**Musila v Thengi & 2 others (Civil Appeal 607 of 2019)**
**[2025] KECA 750 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 750 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 607 OF 2019**

**MSA MAKHANDIA, K M'INOTI & A ALI-ARONI, JJA**

**MAY 9, 2025**

**BETWEEN**

**MUTINDA MUSILA ..... APPELLANT**

**AND**

**FRANCIS MUSEE THENGI ..... 1ST RESPONDENT**

**THE DEPUTY COUNTY COMMISIONER KITUI WEST ..... 2ND RESPONDENT**

**THE ATTORNEY GENERAL, REPUBLIC OF KENYA ..... 3RD RESPONDENT**

***(An appeal from the Judgment of the Environment and Land Court at Machakos (Angote, J.) delivered on 18th October 2019 in ELC Constitutional Petition No. 2 of 2017)***

## JUDGMENT

1. The dispute over the property subject matter of this appeal, Parcel No. Nzalae/Mutonguni/198 (the suit property) started way back in 1977, after the adjudication process in the area. The initial dispute was between the parties' deceased parents, Musila Malua alias Musila Ngua, the appellant's father and John Thengi Kangwe, the 1st respondent's father.

2. The appellant's father filed a complaint against the respondent's father in Kitui District Land Adjudication Committee Case No. 257 of 1997, claiming ownership of the suit property. The dispute was heard on 20th July 1977, and the adjudication committee awarded the land to the respondent's father. Aggrieved, the appellant's father appealed to the Appeals Board in Land Case No. 14 of 1977. The appeal was dismissed. Aggrieved by the Appeals Board's decision, the appellant's father raised an objection with the adjudication officer in Kitui. The objection was heard on 2nd December 1986 and was dismissed. The appellant then escalated the matter to the Minister in Land Case No. 110 of 1988, and the 2nd respondent was gazetted as a Special Minister in Gazette Notice No. 6854 to deal with the matter. The proceedings of the 2nd respondent and determination thereof are the subject of this appeal.

3. The hearing before the 2nd respondent was initially slated for 5th August 2015, but the appellant was unavailable. At his request, made through his brother, the matter was adjourned to the 14th August 2015. On the 14th of August, the appellant was once again absent. The matter was dismissed for non-attendance. After the dismissal, the appellant filed a Constitutional Petition in the High Court.

4. In the petition dated 25th of January 2017, the appellant sought for a declaration that the proceedings, the trial, and the verdict of the 2nd respondent violated his fundamental rights of fair administrative action, before an impartial tribunal within the meaning of Article 47(1) & 50(1) of *the Constitution*, and thus null and void, an order directing the appeal to be heard afresh; and for costs of the suit.

5. The appellant contended in the petition and his supporting affidavit dated 25th January 2017 that the proceedings before the 2nd respondent violated his rights under *the Constitution*, and as a result, he lost his land. He alleged that he was not adequately informed of the hearing dates during the proceedings. Further, there were instances in which notice of the dates was shared through his brother, through phone calls, and there were times that he would be away from home. On the 5th August 2015, he was informed by his brother, James Musila that the 2nd respondent had called and informed him that the appeal would be heard on the same date, that is 5th August 2015 and that he should proceed to the Commissioner's Office; having been away from Machakos doing manual labour, he requested his brother to seek for a change of dates; the brother spoke to the 2nd respondent and the matter was fixed for hearing on 14th August 2015; he was however not served with summons by the area chief and further he did not have fare to travel for the case on 14th August 2015, but managed to go on 17th August 2015 when he was served with summons for hearing of the appeal that had been scheduled for 14th August 2015, which had passed 3 days earlier; he immediately proceeded to the 2nd respondent's office to inquire the circumstances under which the summons were served on him after the date of the hearing of the appeal. The 2nd respondent extended the date for the hearing of the appeal to 27th August 2015 and countersigned the same. However, on 27th August 2015, the appeal did not proceed because the 2nd respondent had been moved on transfer. He was informed that a different person would hear the appeal. Hence, he went home and waited for another notice. On 5th August 2016, one year later, he was summoned by the area chief to attend the office of the 2nd respondent, which he did and was shocked to be informed by the clerk that the appeal was heard on 14th August 2015 and dismissed by the 2nd respondent. Yet the 2nd respondent had hitherto extended the hearing to 27th August 2015.

