Kamundi v Mbare & another (Environment and Land Appeal E002 of 2022) [2022] KEELC 14677 (KLR) (9 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14677 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND APPEAL E002 OF 2022

CK YANO, J

NOVEMBER 9, 2022

BETWEEN

ALBANO NJOKA KAMUNDI ..... APPELLANT

AND

GEORGE MUNENE MBARE ..... 1ST RESPONDENT

EDWIN MURITHI KINYUA ..... 2ND RESPONDENT

(Being an appeal from the Judgement and decree of the Chief Magistrate (Hon.J.M Njoroge) in Chuka Chief Magistrate's Court ELC No. 51 of 2017 delivered on 28/01/2022)

JUDGMENT

Introduction

1. The appellant herein Albano Njoka Kamundi filed this appeal against the judgement and decree of Hon. J.M Njoroge Chief Magistrate, delivered on January 28, 2022 in Chuka ELC Case No. 51 of 2019 and set out the following 6 grounds of appeal:

    i. That the learned trial magistrate erred in law and fact by denying the appellant a chance to give evidence and locking out the evidence of the appellant.

    ii. That the learned trial magistrate erred in law and fact in disregarding the appellant's defense despite the appellant demonstrating that there was sufficient cause why he could not attend court on that day.

    iii. That the learned trial magistrate erred both in law and fact by denying the appellant his rights to a fair hearing.

    iv. That the learned trial magistrate erred in disregarding the appellant's defense and disregarding his statement of defense which raised triable issues.

v. That the learned trial magistrate erred both in law and fact for being bias (sic) in denying the Appellant a hearing hence denying his constitution (sic) right to access to justice as provided for in *the constitution*.

vi. That the findings of the learned trial magistrate court was against the weight of the evidence that had been filed by the defendant.

2. The appellant prayed to the honourable court for the orders that the appeal herein be allowed and the judgment of the trial magistrate be set aside with costs; that this honourable court be pleased to order a retrial in the interest of justice; and that the costs of this appeal be borne by the respondents.

Background of the Appeal

3. The gist of the case in a nutshell is that the respondents filed suit against the Appellant in the lower court. In their plaint, the Respondents pleaded that they were joint registered proprietors of those land parcels and/or plots known and described as LR Karingani/Mugirirwa/3573, 3575,3612 and 3925 (hereinafter referred as the suit properties situated in a place referred to as Kanguu village, Mugirirwa Sub-location, Mugwe Location within Tharaka Nithi county and which Registration thereof in the respondents are free from any encumbrances and/or claims from any 3rd party.

4. The respondents averred that as per the Original Registry Index Map (RIM)sheet No.12, Mugirirwa Registration Section, road of access leading to their Land parcels and/or plots above described is clearly defined and/or earmarked on the Registry Index Map.

5. The respondents further averred that the Appellant had illegally constructed and continues to construct illegal structures on the road of access leading to the respondents Land parcels and /or plots despite numerous protestations from the previous owners of the suit properties to desist from further blockage of the road of access leading to the respondents Land parcels and/or plots.

6. The respondents contended that the Appellant had further excavated a non-treatable sewerage system on the access road leading to the respondents and which leaks and emits poisonous effluents and harmful gases which predisposes the respondents' habitation on the plots at great health risks.

7. The respondents further contended that the illegal structures constructed by the Appellant and continues to be constructed on the road of access leading to the respondents Land parcels and/or plots have been constructed and continues to be constructed without the necessary approvals from the relevant bodies to wit, Tharaka-Nithi Health Inspectorate Offices, Kenya National Highway Authority (KENHA), and Tharaka Nithi County Government.

8. The respondents averred that as a consequence of the matters pleaded above, they have suffered loss and continues to suffer damages both general and special and holds the Appellant liable for the same.

9. The respondents have further particularized particulars of general damages, particulars of loss and illegalities against the appellant and claimed mesne profits.

10. The respondents prayed for judgement against the Appellant for an order directing the Appellant to remove all the illegal structures standing and/or erected on the road of acess leading to LR Karingani/ Mugirirwa/3573, 3575,3612 and 3925 and the Appellant to be ordered to compensate the respondents for loss and damages arising from his acts of commission and/ or omission and costs of the suit.

