**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC APPEAL NO. 2 OF 2014**

**SETH MUDANYA KAVERENGE...................................APPELLANT**

**VERSUS**

**ABSOLOM STEPHEN OMONDI.................................RESPONDENT**

**JUDGEMENT**

The appellant Seth Mudanya Keverenge being dissatisfied with the ruling and or orders of Susan N. Mwangi in the above matter do hereby appeal against the same on the grounds that:-

1. The learned Ag. Senior Resident Magistrate erred in law in ruling on the merit of defence in an application before her of which the defendant/appellant had neither been accorded an opportunity to file defence or be heard on the merit.

2. The ruling is against the principles of natural justice.

3. The learned Ag. Senior Resident Magistrate erred in law in ruling propriety of service of summons before according the appellant opportunity to cross examine the process server.

4. The learned Ag. Senior Resident Magistrate erred in law in assuming the application before her concerned the exercise of her discretion when not.

5. The learned Ag. Senior Resident Magistrate erred in maintaining judgment involving interest in land which was outside her jurisdiction and within the exclusive jurisdiction of the Environment and Land Court.

The appellant shall seek orders of this honourable court:-

(a) The appeal be allowed.

(b) The ruling and orders of the learned Ag. Senior Resident Magistrate be set aside.

(c) The application dated 20th day of June, 2014 before the lower court be allowed.

(d) The costs of this appeal and the lower court be recovered from the respondent.

The appellant in this case is Seth Mudanya Keverenge. The respondent is Absolom Stephen Omondi. The appeal arises from the ruling and or order of Susan N. Mwangi Senior Resident Magistrate dated 31st day of July 2014 in Vihiga Senior Principal Magistrates Court Civil Suit No. 94 of 2013. The Appeal is premised on 5 grounds found in the Memorandum of Appeal On the basis of the said Memorandum we submit that:-

Article 50 of the Constitution of Kenya provides for that every person is entitled to a fair hearing which is an ingredient of Natural Justice. In concept the principle of natural justice has two essential rules: the person who has to be effected by a decision has a right to be heard and the authority deciding the matter should be free from bias. The appellant's right to be heard was not adhered to when the Learned Magistrate proceeded to hear and determine his application in his absence. The appellant was not accorded the opportunity and chance to present their case and evidence in court. Order18 of the Civil Procedure Rules clearly gives every party a right to hearing of their caseand calling of witnesses. In denying to accord the appellant the opportunity to defend hiscase and merely putting him on the defence with undue regard to be heard on merit isbut a miscarriage of justice.

Order 36 Rule 2 Civil Procedure Rules states that in a case where judgment was entered in default the defendant may show cause. Through

the application resulting in this appeal, the defendant did show cause in the affidavit as filed further Order 36 rule 10stipulates that;-

> "'Any judgment, given against a party who did not attend at the hearing of anapplication under this order, may on application be set aside or varied on such terms asare just";

That this is not a discretional exercise accorded to theLearned Magistrate, it is however a right of the defence to be heard rather than be condemned unheard. Even so, where the courts are invited to exercise their discretion,the same should at all times move towards achieve a just conclusion and ideally it should always be in the interest of justice. Discretion cannot overrule the reliance and observance of the overriding objectives as set out in the Civil Procedure Act. Denying aparty the right to be heard in our humble submission impedes the interest of justice as it is prejudicial to the party who is condemned unheard.

On ground 3, Order 5 Rule 16 of the Civil Procedure Rules 2010 provides as follows;

> "On any allegation that summons has not been properly served, the court may examine the serving officer on oath or cause him to be so examined by another court touching his proceedings and may make such further injury in the matter as it thinks fit.And shall either declare that the summons has been duly served or order such service as itthinks fit".

The appellant brought to this court such allegations as to not having been served with the said summons by the respondent then the plaintiff. The Learned Magistrate went ahead to declare the summons were properly served at the instance of the appellant stating it was false and misleading as indicated in the affidavit of service. In failing to have the appellant get an opportunity to cross-examine the process server before ruling on the propriety of the service of summons, the Learned Magistrateerred in law as the law has provision to have the same decided on clear uncut basis. This would have otherwise made the Learned Magistrate come to a different conclusion other than the one reached at in absence of cross examining the processserver.

On ground 5, the allegations or averments as presented involve contract for the sale of land namely N. Maragoli/Bugonda/3120. This in essence puts the jurisdiction of the said matter exclusively on the Environment and Land Court.