6. As a result, he averred that he was not given a fair hearing and was denied the right to be heard; he claimed further that the manner in which the 2nd appellant handled the case suggests that he was out to give the 1st respondent the parcel of land. Further the 2nd respondent's conduct was fraudulent and procedurally unfair as it would appear that after he realized that he had been transferred, he called for the file and wrote the verdict after 17th August 2015; alternatively, he may have heard the case on 14th August 2015, and as at the date he was extending the summons to the 27th August 2015, he was doing so while hiding the truth from the appellant.

7. In opposition, the 1st respondent filed a replying affidavit dated 24th April 2017, wherein he deposed that the matter before the 2nd respondent was listed for hearing on 6th August 2015 and summons issued through the Office of the Chief. The appellant admitted that on 5th August 2015, he was informed of the hearing date by his brother, James Masila, and that he was aware of the rescheduled date of 14th August 2015, but failed to attend the proceedings. The 1st respondent contended that since the appellant knew the date for the hearing as the 14th of August 2015, he had no business attending the office of the 2nd respondent on the 17th August 2015, and that in the absence of the appellant, the

2nd respondent made appropriate orders; the appellant is the author of his misfortune for deliberately failing to prosecute his case.

8. In its determination, the trial court held that the right to a fair hearing does not mean that a party chooses when they want to appear before a tribunal. The right to a fair hearing entails notifying all parties of the hearing date, allowing each party to be heard, and permitting cross-examination of their opponents and witnesses. It also held that, given the appellant's admission, he was informed of the hearing date of 5th August 2015 and on that date, the appeal was adjourned to 14th August 2015 at the appellant's request, the appellant was accorded an opportunity to be heard but failed to appear before the 2nd respondent. Therefore, his right to a fair hearing and a just and reasonable administrative action was not violated. The court dismissed the appellant's petition with costs.

9. Aggrieved by the judgment of the High Court, the appellant has raised 11 grounds of appeal in his memorandum of appeal dated 5th December 2019, seeking to have the judgment of the High Court set aside and for the costs of the appeal.

10. The grounds of appeal can be summarised into three as follows; that the learned judge erred in law and fact by failing to appreciate that service upon the appellant, if any, was not done following the law as it was effected three days after the date of the hearing; failing to find that the constitutional rights of the appellant were breached by the 2nd respondent while purporting to exercise his mandate under the law; and by failing to appreciate that the appellant was not afforded a fair hearing.

11. Learned counsel for the appellant filed submissions and a list of authorities dated 13th August 2020. He reiterated the facts of the case, which we need not repeat. He further submitted that on 18th August 2015, through his advocate, David Mutinda the appellant wrote to the 2nd respondent requesting him to hold the hearing of the appeal on 27th August 2015 in abeyance due to the issues raised therein, which included letters of administration since the appellant's father had passed on. The letter elicited no response. On 27th August 2015, the appellant attended the hearing as advised by the 2nd respondent. Still, the appeal did not proceed apparently because the 2nd respondent had been transferred, and the appellant was informed that his appeal was to be heard by a different commissioner at a later date on notice. It was not until the 8th of August 2016 that the area chief informed the appellant that he needed to attend the 2nd respondent's office, which he did, and he was informed of the decision that was made on the 14th of August 2015, dismissing his appeal.

12. Learned counsel urged that the 2nd respondent, appointed as a Special Minister to preside over the appeal in Land Appeal Case No. 110 of 1988, assumed the power and authority to determine the matter. He was expected to act lawfully, reasonably and procedurally fairly. He was expected to allow the appellant to prosecute his appeal. However, the 2nd respondent acted contrary to Article 47(1) of *the Constitution*. In support, learned counsel relied on the cases of Onyango vs. Attorney General [1986-1989] EA 456, Kiai Mbaki & 2 Others vs. Gichuhi Macharia & Another [2005] eKLR and Juma & Others vs. Attorney General [2003] 2 EA 461.

13. He submitted further that the appeal before the 2nd respondent was not open and free from secrecy, as the act of extending the summons from 14th August 2015 to 27th August 2015 without disclosing to the appellant that the appeal had been heard amounted to the 2nd respondent acting in secrecy and mystery.