11. The Appellant filed a defence dated October 28, 2019 in which he denied the Respondents' claim and averred that the only properties he had developed were plot numbers 22 and 26, Kirege market, which

were allotted to him by the defunct Municipal Council of Chuka on October 27, 1997 and which he had been paying rates and rent to the County Government of Tharaka Nithi.

12. The Appellant averred that he bought the said plots from the original owner of Land Parcel Karingani/mugirirwa/281 and which was the only property adjacent to the plots and had an access road. He averred that commercial plot numbers 25 and 26 were among a series of commercial plots along the same line that had been allocated to him and other members of the public.

13. The Appellant averred that he had in occupation of plot numbers 25 and 26 since the year 1997 to date without any dispute with the original owner of land parcel number Karingani/Mugirirwa/281 and that the problems arose as a result of subdivision of land parcel Number Karingani/Ndagani/281.

14. The Appellant averred that the developments on Plot Numbers 25 and 26 were done with approval by the liason committee which was comprised of officials from the relevant government offices.

15. The Appellant further pleaded that there was a similar case Chuka CMCC E& L suit No. 142 of 2017 (formerly Chuka ELC No. 17 of 2017) in which the Plaintiff therein claim to own the properties adjacent to the Appellant's plots and which was pending in court. He sought for the dismissal of the Respondents suit with costs.

16. The case was fixed for hearing on September 3, 2021 when the 2nd respondent testified and was cross-examined by Mr. Muthomi learned counsel for the Appellant and re-examined by Mr. Kirimi learned counsel for the respondents. At that juncture, the Respondents closed their case.

17. The record indicates that the matter was fixed for defence hearing on September 22, 2021 when the Appellant failed to attend court on account of being indisposed. Pursuant to an application for adjournment made by the advocate for the Appellant, the trial court noted that no medical documents from the Appellant had been shown to the court, but the court granted a last adjournment for the appellant, and fixed the matter for defence hearing on October 6, 2021.

18. When the matter came up for defence hearing on 6th October, 2021, the record shows that the Appellant was absent and his advocate informed the court that he had not been able to contact him as his phone was off.

19. In a ruling delivered on 8th October, 2021, the trial court noted that the Appellant had switched off his phone without any explanation and that there were no medical records produced in court. The trial court concluded that the Appellant was not interested in pursuing or defending the claim and proceeded to close the Appellant's case.

20. The trial court then proceeded to write a judgment delivered on 28th January, 2022 in favour of the Respondents as follows:

    a. An order directing the Defendant to remove all illegal obstructions standing and / or erected on the road access leading to the 1st and 2nd Plaintiffs LR. Karingani/Mugirirwa/3573, 3575,3612 and 3925,

    b. The Defendant to pay Kshs 200,000/= as damage for loss arising from his acts of commission and/or omission.

    c. That in default of order (A) above the defendant to be evicted forthwith.

    d. The plaintiffs shall have The costs of the suit and interest at court rates.

21. The appeal was canvassed by way of written submissions. The appellant filed his submission on the 12th of September 20022 while as the respondents filed theirs on October 11, 2022.

The Appellant's Submissions

22. The Appellant submitted that this being a first appeal, this court is enjoined to re-evaluate the evidence available before the subordinate court and draw its own conclusions. The Appellant's counsel relied on the case of *Abok James t/a Odera & Associates –v- John Patrick Machaira t/a Machira & Co. Advocates* [2013] eKLR.

23. The appellant's advocates identified three issues for determination which were:

    a. Whether the learned magistrate was biased and denied the Appellant a hearing leading to violations of his Constitutional rights to a fair hearing and access to justice as provided for in *the Constitution*?

    b. Whether the learned magistrate erred in disregarding the appellant's defense which raised triable issues despite the appellant demonstrating that there was sufficient cause why he could not attend Court on that day?.

    c. Whether the findings of the learned trial Magistrate Court were against the weight of the evidence that had been filed by the Appellant

24. The Appellant's submitted that when the lower court case was coming for hearing on September 3, 2021, he was indisposed and his counsel attended Court and communicated to the court to that effect. That the learned magistrate proceeded with *exparte* hearing whereof the 2nd Respondent testified on behalf of the respondents and the court proceeded to deliver judgment without closing the appellant's case or giving directions on submission.

