May 30, 2014, same has remained pending to date. In this respect, Learned counsel for the Respondents has therefore submitted that it is imperative that the entire suit should be heard and determined in its entirety.
 25. Nevertheless and despite the foregoing submissions, Learned counsel for the Respondents has not clearly pointed out how the suit which is pending in the subordinate court can be heard and determined in its entirety through the current Appeal, which only relates to Interlocutory application that was undertaken in the subordinate court.
 26. Lastly, Learned counsel for the Respondents has submitted that there has been gross and inordinate delay in the hearing and determination in the subject matter; and that the inordinate delay, attendant to the instant matter, amounts to an Injustice.
 27. In support of the foregoing submissions, Learned counsel for the Respondents has cited and relied on, inter-alia, the case of Kenya Breweries Ltd versus Washington Okeyo (2000)eKLR, Safina Properties Ltd & Another versus Barckleys Bank of Kenya Ltd & Another (2015)eKLR, Fadhili Zaharan Mohamed & Another versus Alia Haran Mohamed & Another (2017)eKLR, Kenye Tea Growers Association versus Francis Atwoli & 5 Others (2012)eKLR, Fracis Munyoki Kilonzo & Another versus Vincent Mutua Mutiso (2013)eKLR; and Ann Mumbi Hinga versus Gaitho Oil Ltd (2019)eKLR, respectively.

Issues For Determination

28. Having reviewed the Further Amended Memorandum of Appeal dated the February 10, 2023, the Record of Appeal; and the written submission filed by and on behalf of the Parties, the following issues do arise and are thus worthy of determination;



- i. Whether the Learned Magistrate was at liberty to proceed and grant Reliefs/Prayers which diametrically at variance with the prayers Contained in the Application dated June 18, 2014.
- ii. Whether the orders granted at the foot of the impugned Ruling were Substantive and Precipitate and in any event; determined the entire suit albeit at an Interlocutory Stage.
- iii. Whether the impugned Ruling and the resultant orders constituted a violation of the Right to Fair Hearing in terms of Article 50(1) of the Constitution 2010.

Analysis And Determination

Issue Number 1

Whether the Learned Magistrate was at liberty to proceed and grant Reliefs/Prayers which diametrically at variance with the prayers Contained in the Application dated June 18, 2014.

29. It is common ground that what was before the Learned magistrate for hearing and determination was the Application dated the June 18, 2014 and in respect of which the Defendant/Applicant (now not a party to the proceedings) sought for the following Reliefs;
 - i. Mr Yunis Soroya be enjoined in this proceedings.
 - ii. The Court orders the name of the Defendant herein to be struck out from the proceedings upon depositing the original title for the property LR No 209/4300/161 in court.
 - iii. Costs of the Application be provided for.
30. Despite the fact that the Learned Magistrate had clearly delineated the nature and scope of the reliefs that were being sought at the foot of the Application, same however proceeded to and granted, inter-alia, the following orders;

'I therefore direct the Defendant to release all the documents deposited by his client, the 1st Plaintiff herein to the depositor forthwith'
31. Clearly, it is evident and apparent that the Learned magistrate was granting and/or making an order, which was neither sought for nor Contained in the body of the Application dated the June 18, 2014, whose terms were well captured in the preamble of the impugned Ruling.
32. In addition, it is also not lost on this Honourable court that the Learned magistrate was granting orders to and in favor of (sic) the 1st Plaintiff (now 1st Respondent) who was not the originator of the Application the June 18, 2014. For good measure, the Application dated the June 18, 2014, was filed by and on behalf of M/s Gikera & Vадgama Advocates.
33. Without belaboring the point, it is trite , hackneyed and established principle of the law that both the litigants and by extension the Honourable court are bound by the Doctrine of Departure; such that none of the Parties can be allowed to canvass and/or ventilate an issue/claim, which has not been pleaded before the court.
34. Additionally, it is also common knowledge that a court of law operating in an adversarial legal system, like ours, cannot enter into the arena of dispute and purport to grant an order which has not been sought for or contained in the Pleadings filed by the concerned Parties.
35. Nevertheless, despite the established and hackneyed position of the law, the Learned magistrate ventured and proceeded on an a frolic of his own and chose to grant an order that was well outside the parameters of the Application that was before the court/ Magistrate.



36. To my mind, the Learned Magistrate committed a serious breach, infraction and violation of the established principle of the law by, inter-alia, granting an order which was neither prayed for nor contained in the body of the Application beforehand.

37. At this juncture and given the importance of Pleadings in our Jurisprudence; it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *IEBC versus Stephen Mutinda Mule & Others (2014)eKLR*, where the court stated and observed thus;

' As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.

Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice.'

38. Furthermore, the Court of Appeal ventured further and stated as hereunder;

' As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.'

39. Further and in addition, the significance of the Doctrine of Departure and essentially the legal position that Parties are bound by their pleadings; was revisited by the Court of Appeal in the case of *Dakianga Distributors Ltd versus Kenya Seed Company Ltd (2015)eKLR*, where the honorable court stated and held as hereunder;

' A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No 5) where the learned authors declare:-

'The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them.



It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.'

Sir Jack Jacob in an article entitled 'The Present Importance of Pleadings' published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu [1998] MWSC 3* states of the importance of pleadings:

'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice.'

In *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis [1986] UGCA 6* the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in *Jones v National Coal Board [1957] 2 QB 55* that:

'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.'

This Court in *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others (supra)* cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002* where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

'It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'

40. Based on the succinct exposition of the law, in terms of the ratio alluded to in the decisions (supra), I come to the conclusion that the impugned Ruling by the Learned Magistrate, which ventured and dealt with issues that were neither pleaded nor contained in the body of the Application dated the June 18, 2014, was irregular, illegal and thus a nullity.



Issue Number 2

Whether the orders granted at the foot of the impugned Ruling were Substantive and Precipitate and in any event; determined the entire suit albeit at an Interlocutory stage.

41. Prior to and before venturing to address the issue herein, it is appropriate to state and underscore that the 1st Respondent (who was the Plaintiff in the subordinate court) had filed the Plaint dated May 30, 2014; and in respect of which same sought the following Reliefs;
 - i. An order of Permanent Injunction restraining the Defendant [Gikera & Vadgama Advocates] from dealing in any manner whatsoever with the parcel of land known as IR No 10455/1/1, LR No 209/4300/16.
 - ii. An Order of Specific Performance compelling the Defendant to release the Transfer document of the suit property to the Plaintiffs herein, the Certificate of Title for the parcel of land known as LR No 10445/1/1 LR No 209/4300/161 and all the all other documents pertaining to the suit property that are in custody of the Defendant {Emphasis Ours.
 - iii. Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to order.
 - iv. Any other just and equitable relief as this Honourable Court may deem appropriate.
42. From the reliefs sought at the foot of the Plaint (details in terms of the preceding paragraph) it is apparent that one of the precipitate orders which was sought was the order relating to specific performance by compelling the Defendant, namely, M/s Gikera & Vadgama Advcates, to release the assorted conveyance documents to the Plaintiff.
43. First forward, the Learned magistrate at the foot of his Ruling dated February 10, 2015; has proceeded to and granted orders which replicate and resemble the very precipitate orders sought at the foot of the Plaint.
44. Furthermore, the impugned orders, which are clearly substantive and final in nature, have been granted on the basis of an Interlocutory Application.
45. Consequently, the question that does arise and which deserves to be canvassed and determined; relates to whether or not the Learned magistrate was within his mandate and Jurisdiction to grant substantive and final orders, albeit at an Interlocutory stage.
46. Instructively, there is no gainsaying that a court entertaining and engaging with an Interlocutory Application possess limited scope and Jurisdiction and cannot arrogate unto his/herself the mandate of the trial court. Clearly, the determination of substantive issues and granting of final orders is the Jurisdiction of the trial court, albeit after a plenary hearing.
47. Nevertheless, it is apparent that the Learned magistrate herein was not abreast or appraised of the obtaining Legal position and thus same proceeded to and indulged in granting substantive and final orders, resembling the ones in the Plaint, albeit at an Interlocutory stage.
48. To my mind and premised on the established position of the Law, the procedure adopted and applied by the Learned magistrate was clearly antithetical to the law on Interlocutory applications. In this respect, it is difficult to avoid the conclusion that the Learned magistrate either did not appreciate the scope and tenor of his Jurisdiction; or was otherwise reckless.



49. To buttress the scope and tenor of the Jurisdiction of a court while dealing with an Interlocutory Application, it is instructive and appropriate to restate and reiterate the holding of the Court of Appeal in the case of *Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) versus Sarah Nyiva Hillman & 3 others* [2018] eKLR, where the court held thus;

23. It was not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit evidence. As Lord Diplock warned in *American Cyanamid Co (No 1) vs Ethicon Ltd* [1975] UKHL 1 'it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.' This Court expressed a similar view in *Mbuthia vs Jimba Credit Finance Corporation & another* [1988] KLR 1 where it was held that 'the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions.'

