



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, MAKHANDIA & ODEK, JJ. A)

CIVIL APPEAL NO. 139 of 2012

BETWEEN

SAULO KANDIE.....APPELLANT

AND

JAMES KWAMBAI CHERUIYOT.....RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Eldoret (A. Mshila, J.) dated 20<sup>th</sup> April 2012*

*in*

*ELD. HCC Appeal No. 3 of 2012)*

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JUDGMENT OF THE COURT

1. The respondent, **James Kwambai Cheruiyot**, suing on behalf of the Estate of **Cheruiyot Cheserem Kiyab** (deceased) filed a plaint against the appellant seeking an eviction order from **Land Reference No. Sergoit/Elgeyo Border 1 (Beliamo) 136**. The respondent also prayed for general damages for trespass, *mesne* profits and costs of the suit. The suit was filed before the Eldoret Chief Magistrate's Court as **CMCC No. 329 of 1998**.

2. The appellant, **Saulo Kandie**, filed a defence against the suit averring that the magistrate's court did not have jurisdiction and that the matter was *res judicata*.

3. The suit was set down for hearing on 11<sup>th</sup> May 2001. On this day, the record of proceedings show that the following happenings took place before the learned Principal Magistrate, the Hon. L. W. Gitari (as she then was) as follows:-

**“Mr. Kimaru for the Plaintiff (respondent herein)**

**Mr. Momanyi for the Defendant (appellant herein)**

**Mr. Kimaru:** *The case is for hearing. The hearing date was taken by consent on 30<sup>th</sup> March 2001. This morning Mr. Momanyi and his client were in court. The court advised his client to attend at 2.00 pm. It is now 3.15 pm. The defendant and his advocates are not in court. I pray the court to allow me to proceed ex-parte.*

**Court (Hon. L. W. Gitari):** *I note that the defendant and his advocate are not in court. The defendant was in court and I told him the case would proceed at 2.00 pm and he should be available with his advocate.”*

4. With the foregoing narration, the magistrate proceeded *ex parte* to hear and determine the case and delivered judgment dated 13<sup>th</sup> August 2001 in favour of the respondent.

5. Subsequent, the appellant filed an application seeking to set aside the judgment and all consequential orders. By a ruling dated 14<sup>th</sup> December 2001, the application was dismissed. In dismissing the application, the magistrate held that the court was entitled to proceed with the *ex parte* hearing and that the appellant had not offered any reasonable explanation to warrant the court to set aside the judgment.

6. Aggrieved by the dismissal of the application to set aside the judgment, the appellant lodged an appeal at the High Court being **HC Civil Appeal No. 3 of 2002**. The grounds in support of the appeal before the High Court were *inter alia* that the magistrate erred in refusing to set aside the judgment; the court erred in ignoring the fact that the suit was not listed in the cause list; the magistrate ignored the fact that the court file was only made available in the afternoon and that the decision of the magistrate was unfair and unjustified given the circumstances under which the *ex parte* hearing of the suit proceeded.

7. Upon hearing the parties, the learned Judge delivered a judgment dated 20<sup>th</sup> April 2012 dismissing the appeal. In dismissing the appeal, the Judge expressed herself thus:

***“The court has perused the application made by counsel for the appellant and find that the cause list for that date was not annexed to the application to set aside the ex-parte judgment. This would have been conclusive evidence that would have swayed this appellate court to decide in the appellant’s favour.”***

***This court also notes that the trial magistrate did not enter a Coram in the morning. The Coram in the record of appeal for the dated of 11<sup>th</sup> May 2001 reads like it was made in the afternoon session. This fact again would have rendered the appeal favourable to the appellant.***

***Again this court reiterates that counsel for the appellant failed to annex that day’s cause list to the application for setting aside. The rules of practice are that if a matter is not cause listed and either of the parties is absent, the matter cannot proceed. This court notes that the date for hearing was taken by consent and taken by both counsels in court on the 30<sup>th</sup> March 2011. Unfortunately, this is the evidence this court has that supports the decision of the trial magistrate to proceed to hear and determine the suit. In the absence of the cause list for the day of 11<sup>th</sup> May 2001, this appeal is disallowed.”***

8. Dissatisfied by the judgment of the High Court, the appellant has lodged the instant appeal to this Court citing the following abridged grounds of appeal.

***(i) That the judge erred in failing to note that the file in the magistrate’s court was not in court the entire morning when the case was to be heard on 11<sup>th</sup> May 2001.***

***(ii) The judge erred in taking the appellant’s right to be heard lightly thereby denying the appellant the right to be heard.***

***(iii) The judge erred in failing to set aside the trial magistrate’s judgment dated 13<sup>th</sup> August 2001 in view of the reasons advanced.***

***(iv) The decision of the learned judge was unfair, unjust and untenable considering the circumstances of the case.***

***(v) The judge erred in failing to find that an award of costs would be sufficient to re-open the case for full hearing on merits.***

***(vi) The judge erred in holding that the only issue for determination was whether or not the case in the lower court was listed on 11<sup>th</sup> May 2001.***

9. At the hearing of this appeal, learned counsel **Mr. Elijah Momanyi** appeared for the appellant. Learned counsel **Mr. Tororei** appeared for the respondent. Both parties filed written submissions and cited judicial decisions.