25. The Appellant submitted that the Judgment delivered by the learned magistrate on January 8, 2022 was an *exparte* Judgment and not a judgment on merit .

26. The Appellant cited the case of HCCC Civil Suit No.101 of2011 *Wachira Karani-versus-Bildad Wachira* [2016]eKLR which made reference to the judgment in a High Court of Uganda case, *Tansafrica Assurance Co. Ltd vs Lincoln Mujuni* and *Patrl vs East Africa Cargo Handling Services*.

27. The Appellant submitted *inter alia* that he was denied a hearing by the learned trial magistrate despite having on record a strong defence in contravention of his Constitutional rights to a hearing as enshrined in Article 50 of *the constitution*. That the learned magistrate acted with bias by proceeding to deliver judgment without hearing all parties and his action of of locking out the Appellant from the wheels of justice amounted to a miscarriage of Justice

28. The appellant cited the same case of *Wachira Karani-versus-Bildad Wachira* (supra) where the Court stated *inter alia*:

> " The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

29. In the same case, the court stated:

> " 'The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[23] The inherent power, as observed by the Supreme Court of India in *Raj Bahadur Ras Raja vs Seth Hiralal*

[24]"has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Lord Cairns in *Roger Vs Comptoir D' Escompts De Paris* stated as follows:-

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

30. The appellant averred that he was indisposed on the hearing date and the proceedings confirm that his advocate then on record communicated to the court about his predicament while requesting for adjournment. The Appellant therefore submitted that he had sufficient cause for failing to attend court on the hearing date.

31. The appellant further submitted that indeed the court proceedings indicate that the matter was mentioned severally and in the end judgment was delivered without closing the appellant's case.

32. The Appellant submitted that the learned trial magistrate erred in denying him a hearing in his defence in violation of his rights under article 50 of *the constitution*. The Appellant contends that he had evidence on record of paying land rates and land rent to the county government of tharaka nithi to date. That he stated in his defence that he bought the two plots from the original owner of land parcel number Karingani/Mugirirwa/281 which was the only property adjacent to these plots and had an access road. The appellant urged the honourable court to allow this appeal on that ground.

33. The appellant submitted *inter alia*, that the trial court erred in disregarding a defence on record dated October 28, 2019 raising triable issues, and stated that the trial magistrate erroneously based his judgment on unapproved , undated and unsigned sketch map crafted by the Respondents.

34. It was the appellant's submission that the respondents failed to prove their case against the appellant to the required standards and invited the court to critically peruse through unapproved , undated and unsigned sketch map on page 40 of the record of appeal that was produced in evidence by the Respondents and compare it with the approved part development plan dated July 8, 1999 on the appellant's defence and that confirm that the Appellant had a very strong defence on record raising triable issues.

35. The Appellant relied on the case of Kisumu Civil Appeal No. 149 of 2009 *Peter Lolwe Ombee versus DDalmas Okatch Randa* which made reference to the case of *Haji Ahmed Sheikh t/a Haja Hauliers -vs- Highway Carriers* [1982-88] 1 KAR 1196 and *Shah vs Mbogo & Another* [1967] EA 116.

36. The Appellant submitted that the burden of proof in civil matters lies with the party who alleges the existence of a matter in accordance with the provisions of Section 107 of *Evidence Act*, and also referred to Section 108 that defined the burden of proof in civil matters as on a balance of probabilities. The appellant further contends that the respondents had the burden of proving the allegation they presented to court and that it is clear from the evidence presented before the subordinate court by the Respondents that the respondents failed to proof allegations that the appellant's plots had denied them access to their land parcels and that the appellant had developed on their land/access road to warrant the eviction orders issued by the learned magistrate.