14. On the part of the 1st respondent, learned counsel filed submissions dated 19th October 2020. Learned counsel submitted that the appellant did not have locus standi to appeal to the minister and that he had raised this ground in his submissions before the trial court, but it was not addressed. In a letter dated 18th August 2015, the appellant's advocate indicated that the suit property was registered in the name of the appellant's deceased father. Yet, the appellant was not an administrator of his father's estate. The

appellant deliberately delayed the hearing process to obtain a grant which would have enabled him to proceed with the appeal; the oxygen principles cannot save him, and there was no loss occasioned to him when the matter was dismissed for non-attendance. He cited Coast Bus Service Limited vs. Samuel Mbuvi Lai (1997) eKLR and Sheila Nkatha Muthee vs. Alphonce Mwangemi Munga & Others [2016] eKLR, in support of the submission that the proceedings at the 2nd respondent were, in the first place, null and void and cannot be reinstated for the purposes of hearing.

15. Regarding whether the service was done in accordance with the law, he submitted that the hearing date of 14th August 2015 was set at the appellant's request; however, he decided not to attend the proceedings and was the author of his misfortune. That failure to attend was intentional, as the 2nd respondent had taken all reasonable steps to ensure the appellant was aware, despite not having a phone. Learned counsel relied on the case of Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 Others [2005] eKLR.

16. On whether the appellant was given a fair opportunity to be heard, learned counsel submitted that the 2nd respondent adjourned the hearing from the 5th of August 2015 to the 14th of August 2015 to accommodate the appellant; who did not relate any difficulties on attending the hearing on 14th August 2015 and he is thus estopped from stating that his right to fair administrative action was breached. In support, learned counsel cited the case of Union Insurance Company of Kenya vs. Ramzan Abdul Danji, Civil Application No. 79 of 1998, where the court held that the law does not require a party to be heard in every litigation. The law requires parties to be given a reasonable opportunity to be heard.

17. On whether the proceedings were conducted openly and freely, he submitted that the matter having been concluded, it beats logic why and by whom the appellant's summons was extended to 27th August 2015 and that the 2nd respondent could not adjourn a matter that had already been concluded.

18. This being a first appeal, it is our duty, in addition to considering submissions by the appellant and the respondents, to analyse and re-assess the evidence on record and reach our independent conclusions. This approach was adopted in Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR, where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows: -

> " An appeal to this Court from a trial by the High 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. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

19. We have carefully considered the pleadings, submissions by parties, case law cited, and the law. We form the opinion that the issues that call for consideration are whether the appellant was duly informed of the hearing of his appeal by the 2nd respondent, whether the appellant was accorded a fair hearing, and whether the appellant's rights under Articles 47(1) and 50 ( 1) of *the Constitution* were violated.

20. A cardinal rule of natural justice is that no party should be condemned unheard. All parties appearing before a court of law or a quasi-judicial process ought to be allowed to present their case and be heard. It is also common-place that timelines are put in place to ensure that this right is neither abused nor used to the detriment of the other party. In this instance, the parties were initially informed of the

hearing of the appeal. The appellant, who lived away from his home area and worked in Machakos as a labourer, was served, as it frequently happens in the rural setup, through his area chief, who diligently informed the appellant through his brother. It is not clear why the appellant's brother was the go-between. The appellant seemed comfortable with the arrangement, as he, too, used his brother. The appellant admitted that the brother had advised him of the hearing date of the 5th of August 2015, but the date was not convenient, and he asked the brother to reach out to the 2nd appellant to request the 14th of August 2015, which his brother did. Having received the request, the 2nd appellant adjourned the matter to 14th August to accommodate the appellant. This date was specifically requested by the appellant and granted. This date was fixed and known to the parties, and therefore, no notice was required to be issued. Nonetheless, the 2nd respondent issued a notice in the usual manner.

21. The appellant admits that he was aware of the date but did not attend the hearing due to lack of fare. Interestingly, three days later, on the 17th of August 2015, he was available, passed by the area chief's office and was given the hearing notice belatedly. He then went to the 2nd respondent's office, where the summons was extended. The importance of hearing or other notices on parties cannot be gain-said. Parties must be aware of the date their matters will be mentioned or set down for hearing. Where parties are present or represented when a date for hearing or mention is fixed, or where they request a date convenient to them, they are deemed to be already informed or aware.

