Kimani alias Samuel Maina Gichuhi & 2 others v Gichuhi (Civil Appeal 34 of 2020) [2025] KECA 991 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 991 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 34 OF 2020

JW LESSIT, A ALI-ARONI & AO MUCHELULE, JJA

MAY 23, 2025

BETWEEN

SAMUEL GICHUHI KIMANI ALIAS SAMUEL MAINA GICHUHI ..... 1ST APPELLANT

ARTHUR KIMANI GICHUHI ..... 2ND APPELLANT

SAMSON NGAHU GICHUHI ..... 3RD APPELLANT

AND

ALLAN KAMAU GICHUHI ..... RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Murang'a (Kemei, J.) dated 11th December 2019 in ELC NO. 55 of 2017)

JUDGMENT

1. Article 50(1) of the *Constitution* provides for the right to a fair hearing. It states 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".

2. The right to a fair hearing is a fundamental non-derogable principle that dictates that an individual has the right to have any dispute involving him, or whose result will affect him, to be resolved in a fair and public manner. He is entitled to be given the opportunity, for instance, to be present when evidence is being given against him, to challenge the evidence through cross-examination, be given opportunity to explain himself and call witness, before a decision is rendered in the matter.

3. The Supreme Court of Kenya in Stephen Maina Githiga & 5 Others -vs- Kiru Tea Factory Company Limited, Petition No. 13 of 2019 was dealing with the question of a fair trial in relation to a contempt

of court matter when it acknowledged that the doctrine of due process encompassed the right to be treated fairly, efficiently and effectively; and that it was a fundamental pillar of the rule of law under the *Constitution* that should be observed by the courts in the administration of justice. The Court expressed itself as follows: -

> " 61. Likewise, procedural fairness in decision making requires courts not to deprive any person of their right without due process of the law, a fundamental precept that implies that the right of a person affected by any adverse decision or action is present before a tribunal that pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved."

4. This appeal involves siblings. Samuel Gichuhi Kimani alias Samuel Maina Gichuhi (1st appellant), Arthur Kimani Gichuhi (2nd appellant) and Samson Ngahu Gichuhi (3rd appellant) are brothers to the respondent, Allan Kamau Gichuhi. They are sons of the Late Josephat Gichuhi Kimani and the late Elizabeth Wangari Gichuhi.

5. In a suit filed before the Environment and Land Court (ELC) at Murang'a, the respondent claimed that the 1st appellant had unlawfully caused the name of their late father, Gichuhi Kimani, on the family land Forthall Loc.13/Karunge/1181 to be changed into his name. Then, that, in collusion with the 2nd and the 3rd appellants, he had caused the subdivision of the property into four portions, namely Loc.13/Karunge/3178, Loc.13 Karunge/3179, Loc 13/Karunge/3180 and Loc. 13 Karunge/3181 which they had shared amongst themselves, rendering him destitute. Further, they had destroyed his crops and developments on his portion. He sought that parcel Loc. 13/Karunge/3178, which had been registered in the 1st appellant's name, be ordered to be transferred to him, he be paid Kshs.270,000/=, being the value of his damaged property, Kshs.15,000/=, being valuer's fees, general damages for trespass upon his land, and then costs and interest.

6. The claim was denied by the appellants in a statement of defence.

7. In a consent recorded on 24th January 2018, the parties agreed that the 1st appellant would transfer Loc. 13/Karunge/3178 to the respondent. The rest of the dispute was to be determined following the hearing. The parties were represented by learned counsel Mr. Karweru for the respondent and learned counsel Mr. Kiriba for the appellants.

8. On 11th March 2019 the Court was informed that the title to Loc.13/Karunge/3178 had been transferred to the respondent.

9. On 5th September 2019, the rest of the suit came for hearing. Counsel for the respondent was present with his client. The appellants were present but their counsel was not present. They indicated they wanted their counsel to be present for the hearing. After the trial court (learned J.G. Kemei, J.) confirmed that there had been service to the appellant s' counsel, it is ordered that the hearing would proceed "exparte" at 10.30am. At 10.30am all parties were still present except counsel for the appellants. The evidence of the respondent and his witness was taken. At the conclusion of the evidence, the court directed parties to file written submissions as judgment was being reserved for 11th December 2019.

10. On 11th December 2019 judgement was delivered. This time counsel for the appellants was present. He requested for stay of execution of the judgment to be able to appeal the decision. He was asked to make a formal application. In the judgment, the appellants were ordered to pay Kshs.150,000/= being the value of the damaged crops and developments, Kshs.15,000/= being valuation fees, general damages

of Kshs.10,000/= and a permanent injunction was granted against the appellants and all those under them, in respect of the 0.7 acres that the respondent occupied.

