



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 101 OF 2021**

**SYOKIMAU RESIDENTS ASSOCIATION**

**GERALD MAINA WANJOHI,**

**AGNES MUTHONI MUTUNGU,**

**SUSAN WAMBUI WACHIRA,**

**FRANCIS NAYDIMO YWAYA,**

**MUSA OBUYA .....APPELLANTS**

**VERSUS**

**REGINA MUENI KALOKI**

**WINIFRED MUTINDI NDETO.....RESPONDENTS**

**(Being an appeal from the Ruling and order of the Honourable H. Onkwani, PM in Mavoko CMCC No. 550 of 2020 delivered on 3<sup>rd</sup> June, 2021)**

**BETWEEN**

**REGINA MUENI KALOKI**

**WINIFRED MUTINDI NDETO..... PLAINTIFFS**

**VERSUS**

**SYOKIMAU RESIDENTS ASSOCIATION**

**GERALD MAINA WANJOHI,**

**AGNES MUTHONI MUTUNGU,**

**SUSAN WAMBUI WACHIRA,**

**FRANCIS NYADIMO YWAYA,**

**MUSA OBUYA.....DEFENDANTS**

**JUDGEMENT**

1. The genesis of this appeal was a Motion on Notice dated 3<sup>rd</sup> August, 2020 taken out by Regina Mueni Kaloki against Syokimau Residents Association and Unique Homes Court Jambush seeking an injunction restraining the said Defendants from harassing, interrupting and restricting the Plaintiff from carrying on her business at her business premises pending the hearing and determination of both the application and the suit. That application was based on the grounds that the Plaintiff, a businesswoman running a hardware and construction business in Syokimau, Machakos County on LR No. 12715/4887/12 registered in the name of **Wilfred Mutindo Ndeto**, was being subjected to threats and harassments from the Defendants which actions were adversely affecting the running of her business and causing her economic and irreparable loss. It was averred that on diverse dates dating back to July, 2020, the Plaintiff received a phone call from a member of the 1<sup>st</sup> Defendant informing her that he had been sent to ask the Plaintiff to move her business elsewhere as there was information that the Plaintiff's business was being carried out in a residential area. According to the Plaintiff her landlord was in the process of converting the said property to a commercial property.
2. On 3<sup>rd</sup> August, 2020, the said application was placed before **Onkwani, PM** who granted the same in terms of prayers 1, 2 and 3 on interim basis and fixed the matter for directions on 20<sup>th</sup> August, 2020. It would seem that the formal interim orders were issued on 4<sup>th</sup> August, 2020. However, the matter seems to have been placed before the Court on 19<sup>th</sup> August, 2020 when none of the parties appeared. It would seem that the Plaintiff then made an application dated 26<sup>th</sup> August, 2020 seeking to reinstate the orders that had been issued on 4<sup>th</sup> August, 2020. According to the record, the next minuted date was 27<sup>th</sup> August, 2020 when **Ms Kaloki**, learned counsel for the Plaintiff informed the Court that the application dated 3<sup>rd</sup> August, 2020 was coming for hearing on 20<sup>th</sup> August, 2020 but was diarised for 19<sup>th</sup> August, 2020. She therefore prayed for a hearing date of the application dated 2<sup>th</sup> August, 2020. Accordingly, the matter was fixed for 10<sup>th</sup> September, 2020.
3. On 10<sup>th</sup> September, 2020, the day fixed for the hearing of the said application, **Ms Kaloki**, appeared before the said trial court and informed the court that the Defendants had been duly served and applied that the said application be allowed, an application that was acceded to by the court and the matter fixed for mention on 29<sup>th</sup> October, 2020 for pre-trial directions.
4. On 27<sup>th</sup> October, 2020, the 1<sup>st</sup> Defendant filed notice of Preliminary Objection dated 26<sup>th</sup> October, 2020 in which it was stated that the Plaintiff had instituted the suit against the 2<sup>nd</sup> Defendant, a non-existent entity and it was sought that the application be struck out with costs.
5. By a Notice of Motion dated 17<sup>th</sup> November, 2020, taken out by the said 1<sup>st</sup> Defendants and 5 other defendants, Gerald Maina Wanjohi, Agnes Muthoni Mutungu, Susan Wambui Wachira, Francis Nyadimo Ywaya and Musa Obuya, it was sought that the orders issued on 4<sup>th</sup> August, 2020 be reviewed, varied and set aside and that the interim injunction be deemed to have automatically lapsed for failure by the Plaintiff to serve the Respondents with the pleadings. It was further contended that the 2<sup>nd</sup> Defendant Unique Court Jambush was a non-entity in lw. xi
6. The said application was based on the grounds that the Defendants were never served with the Application, the Summons to enter appearance and the pleadings in the suit and that the Defendants only became aware of the same when they were annexed in ELC Case No. 49 of 2020. It was further contended that on 20<sup>th</sup> August, 2020 when the matter came up the Defendants' advocates had filed a preliminary objection which the court directed be heard together with the main suit without giving directions on the application which according to the Defendants had not been dispensed with. It was contended that the order issued against the said non-entity could not be binding on the Defendants as per the amended plaint.
7. In the same application, it was intimated that the Defendants would at an opportune moment apply for the cross-examination of the process server.
8. In a further affidavit, it was deposed that the allegations contained in the affidavit of service were untrue and that the person who purported to have effected service was not a licensed process server.
9. In response to the said application, the Plaintiff deposed that the process server was instructed to effect service on the Defendants and that service was duly effected on the 1<sup>st</sup> Defendant, the Chairperson of Unique Homes Court Jambush, the 4<sup>th</sup> Defendant herein and the process server swore an affidavit of service to that effect a copy of which was annexed. According to the Plaintiff, the fact of the existence of the order was reiterated to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants to whom a copy thereof of handed but the said Defendants destroyed the same. It was averred that the 1<sup>st</sup> Defendant entered appearance on 26<sup>th</sup> October, 2020 and had been aware of the order for two months without raising the issue of the validity of service thereof
10. The Plaintiff averred that upon realising the legal status of the 2<sup>nd</sup> Defendant, her advocates amended the plaint on 5<sup>th</sup> November, 2020 and effected services thereof on the Defendants the same day. According to him, the Defendants are all members of Unique Homes Court Jambush hence the order is binding upon them.
11. In her ruling 3<sup>rd</sup> June, 2021, the learned trial magistrate found that there were two applications dated 3<sup>rd</sup> August, 2020 and 17<sup>th</sup> November, 2020 which were pending hearing and determination before the main suit could proceed to hearing and final determination. According to her, there was no replying affidavit to the application dated 3<sup>rd</sup> August, 2020 which application was duly served. The Court also noted that despite directions having been given to the parties to comply with Order 11 of the CPR, the Defendants were yet to file their defence. It was noted that the Plaintiff upon the lapse of the interim orders made an application dated 26<sup>th</sup> August, 2020 seeking the reinstatement of the orders and instead of replying to the said application, the Defendants instead filed an application dated 17<sup>th</sup> November, 2020 seeking to set aside the said application (sic).
12. Being of the view that the many applications were delaying the hearing and determination of the case, the learned trial magistrate dismissed the application dated 17<sup>th</sup> November, 2020, extended the interim orders pending the finalisation of the suit, directed the parties to comply with Order 11 of the **Civil Procedure Rules** and set the matter down for mention to confirm compliance.