37. The appellant further submitted that there was further evidence that he had complied with all the requirements for allocation of the two plots which were approved for allocation by 19 government agencies and that it was evident from the Appellant's defence that on the plots allocated there exists a

petrol station and a church which were confirmed by the 2nd Respondent when tendering his evidence in court. That the allocations of the plots by the municipal council, now county government, could not be illegal as found by the trial magistrate.

38. The Appellant submitted that the allegations that the Respondents had no access road through his plots was totally misplaced. The Appellant's contention was that there was no road reserve on the location of his plots. That it was clear from evidence that the Appellant had purchased the plots from the original owner of Land parcel Number of Karingani/Mugirirwa/281 who subsequently subdivided the same and sold to other people who later sold to the Respondents .

39. The Appellant further submitted that the respondents in the evidence tendered in court admitted the existence of the Appellant's plot numbers 25 and 26 including the church on the ground. That from the approved development plan referred to on cross examination, the respondents have an access road to Meru Embu running through the original Land parcels Numbers Karingani/Mugirirwa/281 , 533 and 425.

40. The Appellant contends that the learned magistrate appeared to give a lot of emphasis on Sections 25 and 26 of the *Land Registration Act* on indeafisibility of title in reference to the respondents' titles which the appellant was not challenging and proceeded to erroneously conclude that the appellant was allocated a road reserve. The Appellant submitted that Sections 25 and 26 of *Land Registration Act* was applicable to both the Respondents and the Appellant in as far as protection of title is concerned and the bias application of the sections exhibited by the magistrate in favour of the Respondents who had acquired leases as against the Appellant who was equally allocated his plots was a clear misapprehension of the facts and the law by the trial magistrate who instead was enjoined in law to protect the Appellant under section 25 and 26 of the *Registration of Titles Act* .

41. The Appellant submitted that the decision of the trial magistrate in issuing eviction orders was unconstitutional and it amounted to deprivation of property contrary to Article 40 of *the constitution* and an infringement to the appellant's rights .

42. The appellant contends that the learned Magistrate's finding that the Appellant's subject plots were on a road reserve remained his own opinion as no such evidence produced by the Respondents to that effect.

43. The Appellant further contends that contrary to the magistrate's finding, the appellant's defence together with the documentary evidence confirmed that the appellant's plots were not located on a road reserve or access road and that there was an access road to the Respondent's parcels away from the appellant's plots.

44. The appellant submitted that the Respondents failed to prove their case on a balance of probabilities and that the trial court erred in denying the Appellant a right to defend himself.

45. The appellant urged the court to allow this appeal with costs to the Appellant.

Respondents' Submissions

46. The respondents submitted that the matter before the lower court was brought under a certificate of urgency and certified as such in the year 2019 and had been pending in the court corridors and that the inordinate delay in concluding the matter had substantially been occasioned by the part of the appellant.

47. The respondents further contended that the appellant had been employing a legion unorthodox tactics in his scheme and tactic to either frustrate, obstruct and/or block the matter from being concluded and

determined and such schemes include evident circumstances and occasions where the appellant had at every opportunity been taking the court process through an endless circus by for example changing representation. That the appellant had so far either removed and/or changed advocates countless times and the record would bear them out on this issue and the most recent such act is when he changed his advocates immediately after filing of this appeal.

48. The respondent contends that at other instances the appellant would pretend to want to appear personally only to change tune and bring in counsel to act for him and this mess has had its frustrating effect on the trial process and that this is a litigant who has demonstrated a high affinity at abusing the court process because he has never wanted the matter concluded in the knowledge that he was on the wrong and had no chances of success.

49. Regarding the issue whether the learned magistrate was biased and denied the Appellant a hearing leading to violation of his Constitutional rights to a fair hearing and access to justice as provided for in *the constitution*, the Respondents submitted that contrary the appellant's contention that he was indisposed on the day the case in the lower court was coming up for hearing on September 3, 2021, the fact is that that was another ploy employed by the Appellant to frustrate the hearing and conclusion of the matter and that it is not true that his counsel then, one Mr. Muthomi Gitari, advocate attended court and communicated to the court to that effect. According to the respondents, the true position is that the said counsel then appearing for the Appellant was in court ready for the hearing and had difficult in even raising the whereabouts of the Appellant who had not even notified the advocate about his imminent absence from court and that the counsel had to look for the appellant without success while the court patiently waited in vain and subsequently the advocate came back to court and communicated to court to the effect that he could not trace the appellant with an indication that the appellant had not communicated to him.

