



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC APPEAL NO. 20 OF 2019**

**FREDRICK MARITIM.....1<sup>ST</sup> APPELLANT**

**MARGARET JEROTICH.....2<sup>ND</sup> APPELLANT**

**JOHN MARITIM.....3<sup>RD</sup> APPELLANT**

**NANCY CHEPKORIR MARITIM.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**EKEGORO PROPERTY MANAGEMENT LIMITED.....1<sup>ST</sup> RESPONDENT**

**PETER KUNYANJUI KIBE.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. The instant appeal is against the judgment of the Hon. J. B. Kalo Chief Magistrate in Nakuru CMC ELC No.1183 of 2017 delivered on 27<sup>th</sup> August 2019 in favour of the plaintiffs, the respondents in the present appeal. The learned trial magistrate granted the plaintiff's a permanent injunction against the defendants (now appellants) restraining them from encroaching onto or trespassing onto the respondents property known as Njoro/Ngata Block 2/4816 and 4817. The respondents were also awarded the costs of the suit. Their claim for general damages was not awarded.

2. The appellants being dissatisfied with the judgment have appealed to this court and have vide the memorandum of Appeal dated 16<sup>th</sup> September 2019 set out 4 grounds of appeal as hereunder:-

*1. That the learned trial magistrate erred in law and fact by refusing to grant the Appellants an adjournment when their lawyers failed to turn up in court.*

*2. That the learned trial magistrate erred in law and fact by making a determination without the appellants having been given an opportunity to adduce their evidence.*

*3. That the learned trial magistrate erred in law and fact by granting orders to the respondents when there was no sufficient evidence that the respondents legally acquired the suit properties.*

*4. That the learned trial magistrate failed to appreciate the extent of the loss the Appellants will undergo if they are condemned unheard.*

3. The appellant have prayed for orders that: -

*(a) That the judgment delivered on 27<sup>th</sup> August 2019 be set aside.*

*(b) That the suit in the lower court be fixed for hearing on priority basis before another court of competent jurisdiction.*

4. Before the lower court the respondent initiated the suit against appellants by way of plaint claiming they were the registered owners of land parcel known as Njoro/Ngata2/4816 and 4817 which they alleged the appellants had unlawfully and without any colour of right encroached thereinto and interfered with their quiet possession and use. The respondents sought judgment against the appellants for: -

(a) An order of permanent injunction restraining the defendants, their agents, employees, workers and or representatives jointly and severally from encroaching onto or trespassing into the plaintiffs' property known as Njoro/Ngata Block2/4816 an Njoro/Ngata Block2/4817.

(b) General damages

(c) costs of the suit.

(c) Interest on (b) and (c) at courts rate(s) and/or commercial rate(s)

5. The appellants who were the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants respectively filed a joint statement of defence dated 6<sup>th</sup> February 2018 where they made a general denial of the contents of the plaint and further averred that the suit was defective in law and was instituted in abuse of the court process.

6. The record of the lower court shows that the suit proceeded for hearing before the learned magistrate on 30<sup>th</sup> April 2019 after the appellant's request for adjournment, owing to the absence of their advocate was declined by the court. The suit had previously been fixed for hearing on 4<sup>th</sup> March 2019, 25<sup>th</sup> March 2019, 2<sup>nd</sup> April 2019. On 2<sup>nd</sup> April 2019 the matter was adjourned by consent of the parties and refixed for hearing on 30<sup>th</sup> April 2019. On the 25<sup>th</sup> March 2019 the defendants sought and were granted what was indicated as the last adjournment. On 30<sup>th</sup> April 2019 the defendants advocate was absent though she was present on 2<sup>nd</sup> April 2019 when the date was taken.

7. The 1<sup>st</sup> defendant on 30<sup>th</sup> April 2019 informed the court, their advocate was absent and sought for another date. Mr Kisilah advocate who appeared for the plaintiffs opposed the application for adjournment on the grounds that no reason had been proffered for the absence of the defendants advocate.

