



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ojwang & another v Owuora (Suing as a personal representative of the Estate of George Anyach Owuora) (Appeal 6 of 2021) [2022] KEELC 13849 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13849 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**APPEAL 6 OF 2021**  
**GMA ONGONDO, J**  
**OCTOBER 24, 2022**  
**(FORMERLY MIGORI ELC APPEAL NO 22 OF 2020)**

**BETWEEN**

**LAWRENCE OJWANG ..... 1<sup>ST</sup> APPELLANT**

**JOHN VINCENT OTEYO OLWAL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DUNCAN OTIENO ANYACH ..... RESPONDENT**

**SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE ANYACH OWUORA**

*(Being an appeal from the ruling of Honourable R.N.B Maloba-Principal Magistrate delivered on 9th July 2020 in Homa-Bay Chief Magistrate’s Court Environment and Land case No. 33 of 2018)*

**JUDGMENT**

1. The instant appeal arose from the trial court’s ruling rendered on July 9, 2020 where the learned trial magistrate held thus;

“I have perused an application dated June 24, 2020. I note that the issues raised will not change my view with regard to my ruling dated May 29, 2020; no new issue that could not have been in the knowledge of the applicant at the time the application to which it relates have been visited. I direct the aggrieved party to proceed on appeal of my ruling dated May 29, 2020 instead”.



2. In an application dated October 16, 2019, the 1<sup>st</sup> appellant sought to set aside the trial court's *ex parte* judgment delivered on August 17, 2019. However, by the trial court's ruling delivered on May 29, 2020, the same application was dismissed with costs to the respondent.
3. The appellants were aggrieved thereby. So, through Odhiambo Kanyangi and Company Advocates, they duly lodged this appeal by way of a memorandum of appeal dated July 27, 2020 founded on eight grounds which include;
  - a. The Trial Magistrate erred in law and fact, when after her rejection to hear the Application dated June 24, 2020, never determined whether she had dismissed the Application pursuant to Order 45 Rule 3(1) of the *Civil Procedure Rules, 2010* or otherwise.
  - b. The Trial Magistrate erred in law and fact when she failed to appreciate the spirit of the overriding objective and the inherent powers pursuant to Section 1A, 1B and 3A respectively of the *Civil Procedure Act, 2010*.  
  
In the alternative
  - c. The Trial Magistrate erred in law and fact when she failed to consider that through the Application dated June 24, 2020 there were sufficient reasons to have a review of the Ruling delivered on May 29, 2020 which inter alia included the demise to the Applicants' father who was one of the parties to the Suit.
4. In that regard, the appellants have sought that;
  - a. The Appeal be allowed with costs.
  - b. The Honourable Court to direct the Application dated June 24, 2020 be heard meritoriously before another magistrate, preferably in another region Court Station.  
  
In the alternative
  - c. The Honourable Court to exercise its Appellate powers pursuant to Section 78 of the *Civil Procedure Act, 2010*, to determine the Application dated June 24, 2020 accordingly. Any further order(s) the Honourable Court might deem fit to grant.
5. Initially, the appeal was lodged at Migori Environment and Land Court but was transferred to this court with effect from July 28, 2021 for hearing and determination. The court admitted the appeal on January 27, 2022 and directed that the same be heard by written submissions.
6. Accordingly, the 1<sup>st</sup> appellant represented by the firm of Odhiambo Kanyangi and Company Advocates, filed submissions dated 4, 2022 that the appeal is properly before this court and that the same be allowed as the appellants were not given an opportunity to submit on the application dated June 24, 2020 (The application herein) to facilitate an informed ruling. To buttress the submissions, he relied on Article 50 (1) of the *Constitution* of Kenya, 2010, the case of *Esther Wamaitiba Njibia and 2 others-vs-Safaricom Ltd* (2014) eKLR and *Shah-vs-Mbogo* (1967) KLR EALR, among others, cited therein.
7. The 2<sup>nd</sup> appellant represented by the firm of Abisai and Company Advocates, filed submissions dated March 29, 2022 on March 30, 2022. It was submitted that the 2<sup>nd</sup> appellant was denied the right to be heard regarding the application. That this court should allow the appeal with costs. To fortify the submissions, counsel cited the case of *Cosmos Ltd and another-vs-Kenya Revenue Authority* (2019) eKLR and Article 50 (*supra*).