50. The respondents contend that the medical documents introduced in the appeal under a Supplementary Record of Appeal are an afterthought authored for the purpose of either proving the reason of no attendance or justifying the same. The respondents submitted that the medical document under the Index in the supplementary record of appeal cannot be authenticated/verified as they are neither certified, are not for the date in question and are not accompanied and/or supported by any legal receipts and/or registrations as is the norm and that it is most probable that these suspect treatment/medical documents were authored for this case and in a conspiracy to defeat ends of justice.

51. The respondents further contend that they oppose consideration of those documents which the respondents and the trial court have not had an opportunity to probe and that there is nothing to prove with certainty that the appellant was indisposed in a manner even not to be able to contact his counsel. The respondents pointed out that it is also instructive that the appellant's phone was off at all material time and his counsel could not reach him. That the phone was deliberately put off by the appellant so that he could not be reached. The respondents argue that the appellant must not be allowed to benefit from this conspiracy, adding that the reasons given by the appellant for not attending court are neither plausible nor sound.

52. The respondents submitted therefore, that it cannot be said that the court proceeded with exparte hearing and delivered an exparte judgment. That there is nothing in this matter to make the proceedings in the lower court exparte proceedings as is known. The Respondents submitted that to grant the orders sought, the court must be satisfied of one of two things, namely, either that the Appellant was not properly served with summons or that the Appellant failed to appear in court at the hearing due to sufficient cause.

53. The Respondents relied on the case of *Philip Ongom, Capt vs. Catherine Nyero Owota* Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003)).

54. The respondents submitted that in this case the Appellant willfully and deliberately declined and/or neglected to attend court.

55. The respondents cited the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006 where the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

> " It is difficult to attempt to define the meaning of the words "sufficient cause." It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant."

56. The respondents contend that it is imperative in this matter the Court determines what constitutes an ex parte hearing and an ex parte judgment. The respondents submitted that the trial in the lower court cannot in any manner fall within the parameters of matters deemed conducted in an exparte manner and that the judgment was not exparte.

57. The respondents submitted that in a glaring omission, which omission in their opinion the respondents consider to be deliberate, the Appellant had omitted to acknowledge that most of the issues in the appeal herein were handled through his Application dated October 27, 2021 and filed in this honorable court on November 3, 2021 *vide* Misc. Civil Application No. E021 of 2021.

58. The respondents averred that this Honorable Court heard that application that was seeking to stop the proceedings and delivery of the determination of the dispute in Chuka C.M. C ELC case No. 51 of 2019 and that Application by the appellant was dismissed by the court and that the court having heard all the parties on issues touching on the matter and allowed the lower court matter now being appealed to proceed to final conclusion.

59. The respondents stated that it is instructive that, that application by the Appellant herein was found to be without merit and consequently dismissed with costs and that the hearing and determination of that application settled virtually all the issues being canvassed in this appeal. The respondents further submitted that this appeal amounts to inviting the court that has previously rendered itself on the same issues in the matter in Chuka C.M.C elc Case No. 51 of 2019 to vacate its findings under *vide* Misc. Civil Application No. E021 of 2021 that touched on the matters of the proceedings in Chuka C.M.C ELC Case No. 51 of 2019 which is the subject of this appeal.

60. The respondents further submitted that the issue of the omission of critical materials, from the Record of Appeal negates the credibility of the appeal as the same deprives the court of the capacity to render well and fully informed findings and decision, and that this appeal ought to fall on its own sword for want in the Record of Appeal by the fact of either omission or concealment of material relevant and essential for the determination of the appeal.