8. The court rejected the application for adjournment and directed that the matter proceeds for hearing holding that no reason had been given for the absence of the defendants advocates. Two witnesses testified in support of the plaintiffs case. The defendants declined to either cross examine the two witnesses or to tender any evidence in support of their defence. The trial magistrate after evaluating the evidence adduced by the two witnesses of the plaintiffs upheld the claim by the plaintiffs and ordered that a permanent injunction do issue against the defendants and awarded the plaintiffs the costs of the suit. For all practical purposes, the hearing proceeded exparte and by way of formal proof. The decision by the trial magistrate to reject the appellants request for an adjournment is at the core of this appeal as it is the learned trial magistrate's exercise of discretion that is under challenge.

9. Indeed the appellants grounds of appeal are easily condensable into two broad grounds. Firstly, whether the learned trial magistrate erred in refusing to grant the appellants an adjournment and thus erred in failing to exercise his discretion in favour of the appellants. Secondly, whether the learned trial magistrate on the basis of the evidence adduced by the respondents was justified in granting the respondents the reliefs that he did. The appellants have complained that by being denied the adjournment and the court proceeding to take the evidence of the respondents and making a determination solely on the basis of that evidence, they were denied the opportunity of being heard and were therefore condemned unheard.

10. The appellants in their submission have submitted that they were not to blame for the absence of their advocate when the suit was scheduled for hearing before the lower court. The absence of the appellants advocate has not been explained but it is noteworthy that the defendants were present in court even though they elected not to participate in the proceedings in the absence of their counsel. The appellants place reliance on Article 50 (I) of the constitution which provides:-

*(I) 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.*

11. In submitting that the learned trial magistrate erred in failing to exercise his discretion in favor of appellants to grant an adjournment, the appellants relied on the case of **Lawrence Muturi Mburu -vs- Dalago Tours Ltd (2019) eKLR** where the court stated as follows:-

*“ The court finds that in the circumstances of this case, the fair hearing thresholds were not met and refusal to grant and adjournment in the circumstances was unfair”*

The court in the same case further observed thus: -

*“ the denial of Adjournment was not justified. The net effect is that the appellant was condemned without full hearing of his case. The first ground thus succeeds and the court does not have to deal with the other grounds”*

12. The respondent in his response submissions submitted that the learned trial magistrate properly exercised his discretion judiciously and could not be faulted. He placed reliance in the case of **Pithon Waweru Maina -vs- Thuku Mugiria (1983) eKLR** which affirmed the position in **Mbogo -vs- Shal (1968) EA 93** where the court stated:-

*“ the principles governing the exercise of the judicial discretion to set aside an exparte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:-*

*(a) Firstly, there are no limits of restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself*

to fetter the wide discretion given it by the rules. **Patel V EA Cargo Handling Services Ltd (1974) EA 75 and 76 C and E** .

(b) Secondly, the discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. **Shah V Mbogo 91967) EA 116 at 123B, Shabir Din V Ram Parkash Anand** exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some

(c) matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. **Mbogo V Shah (19680 EA 93**.

13. The respondents also placed reliance on the case of **J.S.K ( cargo) Limited -vs- Kenya Airways Ltd (2008) eKLR** where the court observed thus:-

“ In matters relating to adjournments, the court exercising judicial discretion. The court may or may not agree to adjournment and if it declines an adjournment, it should not be made to feel that injustice would be worked if counsel withdraws from the matter on account of his instructions being limited”

14. The respondent further in support has submissions made reference to the supreme court of Uganda case of **Famous Cycle agencies ltd & others -vs- Masukhala Ramji Karia (1995) Kampala Law Reports 100** where the court stated:-

“ Granting an adjournment to a party is left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner upon proper material. Such discretion the court continued, should be exercised after considering the party’s conduct in the case, the opportunity he had of getting ready and the truth and sufficiency of the reasons alleged by him for not being ready”

15. This is a first appeal and this court is under an obligation and indeed a duty to re evaluate the evidence and material before the court below to satisfy itself whether the decision reached was justified. This principle was enunciated in the Court of Appeal case in **Selle & Another -vs- Associated Motor Boat Co Ltd & others (1968) EA 123** where the stated:-

