



Third Engineering Bureau of China City Construction Group Company Limited v Ogada (Suing as the Legal Representative of the Estate of Deborah Owande Ogada - Deceased) & 2 others (Environment and Land Appeal 29 of 2021) [2023] KEELC 21979 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 29 OF 2021**

**GMA ONGONDO, J
NOVEMBER 29, 2023**

BETWEEN

THE THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTION GROUP COMPANY LIMITED APPELLANT

AND

JUDITH ANYANGO OGADA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DEBORAH OWANDE OGADA-DECEASED) 1ST RESPONDENT

SAM ONYANGO OGADA 2ND RESPONDENT

AGNES ATIENO OTIENO 3RD RESPONDENT

(Being an Appeal from the Ruling and orders of the Principal Magistrate Court in Oyugis, delivered by the Honourable B.O Omwansa (PM) on 17th August 2020)

JUDGMENT

1. The present appeal emanates from the ruling of Hon. B.O Omwansa (PM) delivered on 17th August 2020 where the learned trial magistrate reasoned that the 1st defendant/appellant/applicant’s notice of motion dated 20th July 2020 (The application herein) seeking to have the magistrate disqualify himself from the hearing and determination of the plaintiff’s suit generated by way of a plaint dated 28th May 2020 (Fast Track) filed on 4th June 2020, amended on 9th July 2020 and filed on 10th July 2020, was unmeritorious. Therefore, he dismissed the application.
2. The appellant through Omusolo Mungai and Company Advocates, lodged the appeal by way of a memorandum of appeal dated 19th August 2023 anchored upon the grounds, inter alia;



- a. The Honourable Magistrate erred in law and in fact in finding that the Appellant’s Motion was intended to achieve unknown and possibly nefarious motives, whilst failing to appreciate that such an application is a necessary evil, unpleasant as it may be, with the alternative thereof being to risk violating a cardinal guarantee of *the Constitution* being the sacrosanct right to a fair trial. On this finding alone, the Honourable Magistrate ought to have recused himself.
 - b. The Honourable Magistrate erred in law and in fact in finding that the Appellant’s motion was based on whims and caprices and unreasonable apprehension of suspicion. whilst failing to weigh the serious grounds raised therein against the test of there being a real like hood or probability of bias as held by a reasonable and right-minded person.
 - c. The Honourable Magistrate erred in fact in finding the only issue raised by the Appellant on the partiality of the court was in respect of the modus operandi of the strict timelines which favour the Plaintiff/Respondent.
3. So, the appellant has sought the following orders;
- a. That the appeal be allowed.
 - b. That the Ruling and orders of the Honourable Magistrate in Environment and Land Case Number 20 of 2020, be set aside and the matter herein be allocated to a different court for trial.
 - c. That costs of the Appeal be borne by the Respondents.
 - d. That alternatively, the court do make such order as it deems just to grant.
4. On the 12th June 2023, this court directed that the appeal be heard by way of written submissions.
5. Accordingly, by the submissions dated 13th September 2023, learned counsel for the appellant referred to the impugned ruling, the grounds of appeal and the WhatsApp conversation between the learned counsel for the appellant and the learned trial magistrate that confirmed that the application called for recusal of the learned magistrate from the suit. That by the said conversation, the trial magistrate confirmed that he would proceed virtually on 22nd June 2020 but proceeded in open court in the absence of the said counsel. That the trial magistrate was impartial as he did not uphold the sacrosanct right to a fair trial of the matter thus implored the court to order that the suit be heard and determined before a different judicial officer. To reinforce the submissions, counsel relied on, inter alia, the case of President of the Republic of South Africa and others-vs-South Africa Rugby Football Union and others 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) on recusal of judicial officers.
6. Ms Kiiru, learned counsel for the appellant applied to serve the respondents by substituted service on the grounds including that Mr Kimanga, learned counsel on record for the respondents is deceased. On 1st March 2023, this court allowed the application accordingly.
7. The 1st respondent through her authorized representative, Isaac Aluochier appointed by her affidavit sworn on 29th March 2023 under Section 22 of the Environment and Land Court, 2015 (2011), filed submissions dated 23rd July 2023. It was her submission that she did not participate in the proceedings which provoked the impugned ruling. That the contest was between the appellant and the learned trial magistrate. That however, no case has been made on the balance of probability that the magistrate was biased hence, his orders should not be set aside. Reliance was placed on Articles 50 (1), 22 (3) (c) and 75 (1) (a) of *the Constitution* of Kenya, 2010, to fortify the submissions.
8. The 2nd and 3rd did not file submissions herein.