22. The 2nd respondent, having adjourned the matter from 5th August 2015 to 14th August 2015 at the appellant's request, dismissed it when the appellant failed to attend. The High Court found no wrongdoing on the part of the 2nd respondent as the appellant was duly aware of the date. In paragraphs 16-20 of the judgement, the High Court judge stated:

> " 17. Indeed the petitioner has exhibited the summons dated 7th(sic) August, 2015 addressed to him. According to the summons, the petitioner was to appear before the 2nd respondent on 14th August 205. However, it was not until 17th August 2015, that the petitioner travelled from Machakos to Kitui West and officially received the summons.
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> 18. The evidence before me shows that although the appeal before the 2nd respondent was to proceed for hearing on the 5th of August, the same was adjourned to 14th of August to enable the petitioner travel. The petitioner was accordingly notified by his brother of the date for 14th August 2015.
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> 19. The petitioner has admitted that he did not attend the hearing of 14th August 2015 due to lack of fare. Having been aware of the hearing date 14th August 2015, and the appeal having been dismissed by the 2nd respondent on the said date for non-attendance, the petitioner cannot allege he was not given a fair hearing.
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> 20. Indeed, the right to a fair hearing does not mean that a party chooses as and when he wants to appear before a tribunal. The right to a fair hearing entails the notification of all parties of the date of the hearing, and eventually giving every party an opportunity to be heard and cross- examine his opponent and witnesses.
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> 21. However, in a situation where a party has been informed of a hearing date, whether by summons, or otherwise, but fails to appear before the tribunal on

the appointed date, then the matter can proceed, his absence notwithstanding. That is what happened in this matter on 14th August 2015."

23. We cannot agree more with the learned judge. It is not for a party to seek an adjournment; when granted, they choose not to appear and then cry foul. Justice must be served for both parties. There was a party before the court twice. The 5th and 14th of August 2015. Secondly, no information was relayed as to why the appellant, who had sought an adjournment, was absent. The 2nd appellant, in the circumstances, did the right thing and dismissed the matter for non-attendance.

24. We have examined the findings made by the trial court above to establish whether it properly exercised its discretion in arriving at the decision. This Court, in interfering with the decision made in the exercise of discretion, is to be guided by the principles set out in the case of Mbogo vs. Shah [1968] EA 93, where the predecessor of this Court stated:

> " It is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

25. Regarding whether there was a violation of the appellant's constitutional rights, Article 47(1) of *the Constitution* addresses the fair administration of service for every person, which requires an expeditious, efficient, reasonable, and procedurally fair hearing. In this matter, there has been no demonstration that the 2nd respondent acted unreasonably, failed to act fairly, or acted unprocedurally.

26. In the case of Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji, Civil Application No. Nai. 179 of 1998, this Court held that:

> " Whereas the right to be heard is a basic natural justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it." (emphasis added)

27. Article 50 of *the Constitution* addresses the right to have a dispute fairly resolved by a court or an impartial tribunal. Due to the various elaborate motions available to resolve land disputes arising from adjudication processes, the matter may have taken a long time. The appellant followed all steps, culminating with an appeal before the 2nd appellant. We see that opportunities were available to him, including before the 2nd respondent, when an adjournment was granted at his request; however, on the date he requested the matter be heard, he failed to prosecute the appeal. The reason given by the appellant for his absence at the hearing, in our view, was lame as it does not make sense how, barely three days later, the appellant surfaced. Learned counsel for the appellant has introduced a new angle of having written to the 2nd respondent. The record does not show the involvement of counsel at that stage. Learned counsel does not explain why he was absent before the 2nd respondent to explain his client's predicaments, if any. Furthermore, adjournments at hearings are not ordinarily sought through

letters; in any event, this was not brought to the attention of the first appellate court and appears as an afterthought.

28. In the end, we find the appeal without merit and dismiss it with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**K. M'INOTI**

**.....**

**JUDGE OF APPEAL ALI-ARONI**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**