8. By the submissions dated May 4, 2022 of even date, the firm of Nyambati and Company Advocates for the respondent stated the background of the suit commenced by way of a plaint dated April 10, 2018 before the trial court as well as the application and relied on section 80 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and Order 45 (2) of the *Civil Procedure Rules, 2010*. Further, counsel relied on authorities including *Serephen Nyasani Menge-vs-Rispha Onsase* (2018) eKLR, *Nicholas Kiptoo Korir Salat-vs-IEBC and 6 others* (2013) eKLR and *National Bank of Kenya Ltd-vs-Ndungu Njau* (1997) eKLR to have the application dismissed with costs.
9. On July 19, 2021, learned counsel for the respective parties orally highlighted their submissions pursuant to this court's directions given on May 9, 2022.
10. On that score, Mr Odhiambo Kanyangi, learned counsel for the 1<sup>st</sup> appellant submitted, inter alia, that the appellants were not accorded a fair hearing in respect of the application. Thus, he urged this court to invoke its powers under section 78 of the *Civil Procedure Act* Chapter 21 Laws of Kenya.
11. Mr R Abisai, learned counsel for the 2<sup>nd</sup> appellant orally submitted that he fully associated himself with the 1<sup>st</sup> appellant's submissions. He further submitted in part that the trial court did not accord the parties the right to be heard which is the cornerstone of justice and the rule of law.
12. Mr G Nyambati learned counsel for the respondent orally submitted, inter alia, that the appeal was not admitted with the leave of the court. That the subject of the appeal was not brought under Order 45 (*supra*) and that the authorities cited in the appellants' submissions are irrelevant. So, he urged the court to dismiss the appeal with costs to the respondent.
13. This court is conscious of its mandate in the instant appeal being the first one from the trial court; see the Court of Appeal decision in *Mwanasokoni-vs-Kenya Bus Services Ltd* (1982-88) 1KLR 278.
14. In the foregone, the issues for determination herein are as captured in the grounds of appeal which are compressed to whether;
  - a. The appellants were accorded a fair hearing in respect of the application and
  - b. Therefore, is the present appeal tenable?
  - c. Depending on the outcome on issues (a) and (b) hereinabove, what orders can this court render to meet the best ends of justice?
15. The application relates to review of the trial court's orders of May 29, 2020 as stated in paragraph 2 hereinabove as provided for under section 80 as well as Order 45 (*supra*). It must be appreciated that review is meant to correct an apparent error or omission on the part of the court, among others, as held in *National Bank of Kenya Ltd* case (*supra*).
16. A fair opportunity to heard in a fundamental principle of justice; see *Halsbury's Laws of England* 5<sup>th</sup> Edition 2010 Volume 61 paragraph 639.
17. In the case of *Kanwal Sarjit Singh Dbiman-vs-Kashavji Jivraji Shah* (2015) eKLR, the Court of Appeal held-
 

“...the courts exist for the purposes of dispensing justice and that the sword of justice cuts both ways. As a court, we have to balance the two divergent interests...”
18. The respondent asserted that the appellant can't apply for review and appeal from same decree or order. I take into account *Nicholas Salat and Njihia* cases (*supra*) regarding dispensation of justice.



19. In the case of *Butt-vs-Rent Restriction Tribunal* (1979) eKLR, the Court of Appeal remarked;
- “...the appellant has an undoubted right of appeal....”
20. Admittedly, to deny a litigant a hearing should be the last resort of a court; see Shah case (*supra*).
21. In the case of *James Kanyiita Nderitu and another-vs-Marios Philotas Gbikas and another* (2016) eKLR, the Court of Appeal held thus;
- “The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo-vs-Attorney General (1986-1989) EA 456).....”
22. More importantly, the right to fair trial is unlimited under Article 25 (c) of the *Constitution* of Kenya, 2010.
23. Plainly, the appellants had the right to be heard in respect of the application as stipulated under Article 50 (1) and Cosmos case (*supra*). Hearing of the same ought to have taken even the form stated under Order 51 Rule 16 of the *Civil Procedure Rules, 2010*.
24. The learned trial magistrate had a duty to hear the appellants regarding the application. Indeed, the application was not determined on it’s merits as the trial court did not hear the parties on the same. I am of the considered view that there was a violation of the right to be heard; see also *Re Hebtulla Properties Ltd* (1976-80) 1 KLR 1195 at 1209.
25. This court is guided by sections 1A, 1B, 3, 3A and 78 (1) (e) of the *Civil Procedure Act* Chapter 21 Laws of Kenya as read with section 3 of the *Environment and Land Court Act, 2015* (2011).
26. In the premises, I find the instant appeal tenable.
27. Wherefore, the final orders in this appeal are as follows;
- a. Orders a and b sought in the memorandum of appeal and as set out in paragraph 4 (a) and (b) hereinabove, are hereby granted accordingly.
  - b. The application dated June 24, 2020 be accorded a new trial on priority basis before another magistrate of competent jurisdiction at the Chief Magistrate’s court, Homa Bay.
  - c. This matter be placed before the Chief Magistrate, Homa Bay Law Courts for directions on December 8, 2022.
28. It is so ordered.

**DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 24<sup>TH</sup> DAY OF OCTOBER 2022**

**G M A ONGONDO**

**JUDGE**

**Present;**

- a) Mr.B Singei instructed by Abisai and Company Advocates, learned counsel for the 2<sup>nd</sup> appellant
- b) Ms Otieno instructed by Nyambati and Company and Advocates for the respondent
- c) 1<sup>st</sup> Appellant
- d) T. Luanga and Mutiva, court assistants.