9. In the amended plaint, the plaintiff/1st Respondent sued the 1st defendant/appellant alongside the 2nd and 3rd defendants/ Respondents for, inter alia;
 - a. A declaration that the suit parcels of land Kabondo/Kowidi/899, Kabondo/Kowidi 900 belongs to the deceased hence the purported borrow site lease agreement dated 30th October 2019 is illegal, null and void;
 - b. An order for restitution of the suit parcels of land to the same value it held before the illegal excavation.
10. By the application brought under Articles 25 (c), 48, 50 91 and 159 (2) (a) and (e) of *the Constitution* of Kenya, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the 1st defendant/appellant sought as follows;
 - a. That the Honourable B. Omwansa do disqualify himself from the hearing and determination of this suit.
 - b. That the Honourable Court be pleased to order that this suit be heard and determined by a different magistrate and/or the Chief Magistrate for purposes of appointing a different magistrate to proceed with the hearing and determination of the suit.
 - c. That the Honourable Court be pleased to issue such other orders or may be fair and just to secure the 1st defendant's rights to a fair and just trial.
 - d. That the costs of this Application be provided for.
11. The anchorage of the application was a supporting affidavit of 21 paragraphs sworn on even date by Daniel Kigada, the Administrator of the 1st defendant/appellant/applicant company and copies of an extract of the mobile chat conversation and a copy of the email correspondence by the plaintiff's advocates marked as "DK-1" and "DK-2" respectively annexed to the affidavit. Also, the application is based on grounds 1 to 9 set out on the face of it. Briefly, the applicant's complaint is that the learned trial magistrate on various occasions including conducted proceedings in the suit in such a manner, inter alia, unusual speed and subjected the applicant to extremely restricted timelines within which to file its pleadings as to lead a fair minded and informed observer to conclude that there is a real possibility that the Honourable trial magistrate may be biased against the applicant.
12. The plaintiff, 2nd and 3rd defendants in the suit did not respond to the application as disclosed in the trial court's proceedings of 13th August 2020.
13. In reaching the impugned ruling, the learned trial magistrate considered the application in entirety and that it was brought to his attention when the matter was slated for hearing where counsel for the applicant sought to have it heard first. That the only issue raised in the application was in respect of the impartiality of the court and in particular, the strict timelines set by the court which allegedly favoured the plaintiff in the suit. In his ruling delivered on 29th June 2020, the learned trial magistrate relied on the definition of the term "Recusal" in the Black's Law Dictionary 8th Edition and the case of Jasbir Singh Rai & 3 others-vs-Tarlochan Singh Rai & 4 others (2013) eKLR, among others.
14. The learned trial magistrate then remarked;

“.....and weighing the applicant's apprehension on bias against the test, which insists that the apprehension of bias must be a reasonable one, held, by a reasonable , fair minded



and informed persons, who apply themselves to the question and obtain the required information. I find it not near the threshold.....”