61. The respondents relied on the decision of the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR

62. The respondents have also quoted the Supreme Court of Kenya, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR which held as follows at paragraph 41:

> "Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."

63. The respondents contend besides merely raising the issue of bias by the trial Magistrate, which is unfounded, nothing has been tendered in evidence to show that the trial court either conducted itself or handled the trial in a biased manner and that the Appellant has not shown any interest the trial magistrate may have had in the matter or inclination to occasion bias and it is wrong for a party to so casually accuse and fault a judicial officer arbitrating in an adversarial process of being biased when they render a decision for the purpose of expeditious conclusion of a matter. That in view of the foregoing, the appeal hereof is a non-starter, incompetent, frivolous, vexatious and, therefore, null and void ab initio.

64. The respondents contend in their submission that the appellant did not tender any credible and cogent defence raising any triable issues worthy of the court's favorable consideration and that the trial court cannot be faulted and accused of disregarding the appellant's defense which allegedly raised triable issues when the appellant had not demonstrated that there was sufficient cause why he could not attend court on that day. That the explanation given by the appellant for failure to attend court during trial has been contested as hollow. The respondent submitted that the appellant was not indisposed on the date of trial which he and his counsel were well aware of and that both him and the Advocate had all notices at all material times but elected to await conclusion of the matter and revert to other counter-actions for their own convenience and reasons in sheer circumvention and abuse of the court process. The respondent stated that the "medical" documents are not supported and are unverified.

65. The respondents submitted that there is nothing to justify the Appellant's contention that the trial Court disregarded the defence on record dated 28th October, 2019 and that the only holding was that the defence was found hollow and unsustainable.

66. The respondents submitted that the Government of Tharaka Nithi or its predecessor had no title over the land illegally occupied by the appellant on which he has erected the illegal structures blocking access to the Respondents' parcels of land adding that the same is under the realm and authority of Kenya National Highways Authorty. That not even the purported approvals for the appellant's constructions can sanitize the illegalities thereof. The respondents submitted that *the constitution*, too, has nothing to protect because it does not entertain nor protect illegalities.

67. The respondents submitted that *the Constitution* of Kenya empowers persons to seek redress when their right to a healthy and clean environment has been violated or infringed and the courts are empowered to issue orders that prevent, stop or discontinue acts harmful to the environment and provide compensation to a wronged party.

68. The respondent further submitted that contrary to the assertion by the appellant in his submissions that the approved development plan confirms that there is an access road running through the original land parcels, that curiously the appellant has further omitted from the Record of Appeal documents filed in the lower court by the respondents such as a letter constituting a report dated July 28, 2017 ref: CHKA/HC/ELC. No. 17/17 to The Deputy Registrar Chuka High Court from Johnson Ojwang,

chief executive officer, Chuka Law Courts on the issue of the access road blocked by the Appellant's structures.

69. The respondents submitted that there was enough material provided by the respondents in evidence to prove their case against the Appellant most of which the appellant has deliberately omitted to include in the record of appeal. That the Respondents have dutifully discharged their statutory duty and have satisfactorily proved their allegations and claims against the appellant.

70. The respondents submitted that at no time did the they admit to the lawful existence of the Appellant's plot numbers 25 and 26. The respondents maintain their contention that if such plots do exist the same are illegal and ought to be extinguished. That no lawful allotment can be granted by the County/ Local authority on a road reserve on KeNHA land without the authority of KeNHA.

71. The respondents submitted inter alia that it is misleading of the Appellant to allude that the decision of the trial magistrate in issuing eviction order was unconstitutional and that it amounted to deprivation of property contrary to Article 40 of *the Constitution*, and an infringement to the Appellant's rights, adding that there is no property in a title whose source is illegal, and so to the structures thereon.

72. The respondents submitted that the appellant was never denied the right to defend himself but instead it was the appellant who elected to play games with the court and to frustrate the trial. That the appellant chose and made his bed and must settle and sleep on it.

73. The respondent submitted that in all manifestations, and in view of the afore-going the appeal is deprived of and devoid of any merit. That it is an exercise by a frivolous and vexatious litigant keen on ensuring that the matter is not conclusively determined and ensure that the respondents do not get their relief and lawfully enjoy the fruits of their labor. They prayed that the appeal be dismissed with costs to the respondents.