“—this court is not bound necessarily to accept the findings of fact of the court below. An appeal to this court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect —”

16. In the instant appeal the primary issue for determination is whether given the circumstances the learned trial magistrate found himself in on 30<sup>th</sup> April 2019 when the appellants advocate failed to attend court and the appellants sought an adjournment of the hearing, the learned trial magistrate exercised his discretion judiciously in refusing to grant the adjournment. On 30<sup>th</sup> April 2019 when the matter was scheduled for hearing the 1<sup>st</sup> defendant who was present in court informed the court their advocate was not present in court and requested that the case be given another date. The plaintiff’s counsel opposed the application for adjournment on the basis no reason had been given for the defendants advocates absence. The court declined to grant an adjournment on the basis the date was taken by consent in the presence of both counsel and no reason had been given for the counsel’s absence. The 1<sup>st</sup> and 6<sup>th</sup> 0defendants who were present indicated they would be unable to conduct the hearing in the absence of their advocate.

17. A party has a right to be represented in any matter by an advocate of his choice. The tenets of a fair trial include the right to be represented in any court proceedings by an advocate of one’s choice. The appellants in the instant matter had appointed their advocates and it was unclear why the advocate had not attended court on the day the matter had been scheduled for hearing. No reason was preferred. The appellants may have not known the reason why the advocate was not in court as they may have expected to meet him/her in court particularly considering their advocates, M/s Mitey & Associates Advocates had their offices outside Nakuru. It is usual for a party once they have engaged an advocate to handover all documents, evidence and pleadings relating to the case to their advocate and it was therefore understandable that the appellants may have felt unable to conduct the hearing in the absence of their advocate.

18. Where a party is represented by an advocate and the advocate fails to attend court on the day the matter is scheduled for hearing, the court ought to favourably consider an application for adjournment on the part of the party whose advocate is absent. This is essentially because a party is entitled to be represented by an advocate and if a party states he would like to be represented by an advocate, the court cannot properly deny him such right without offending the constitutional right to a fair trial. In circumstances where an advocate for a party fails to attend court, particularly if the advocate had previously not failed to attend without any good reason the court should exercise its discretion in favour of granting an adjournment to enable the party to confer with his advocate and if need be even appoint another advocate.

19. Considering the circumstances in the present appeal, it is evident that the appellants were not comfortable with the matter proceeding before the lower court in the absence of their advocate and they sought an adjournment which was declined. The record is clear that even though two of the appellant’s were present in court they declined to cross examine the respondent and his witness and further declined to offer any evidence after the respondent closed his case. In those circumstances it cannot be said that a fair hearing took place before the subordinate court.

20. Given the circumstances and the necessity to have a fair hearing the learned trial magistrate ought to have exercised his discretion in favour of granting of an adjournment to the appellants. The adjournment would not have been prejudicial to any of the parties save to occasioning some delay in the finalization of the matter. The respondent would have been compensated by an award of costs. It is my view that justice of the matter demanded that an adjournment be granted in favour of the appellants so that a fair hearing would have been assured. The learned trial magistrate’s failure to grant an adjournment in the circumstances was prejudicial to the appellants unfair and resulted in the

appellants not to have a fair hearing that they were entitled to. They were essentially condemned unheard which runs counter to the rules of natural justice.

21. The first ground of appeal thus succeeds and consequently renders the determination of the other grounds unnecessary. Having found that there was no fair hearing, the proceedings were basically a nullity and the evaluation of the evidence would be of no consequence .

22. In the result I find merit in the appeal and I allow the same. I set aside the judgment delivered on 27<sup>th</sup> August 2019 and direct that the suit be heard afresh before any other magistrate other than J.B. Kalo Chief Magistrate.

23. I order that each party bears their own costs of the appeal.

24. Orders accordingly

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7<sup>TH</sup> DAY OF OCTOBER 2021.**

**J M MUTUNGI**

**JUDGE**