15. In the foregone, the issues for determination in this appeal are as contained in the grounds of appeal which crystalize to whether;
 - a. The learned trial magistrate was impartial at the trial and in arriving at the impugned ruling.
 - b. The appellant is deserving of the orders sought in the memorandum of appeal.
16. As the first appellate court in the instant matter, I am mandated to re-appraise the record of the trial court and draw inferences of fact; see *Selle & Another –vs-Associated Motor Boat Company Ltd & others* (1968) EA 123.
17. It is noted from the trial court’s proceedings of 8th June 2020, that Indimuli instructed by Kimanga learned counsel for the plaintiff and Bana instructed by Omusolo learned counsel for the 1st defendant/ applicant appeared before the learned trial magistrate who directed that the application dated 28th May 2020 duly filed on 4th June 2020 seeking a temporary injunction in respect of the suit parcels LR nos. Kabondo/Kowidi/899, 900 and 903, be responded to within one week from that date. That the parties to file and serve their respective submissions for interpartes hearing of the same on 22nd June 2020.
18. On 22nd June 2020, Bifoli instructed by Kimanga for the plaintiff/applicant informed the court that they had filed their submissions and prayed for a ruling date. Omusolo for the applicant was present in court. Ruling as regards the application dated 28th May 2020 was fixed for 29th June 2020.
19. Clearly, the learned trial magistrate delivered ruling on 29th June 2020 and ordered status quo to be maintained in regard to the suit parcels of land. Mention was fixed for 15th July 2020 while hearing of the main suit was set for 22nd July 2020 and 23rd July 2020.
20. On 15th July 2020, all the parties to the suit were represented in court. Kimanga learned counsel for the plaintiff requested for one week to respond to the amended plaint. Taking into account the new developments, the learned trial magistrate directed the parties to comply with the directions earlier given and that they file their responses within four days from that date. The matter was still set for hearing on 22nd July 2020.
21. The application was brought to the attention of the court on 22nd July 2020 when Mr Kimanga for the plaintiff/1st respondent, Ms. Ondeyo instructed by Kiiru learned counsel for the 1st defendant/ appellant and Bana instructed by Oguso learned counsel for the 2nd and 3rd defendants/respondents appeared before the court. Upon hearing counsel for the respective parties, the learned trial magistrate directed that the application be heard on 13th August 2020 at exactly 9.00 am before he could proceed for mobile court session at Kendu Bay.
22. On 13th August 2020, Mr. Napipo instructed by Mr. Kimanga for the plaintiff told the trial court that the application coming up for hearing on that date, had not been responded to. Counsel relied on the grounds of the same and the supporting affidavit thereto and urged the court to set a ruling date. Kiiru for the 1st defendant was present in court on that said date.
23. As such, the court fixed the application for ruling on 17th August 2020 and the same was delivered. Thus, it provoked this appeal as noted in paragraph 1 hereinabove.
24. A fair opportunity to be heard is a fundamental principle of justice; see *Halsbury’s Laws of England* 5th Edition 2010 at Volume 61 paragraph 639.



25. It is important to note that the unlimited right to fair trial is anchored on Article 25(c) of *the Constitution* of Kenya, 2010. Access to justice and fair hearing rights are enshrined in Articles 48 and 50 (1) of the same Constitution respectively.
26. Further, it is established law that the right to be heard before an adverse decision is made against a party is fundamental and permeates our entire justice system; James Kanyiita Nderitu and another -vs- Marios Philotas Ghikas and another (2016) eKLR.
27. In the present matter, the trial court’s proceedings as discerned in paragraphs 17 to 23 hereinabove, are in line with fair hearing as enshrined in Article 50 (1), Halsbury’s Laws of England and James Nderitu case (supra).
28. Furthermore, the learned trial magistrate acted within the dictates of Article 159 (2)(b) of *the Constitution* which provides;

“Justice shall not be delayed.”
29. In conclusion, the applicant’s allegations taken individually or collectively, cannot amount to creation of any reasonable apprehension in the applicant’s or any right thinking person’s mind that a fair and impartial trial might not be held before the learned trial magistrate. Therefore, the trial court’s ruling was in consonant with *the Constitution* and the law. It remains spotless at law.
30. A fortiori, this appeal commenced by way of a memorandum of appeal dated 19th August 2023 be and is hereby dismissed with costs to the 1st respondent.
31. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 29TH DAY OF NOVEMBER 2023.

G. M. A ONGONDO

JUDGE

Present

1. Kiiru, learned counsel for the appellant
2. Isaac Aluochier instructed by the 1st respondent
3. Luanga, court assistant