Analysis and Determination

74. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the courts' duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. There are only three issues I find call for my determination; -

    i. Whether the learned magistrate was biased and denied the Appellant a hearing despite the appellant demonstrating that there was sufficient cause why he could not attend court during the hearing leading to violation of his Constitutional rights to a fair hearing and access to justice as provided for in *the constitution*.

    ii. Whether the learned magistrate erred in disregarding the appellant's defense which raised triable issues.

    iii. Whether the findings of the learned trial Magistrate Court were against the weight of the evidence that had been filed by the parties.

Whether the learned magistrate was biased and denied the Appellant a hearing despite the appellant demonstrating that there was sufficient cause why he could not attend court during the

hearing leading to violation of his Constitutional rights to a fair hearing and access to justice as provided for in *the constitution*

75. The *Oxford English Dictionary* defines bias "as an inclination or prejudice for or against one thing or person" while *Black's Law Dictionary* defines the word bias as follows:

> " Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."

76. From the above definition, it is clear that the issue of bias negates the twin virtues of impartiality and independence of the Court hearing and determining a matter. These two principles are the hallmark of a fair trial as espoused in Article 50 of *the Constitution*.

77. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the *Universal declaration of Human rights* (UDHR), and Article 6 of the *International Convention on Civil and Political Rights* (ICCPR) among other International conventions, which this country has ratified. Article 25(c) of *the Constitution, 2010* elevates it to an inderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one's case heard by an independent, impartial and unbiased arbiter or judge. The facet of fair trial we are dealing with here is that of bias or perceived bias on the part of the magistrate or the court.

78. Bias, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice. In the words of Lord Goff in the case of *R vs Gough*, [1993] 2 All CR 724:

> " Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking 'the judge was biased'.

79. In *Metropolitan Properties Co., Ltd v Lannon* (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694 it was observed that:-

> " Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias"

80. In the Australian case of *Webb v The Queen* (1994) 181 C L R 41 Mason CJ and McHigh J held:

> " In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done..."

81. The rule against bias is an important element of the right to a fair trial. This rule is to be very strictly applied, so that even the appearance of bias is done away with. This is because it aids in

public confidence in the fairness and impartiality of the judicial system. In view of the jurisprudential importance and uniqueness of this application I find it necessary to say slightly more on perception or appearance of bias. As the court stated in the English case of *R v Sussex Justices ExP. Mc Carthy* [1924] 1 KB 256:

> " "Justice should not only be done but should manifestly and undoubtedly be seen to be done."

82. The import of the rule against bias, as well as its strict application, is that there need not be actual bias on the part of the magistrate for apprehended bias to be found. It is enough that the adjudicator might not appear to be impartial. In determining whether or not there has been bias, the test to be applied is whether a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias.

83. Article 50(1) of *the Constitution* provides that: 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.

84. The right to fair trial is now among four other rights that enjoy an eminent special place in the current Constitution as an inderogable right. This is the more reason why the Court must ensure that the said right is jealously guarded.

85. Article 50 (1) of *the Constitution* imposes a two fold obligation in the dispute resolution process. These are independence and impartiality on the part of the adjudicator, and fairness in the resolution procedures. Thus allegations of bias on the part of a magistrate presiding over a matter is a serious allegation which if proved amounts to breach of a constitutional right that vitiates the dispute resolution process.

86. 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."

87. The court went on to say:

> " ... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.

Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pretrial or in the course of trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The *Civil Procedure Act* and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all

these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time disposition ..."

88. The court has perused the court record and it is clear that by consent of the parties, the case was fixed for hearing on September 3, 2021.The learned magistrate proceeded with the hearing whereof the 2nd Respondent testified on behalf of the Respondents and was cross-examined by Mr.Muthomi learned counsel for the Appellant. The Respondents' case was then closed and the learned magistrate, again with the consent of the parties, fixed the matter for defence hearing on September 22, 2021. However, on that date, the matter did not proceed, and again by consent of the parties, the matter was fixed for hearing on September 29, 2021.