50. In a nutshell, I come to the inescapable conclusion that the impugned Ruling again went beyond the established limits of what can be granted at an Interlocutory stage, where the Court is not permitted to grant Final Orders.

Issue Number 3

Whether the impugned Ruling and the resultant orders constituted a violation of the Right to Fair Hearing in terms of Article 50(1) and (2) of the *Constitution* 2010.

51. Other than the issues which have been canvassed and highlighted in the preceding paragraphs, there is also the issue that the Learned magistrate proceeded to and granted precipitate orders, which affected the rights and interests of the Appellant herein, namely, Mohamed Yunis Soroya, now deceased, as far as LR No 209/4300/161 was concerned.
52. To start with, the Learned Magistrate had found and held that the intended Defendant, now the Appellant, deceased, will be a crucial Party to the proceedings for purposes of enabling the Ends of Justice to be met. In this regard, the Learned Magistrate then ventured forward and decreed the joinder of the intended Defendant, now the Appellant.
53. However, despite finding and holding that the intended Defendant (now Appellant) was an important Party to the proceedings, the Learned magistrate by sidewind proceeded to and granted precipitate orders, which affected the rights of the named Party, even prior to the formalization of the joinder.
54. Additionally, it is important to recall that the substantive orders were also made long before the joined Party could be afforded an opportunity to file any pleadings and/or response pertaining to the claims which were beforehand.
55. Clearly, there is no gainsaying that even though the Learned magistrate had found that the Appellant, now deceased, had an Interests in the suit and the suit property, the Learned magistrate thereafter proceeded to condemn the Appellant, now deceased, in the absence of the opportunity to be heard.
56. In my humble view, having come to the conclusion that the Appellant was a necessary Party, whose presence would be critical in ensuring that the ends of Justice are met; same ought to have been granted the necessary latitude, facilities and opportunity to respond to the issues beforehand.



57. In this respect, I come to the conclusion that the rights and interests of the Appellant, now deceased; and in particular, the Right to Fair Hearing and Right to Fair Trial, as entrenched in Article 50(1) and (2) of the *Constitution*, were breached.
58. Notably, it behooved the Learned magistrate to also comply with and adhere with the dictates of the Rules of Natural justice. In this respect, it was incumbent upon the Learned magistrate to afford the Appellant the requisite facilities and opportunity to be heard.
59. As concerns the significance of the Right to be heard, it is important to adopt, restate and reiterate the elaborate enunciation of the law in the case of *The Speaker, Kisumu County Assembly & Others versus The Clerk Kisumu County Assembly & Others (2015)eKLR*, where the court of appeal stated thus;
1. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
1. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to 'notice and hearing.' That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in *Kanda v Government of Malaya*

'If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.'
60. Furthermore, it is immaterial that the Learned magistrate would still have arrived at the same conclusion after hearing (sic) the Appellant. Instructively, where a decision is arrived at in breach and violation of the Rules of Natural Justice, such a decision is rendered a nullity.
61. To buttress the foregoing exposition of the law, it is expedient to take cognizance of the holding in the case of *David Onyango Oloo versus Attorney General (1987)eKLR*, where the Court of Appeal considered a similar position and observed as hereunder;
- ' A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at: *De Souza v Tanga Town Council [1961] EA 377* at page 338, letter E-G.'
62. In a nutshell, I come to the inescapable conclusion that the impugned Ruling of the learned magistrate which is the subject of the instant appeal was clearly irrational, illegal and thus amounted to a nullity.



Conclusion And Disposition:

63. From the foregoing discourse and the consequential analysis; it is clear, evident and apparent that the impugned Ruling indeed contravened and violated the established principles of the law, inter-alia, the Rules of Natural Justice.
64. Furthermore, the Learned magistrate having found and held that the Appellant, now deceased, was a necessary Party, thereafter proceeded to and condemned the Appellant, albeit without affording same an opportunity to be heard. In this respect, there was a miscarriage of Justice.
65. Consequently and in the premises, I come to the conclusion that the Appeal beforehand is meritorious and hence same be and is hereby allowed.
66. In a nutshell, the impugned Ruling dated the February 10, 2015; be and is hereby Quashed, rescinded and set aside in its entirety
67. Furthermore and insofar as the Appeal has succeeded, it is imperative that the Appellants be awarded costs. Consequently and having taken into account the import and tenor of the holding of the Supreme Court in the case *Jasbir Singh Rai versus Tarlochan Singh Rai (2014) eKLR*; costs be and are hereby awarded to the Appellants.
68. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – Court Assistant

Ms Mesengeli h/b for Mr. Ongoya for the Appellants.

Mr. Sunday Oloo for the Respondents.