Pursuant to the Constitutional mandate granted under Article 162 (2) of the Constitution.Parliament enacted the Environment and Land Court Act chapter 12 A of the Laws of Kenya wherein section 12 (2) (d) stipulates as follows.

> 1........................................
>
> 2.In exercise of its jurisdiction under Article 162 (2) of the Constitution, the court shall have power to hear and determine disputes relating to the environment and land,including disputes
>
> ....(d) relating to public, private and community land and contracts, chores in action orother instruments granting any enforceable interest in land: and.

The pleadings in the matter show that the matter was predominantly a land matter to be dealt with by the Environment and Land Court. The then Learned Magistrate lacked the jurisdiction to entertain the said application and reserved for the Environment and LandCourt. In essence she needs to have downed her tools at the onset as she had no ambit to entertain the claim and or subject matter therein. This being the case, the said application and orders prayed ought to have been granted by a court of competent jurisdiction which the then Learned Magistrate was bereft of.The appellant shall be seeking for Orders that the appeal and that the ruling and or orders of the LearnedMagistrate be set aside, and that the application dated 20th June, 2014 be allowed and the cost of this appeal and lower court be recovered from the respondent.

The court has carefully considered the appellant's submissions in this appeal. The respondent was served but failed to attend court or file any submissions. In the case of Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others (2017) eKLR the court held that;

> "*By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated toestablish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases".*

**This court of appeal decision was delivered at Nairobi on 19th day of October, 2017. The trial court magistrate delivered this judgement subject of the appeal on** 19thJanuary 2016. The case was filed in October 2014.

After the enactment by Parliament, The Statute Law (Miscellaneous Amendments) Act, 2015, Act No. 25 of 2015 received Presidential assent on 15th December 2015. Under Section 2 thereof, several laws were amended as indicated in the schedule thereto. Of relevance to this judgment were amendments made to The Environment and Land Court Act, Act No. 19 of 2011(the ELC Act) with a view to conferring on the Chief Justice the mandate to transfer Judges from the specialized courts to the High Court and vice versa, and clothing Magistrates courts with authority to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land. The relevant sections are as follows;

> "*26. Sitting of the Court*

*(1) The Court shall ensure reasonable and equitable access to its services in all Counties.*

*(2) A sitting of the Court may be held at such places and at such times, as the Court may deem necessary for the expedient and proper discharge of its functions under this Act.*

*(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.*

*(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —*

*(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and*

*(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.*

*(4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court."*

Amendments were made to Section 101 of the Land Registration Act which was amended by inserting the words "*and subordinate courts*" immediately after the expression "2011" and Section 150 of the Land Act that was amended by deleting the words "*is vested with exclusive jurisdiction*" and substituting therefore the words "*and the subordinate courts as empowered by any written law shall have jurisdiction*." The Magistrates Courts Act, Act No. 26 of 2015, an Act of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution was enacted to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. It received Presidential assent on 15th December 2015. It was to commence on 2nd January 2016. Section 9 of that Act deals with claims in employment, labour relations claims; land and environment cases and provides that:

"*A magistrate's court shall —*

*(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —*

*(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(ii) compulsory acquisition of land;*

*(iii) land administration and management;*

*(iv)public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(v) environment and land generally.*

*(b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act, 2011 (No. 20 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations."*

The appeal Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others (2017) eKLR arose from the judgment of the High Court (Emukule, Chitembwe, Thande, JJ) delivered on 11th November 2016 in which the court decreed that Section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015;

"*in relation to thejurisdiction of the subordinate courts, in respect of matters relating to environment and the use, occupation of and title to land is inconsistent with Article 162(2) of the Constitution, and therefore null and void*."

This means that magistrate's court had jurisdiction at that time to entertain land matters prior to the amendments in 2015 discussed above. The case was filed in October 2013.

I have perused the record of appeal. The appellant brought to this court such allegations as to not having been served with the said summons by the respondent then the plaintiff.The Learned Magistrate went ahead to declare the summons were properly served at the instance of the appellant stating it was false and misleading as indicated in the affidavit of service. In failing to have the appellant get an opportunity to cross-examine the process server before ruling on the propriety of the service of summons, the Learned Magistrate erred in law as the law has provision to have the same decided on clear uncut basis.

I find that the learned Ag. Senior Resident Magistrate did not error in law in ruling propriety of service of summons before according the appellant opportunity to cross examine the process server. She satisfied herself that service was proper before rendering her decision. In **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 was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH DAY OF JUNE 2018.**

**N.A. MATHEKA**

**JUDGE**