## **Determination**

13. I have considered the record of the proceedings before the trial court, the grounds of appeal and the submissions filed by the parties herein.

14. From the record of the proceedings and the ruling of the trial magistrate herself, it is clear that when the Defendants' application dated 17<sup>th</sup> November, 2020 came up for hearing, the Plaintiff's application dated 3<sup>rd</sup> August, 2020 was yet to be heard. However, in her ruling dated 3<sup>rd</sup> June, 2021, the learned trial magistrate not only dismissed the application dated 17<sup>th</sup> November, 2020 but proceeded, as it were, to allow the application dated 3<sup>rd</sup> August, 2020 without hearing the parties thereon.

15. That course was not only unprocedural but amounted to a violation of the rules of natural justice as the Defendants were condemned in that application unheard. In **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553** it was held:

**“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.**

16. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

**“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ...Denial of the right to be heard renders any decision made null and void ab initio.”** [Emphasis mine].

17. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

**“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”**

18. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, Lord Reid expressed himself as follows:

**“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”**

19. The rationale for that position was reiterated in **Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR** at page 7 where the Court referred to **The Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, in which the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

**“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”**

20. It is therefore clear that while the learned trial magistrate could properly hear and dismiss the application dated 17<sup>th</sup> November, 2020 which was properly before her, she could not deal with the application dated 3<sup>rd</sup> August, 2020 which was not before her at that time. By dealing with it and making final orders thereon pending the hearing and determination of the suit, the learned trial magistrate erred. She justified her action by stating that the many applications were delaying the hearing and determination of the case. With due respect, the learned trial magistrate by her action short-circuited the procedure, acted in contravention of the rules of natural justice and violated the

Defendants' right to be heard. On this point it was held in Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167 that:

**“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision.”**

21. The necessity of hearing parties however unapprovingly the court might consider their conduct. This was the position adopted by Madan, J (as he then was) in Official Receiver vs. Sukhdev [1970] EA 243 where he held that:

**“In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties.”**

22. As regards the application dated 17<sup>th</sup> November, 2020, there is no indication in the ruling that the issues raised by the Defendants were considered or dealt with at all. In Peter Ochieng vs. Amalgamated Sawmills Ltd [2005] 1 KLR 151 Musinga, J held that:

**“The trial Magistrate by not setting out points for determination and reasons for his decision contrary to Order 20 Rule 4 abdicated his judicial responsibility as a judicial officer is under a duty to state in writing the reasons which made him arrive at a particular decision and any judgement that does not contain the essential ingredients of a Judgement as required under Order 20 Rule 4 is not a Judgement and an appellate court will frown at such a Judgement and would most likely set it aside as an aggrieved party who has a right of appeal would be disadvantaged by such a Judgement if he chose to appeal.”**

23. Having considered the manner in which the proceedings were conducted and the contents of the ruling, I find that this appeal merited. Accordingly, I set aside the ruling delivered by the Honourable H. Onkwani, PM in Mavoko CMCC No. 550 of 2020 on 3<sup>rd</sup> June, 2021. I direct that the Respondents' application dated 3<sup>rd</sup> August, 2020 be heard on its merits. The issues raised in the application dated 17<sup>th</sup> November, 2020 by the Appellant be raised in opposition to the Respondent's application.

24. As none of the parties complied with this Court's directions to furnish the Court with soft copies of their pleadings and submissions in word format and as the record of appeal was prepared in a very unsatisfactory manner by omitting the plaint, there will be no order as to the costs of this appeal.

25. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 6TH DAY OF DECEMBER, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties.**

**CA Susan**