



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. 41 OF 2019**

**SALIM HAMISI KISOKONI.....APPLICANT**

**VERSUS**

**DISMAS MAKOKHA MANGOLI**

**SIFUNA NALIAKA MAKOKHA.....RESPONDENTS**

**JUDGEMENT**

The appellant, Salim Hamisi Kisokoni being dissatisfied and or aggrieved by the orders of the Learned Trial Magistrate in the above matter do appeal the same on the following grounds that:-

1. May this honourable court be pleased to allow him to appeal for review of his conviction and sentence as judgment debtor and it be deemed as properly filed with leave of court.
2. Such orders that may be deemed to be proper and fair in the circumstances.

Based on the Grounds that:-

1. That he was not represented by a legal counsel as per the provisions of Article 50 (2) h of the Constitution.
2. That the civil suit No. 254 of 2011 was heard and determined in his absence thus contravening his rights to a fair trial under article 50 of the constitution.
3. That the plaintiff Dismas Makokha is not known to him in so far as the suit is concerned thus lacking locus standi in the said case.
4. That he prays for orders from this honourable High Court for this civil suit to be heard afresh by a different and competent court of similar or superior jurisdiction that is also impartial.
5. That this honourable High Court stays the orders of 11<sup>th</sup> June, 2018 by the P.M's Court Mumias in Civil No. 254 of 2011.
6. That may this appeal be allowed and stay orders granted.

The respondents submitted that, the suit herein was originally filed at Mumias Principal Magistrate's Court being civil suit No. 254 of 2011 where the respondent sought for an award of Ksh. 96,500/= and injunction restraining the appellant from claiming, demanding and or receiving dues from Mumias Sugar Company in respect of proceeds from plot No. 517 Nambacha. The suit was then heard to its final determination and judgment was entered for the respondent vide decree dated 15<sup>th</sup> November, 2013 as seen at page 36 of the record of appeal dated 7<sup>th</sup> February, 2019. The appellant has now appealed against the judgment based on the six (6) grounds stated in the Memorandum of Appeal dated 10<sup>th</sup> July, 2018 at page 1 of the Record of Appeal dated 7<sup>th</sup> February, 2019. The said grounds of appeal challenge the learned magistrate's entry of judgment for a sum of Ksh. 62,000/=.

This court has considered the appeal and the submissions therein. I have perused the lower court file together with the record of appeal in great detail. On the 20<sup>th</sup> January 2012 Judgement was entered against the appellant by the Trial Magistrate H.W Wandera in which she observed that the defendants were served and failed to attend court or file a defence and the plaint was unopposed. On the 24<sup>th</sup> February the 2<sup>nd</sup> defendant filed a notice of motion to set aside the said judgement as they were not served and the defence raised triable issues. On the 8<sup>th</sup>

June 2012 this application was allowed. Both the defendants filed their defences.

The matter came up for full hearing on the 5<sup>th</sup> November 2012 and defence hearing on 18<sup>th</sup> September 2013 where the appellant was present and participated fully in the trial. The appellant testified as DW1. The appellant admitted harvesting the cane. On the 5<sup>th</sup> November 2012 judgment was delivered by G.N. Sitati Resident Magistrate in the presence of all the parties and a stay of execution granted for 30 days. Thereafter taxation and prosecution proceedings were conducted. I find that the appellant is being untruthful when he states that the trial was conducted in his absence. From the evidence on record the plaintiff produced documentary evidence on the agreement and letter of surrender executed before the Chief. The Trial Magistrate in her judgement had this to say about the 2<sup>nd</sup> defendant who is the appellant herein;

*“The 2<sup>nd</sup> defendant has not denied receiving proceeds out of the 1<sup>st</sup> and 2<sup>nd</sup> harvest. The 2<sup>nd</sup> defendant has not demonstrated that he was entitled to the said harvest.”*

Article 50(1) of the Constitution reads as follows:

*Fair hearing*

*“50(1) Every person has the right to have any dispute that can be resolved by the application of law decide in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal”.*

In the case of **Juma & Another v Attorney General 2003 eKLR** the court held that;

*“It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare at which he is permitted to have the assistance of a lawyer of his choice, a he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary’s witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgement, a right to argue that a decision be made in accordance with the law and evidence.”*

The point of fair trial was made clear in the case of **Commission for the Implementation of the Constitution v Speaker of the National Assembly (2016) eKLR** where the court stated that;

*“Article 50 seeks to assist in upholding the rule of law by guaranteeing every person the due process in the resolution of justiciable disputes. It is an embodiment of the salient common law tenets of natural justice. It has basically three components namely; access to courts and other dispute resolving forums, independence and impartiality and, finally, fairness.”*

I find that in the instant case the appellant received a fair trial. In the case of **Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF JUNE 2020.**

**N.A. MATHEKA**

**JUDGE**