89. The record indicates that on September 29, 2021, the Defendant was not present and his advocate applied for an adjournment. However, counsel for the Respondents opposed the application and pointed out that the Appellant has had the behavior of evading the matter and that there were no medical documents shown by the Appellant. The trial court noted that indeed there were no medical documents forwarded by the appellant to show his position. Nonetheless, the learned magistrate granted the appellant a last adjournment and fixed the matter for defence hearing on October 6, 2021.

90. The record further shows that on October 6, 2021, the advocate for the appellant was present in court, but the appellant himself was absent. Mr. Muthomi informed the court that he had not been able to contact the appellant because his phone was off, and added that he believed the appellant was still sick. The application for adjournment was opposed by Mr. Kirimi learned counsel for the Respondents. The trial court reserved its ruling for October 8, 2021.

91. In his ruling delivered on October 8, 2021, the learned trial magistrate noted that from the record, when the matter came up for hearing on September 29, 2021, the Appellant was absent and was granted a last adjournment and that the Appellant again did not appear in court on October 6, 2021. The trial magistrate concluded that there was no proper reason given by the appellant's counsel as he stated that he was not aware of the appellant's whereabouts and that the Appellant had switched off his phone without any explanation. Further that there were no medical records produced in court. The learned magistrate concluded that that clearly showed that the Appellant was not interested in pursuing or defending the claim. The court further noted that it was proceeding on transfer and therefore was constrained to clear part-heard matters. As a result, the Appellant's case was closed.

92. In this case, the appellant has alleged bias on the part of the trial magistrate. However, having looked at the record as outlined above, in my opinion the allegation of bias has not been sufficiently substantiated. The Appellant has not shown any interest that the trial magistrate may have had in the matter or inclination to occasion bias. In my view, it is wrong for a party to accuse and fault a court arbitrating in an adversarial process of being biased when it exercised its discretion against him/her. In this case, it is clear that the trial court gave the Appellant humble time to present his case, but the Appellant deliberately chose not to attend court. Considering that the trial court was on transfer, the decision rendered for the purpose of expeditious disposal of the matter was reasonable in the circumstance. Moreover, the Appellant was not able to explain his absence satisfactorily as even his own advocate did not know his whereabouts. From the material on record, I am satisfied that the trial magistrate indulged the Appellant several times. The medical reports presented in this appeal by way of supplementary record seems to be an afterthought meant to mislead this court. That explains why those documents were not shown to the trial court and did not form part of the original record of appeal. I am therefore of the opinion that the trial before the learned magistrate was a fair hearing and no bias has been proved. That ground therefore is rejected.

Whether the learned magistrate erred in disregarding the appellant's defense which raised triable issues and whether the decision was against the weight of evidence tendered.

93. In this case, the Appellant did not offer any evidence during the hearing even though he was granted the opportunity to do so. The trial magistrate based his judgment on evidence adduced before him by the Respondents. As an appellate court, this court has jurisdiction to review the evidence of the trial court to determine whether the conclusion reached on the evidence should stand or not. This jurisdiction, however, should be exercised sparingly and with caution since this court did not have the advantage of seeing the witnesses at the trial court.

94. In this case, the Appellant filed a defence but failed to turn up for hearing of the case. The evidence that was tendered by the Respondents in support of their claim against the Appellant was not controverted.

95. I have also perused the impugned judgment. From the reading of the judgment, I find that the trial magistrate analyzed both the Respondents' and the Appellant's pleadings, and considered the evidence available to him. Although the Appellant had filed his defence, it is trite that pleadings in a suit are not normally evidence, and no decision could be grounded on them.

96. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holdings of the learned magistrate were well founded and I find no basis to interfere with the same.

97. In the result, I find no merit in the Appellant's appeal and the same is dismissed. The Appellant to pay costs to the respondents.

98. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF NOVEMBER, 2022. IN THE PRESENCE OF:

CA: Martha

Kirimi for Respondents

N/A for Appellant

C. K. YANO,

JUDGE.