11. The appellants were aggrieved and filed this appeal whose grounds were as follows: -

> " 1. The learned Judge erred in law when she barred the appellants from participating in the trial on account that their advocates on record were absent even though the appellants were present in court when the hearing was taking place and were thus condemned unheard.
>
> 2. The learned Judge erred in law and fact when she awarded the respondent damages in respect of a parcel of land that was not in existence when the matter was being filed.
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> 3. The learned Judge erred in law and fact when she awarded damages relying on a report that did not specifically state the particular piece of land where the damage is alleged to have been committed.
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> 4. The learned Judge erred in law when she failed to evaluate the materials placed before her and the totality of the evidence on record and thus arrived at an erroneous decision."

12. The complaint that we wish to deal with is that the appellants had been condemned unheard by not being allowed to cross- examine the respondent and his witness, and by not being allowed to testify in the matter, now that they were present.

13. It was submitted on behalf of the appellants that they had been condemned without being afforded an opportunity to controvert the evidence that had been tendered against them, and without them being asked to testify in answer to the evidence that the respondent and his witness had given. Learned counsel Ms. Waititu referred us to Article 50(1) of the *Constitution* and to various decisions in which courts have discussed the importance of the right to be heard. The decisions included Pinnacle Projects Limited -vs- Presbyterian Church of East Africa, Nong Parish & Another [2018]eKLR; Yatin Vinubai Kotak -vs- Tucha Adventures & Another [2000]eKLR; The Management Committee of Makondu Primary School & Another -vs- Uganda National Examination Board, HC Civil Misc. Appl. No. 18 of 2010; Mandeep Chauhan -vs- Kenyatta National Hospital & 2 Others [2013] eKLR; and Smail and Another -vs- Njati, EALR 2008 EA 2EA 155. In Smail and Another -vs- Njati (supra), the Court of Appeal of Tanzania observed as follows:

> " In line with "audi alteram partem" rule of natural justice, the court is required to adjudicate over a matter by according the parties a full hearing before deciding the matter in dispute or issue on merit. The omission to give the parties a hearing on the issue of jurisdiction occasioned a miscarriage of justice "

Lastly, learned counsel, while referring to Onyango Oloo -vs- Attorney General [1986-1989] EA 456, submitted that, even Where a decision may be justified on merits, once it is found to violate the rules of natural justice it cannot be permitted to stand. It was reiterated in the cited case that:

> " It is deemed improper and unfair for a decision maker, legally obligated to consider all relevant factors before making a decision affecting substantial liberty, to leave the affected parties guessing about the considerations that influenced the decision."

14. Learned counsel Mr. Karweru for the respondent acknowledged that the courts have been consistent on the importance of observing the rules of natural justice, and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. He referred us to Onyango Oloo - vs- Attorney General (supra) in which, at page 460, Nyarangi, JA. held that:-

> " A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

According to learned counsel, however, although the appellants did not testify their counsel had filed written submissions which had been considered before judgment was delivered. To him, therefore, the appellants had been afforded the right to be heard. Secondly, that the appellants had not raised any objection to the hearing in the absence of their counsel.

15. We have considered the record of appeal, the grounds contained in the memorandum of appeal and the rival submissions. We are required to determine whether the appellants were to be afforded the right to be heard.

16. The record shows that each appellant was asked by the court and he indicated that he wanted his counsel to be present. The learned Judge did not deem it fit to adjourn the hearing to a date when the appellants' counsel would be present. Adjournment entails the exercise of discretion. Now that the option to adjourn did not appeal to the good sense of the learned Judge, hearing was ordered to proceed as scheduled.

17. What was expected was for the respondent to testify and for the appellants to be informed of their constitutional right to challenge the evidence through cross-examination. The same for the evidence of the witness who had been called.

18. At the conclusion of the respondents' case, the learned Judge was expected to inform the appellants that they had the right to tender evidence in rebuttal, and to call witnesses, if they had.

19. Written submissions cannot replace evidence. This Court in Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another [2014]eKLR stated that –

> " Submissions cannot take the place of evidence."

20. The appellants' counsel may have been absent, but they were entitled to participate in the trial in a matter that affected their rights. In Mbaki & Others -vs- Macharia & Another [2005] 2 E.A. 206, it was reiterated that:

> " The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

21. It is our considered view that the learned Judge was required to act fairly by providing the appellants with an opportunity to present their case in answer to the evidence that the respondent and his witness had given. Even if the judgment were to be the correct one, it would still be improper and unfair for this Court to let it stand given that the appellants' right to fair trial was violated. (See Onyango Oloo

-vs- Attorney General [1986 – 1989] EA 456). Lord Wright's opinion in General Medical Council -vs- Spaceman [1943] 2 All ER 337 was 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 has to be declared as no decision."

22. In conclusion, we determine that the judgment delivered on 11th December 2019, which followed the learned Judge's violation of the right of the appellants to be heard, was not a decision.

23. Consequently, on that ground alone, the appeal is allowed and the judgment and decree dated 11th December 2019 are set aside. There shall be a fresh hearing before another Judge to determine prayers (b), (c), (d), (e), (f) and (g) of the plaint dated 14th July 2016 by the respondent.

24. This is a family dispute. Each party shall bear its own costs.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY 2025.

J. LESIIT

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JUDGE OF APPEAL ALI- ARONI

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a True copy of the original.

SIGNED DEPUTY REGISTRAR