#### **APPELLANT’S SUBMISSIONS**

10. Counsel submitted that the two courts below erred in failing to accord the appellant a hearing. That the appellant’s right to be heard was capriciously and arbitrarily taken away by the unjust conduct on the part of the learned magistrate. That the magistrate made an announcement in the morning of 11<sup>th</sup> May 2001 that she was not going to sit and handle the matters in the afternoon. That following the announcement, the appellant’s counsel went away at around noon knowing that the court could not sit to hear any matter in the afternoon of 11<sup>th</sup> May 2001. That it was untenable and unjust for the magistrate to proceed and hear the matter as if she had not made the announcement in the morning. That even if it were true that the magistrate told the appellant to get his advocate to proceed with the case in the afternoon, such conduct is unacceptable on the part of a judicial officer and this is no justification for the magistrate to renege on the announcement she had made in the morning. That it is not enough for the magistrate to rule that she had told the appellant to look for his advocate.

11. Counsel reiterated that the right of a party to be heard is cardinal and cannot be taken away lightly. That the magistrate erred and did not consider and determine whether ends of justice would be served if the judgment was set aside and the appellant condemned to pay costs and be accorded a right of hearing.

12. In concluding his submissions, counsel submitted that the two courts below erred and failed to judicially exercise their discretion to grant a right of hearing to the appellant.

#### **RESPONDENT’S SUBMISSIONS**

13. The respondent’s counsel rehashed the background facts leading to the *ex parte* hearing of the suit by the learned magistrate. Counsel conceded that it was not in dispute that on 11<sup>th</sup> May 2001, the matter was cause listed but the court file was not availed in court at 9.00 am.

That the court file was availed soon thereafter and the matter allocated time for hearing at 2.00 pm. That the appellant was present in person and he was told to get his counsel and prepare for hearing at 2.00 pm.

14. On the merits of the instant appeal, counsel submitted that this Court lacks jurisdiction to hear this appeal as the contestations involves matters of fact. That being a second appeal, only matters of law can be heard and determined by this Court.

15. Counsel submitted that when the appellant alleged that the matter was not listed for hearing before the magistrate, it was incumbent upon the appellant to attach the cause list of the day to support the submission. That failure to attach the cause list meant that the appellant did not prove his case on balance of probabilities. It was urged that the contestation that the trial court was not to sit in the afternoon was not substantiated. That the record is clear that the learned magistrate did not indicate that she would not sit in the afternoon. That when the matter was called at 12.30 pm, the appellant in person was in court and he was advised to call his advocate. The respondent submitted that there was no substantive error of procedure to warrant the learned Judge to set aside the judgment of the magistrate's court.

16. On the issue of the right to be heard, the respondent submitted that the appellant's right to be heard was not violated. Citing the case of **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji, Civil Application No. Nai 179 of 1998**, it was urged that *"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 it is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."*

17. In the instant matter, the respondent submitted that the appellant was not denied an opportunity to be heard. The appellant was given the opportunity but voluntarily opted not to take part in the proceedings before the trial court.

18. Counsel concluded his submissions by urging that the two courts below properly exercised their discretion in a judicious manner. That the trial magistrate made a finding that despite the appellant being aware that the hearing will proceed on 11<sup>th</sup> May 2001 at 2.00 pm, the appellant's counsel chose not to attend court.

#### **ANALYSIS and DETERMINATION**

19. This is a second appeal which must be confined to points of law only. We have considered the grounds of appeal, submissions by both parties and the authorities cited. There are two related primary issues for our determination in this appeal. The first is whether the two courts below erred in failing to accord the appellant the right to be heard. Concomitant to this is the second issue whether the learned judge erred in law in failing to set aside the judgment of the magistrate's court.

20. On the issue as to whether the appellant was given an opportunity to be heard, we hereby expound the legal principles encompassing fair hearing and the opportunity to be heard. We shall then apply the emerging principles to the facts of the instant appeal. In **Mbaki & Others vs. Macharia & Another (2005) 2 EA 206**, at page 210, this Court stated as follows:

***"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. If an opportunity to be heard is given to a party, failure to take advantage of that opportunity may constitute a valid constructive waiver of the right to be heard. What then constitutes opportunity to be heard? An opportunity to be heard must be a full one *to wit* where one voluntarily appears, presents his case, call witnesses and presents any relevant document and is fully heard. The requirement that a reasonable opportunity of being heard must be given has two elements. The first is that opportunity to be heard *per se* must be given; the second is that the opportunity must be reasonable. Both these matters are justiciable and it is for the court to decide whether an opportunity has been given and whether that opportunity is reasonable. The requirement of *"opportunity of being heard"* means that the material and evidence that goes against the applicant which is to be taken into consideration, must be supplied to the applicant with an opportunity to make representation or comment thereon.

22. In **Halsbury's Laws of England**, 5<sup>th</sup> Edition. Vol. 61 page 539 at para 639 it is stated that **the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice.** In **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua, Nairobi HCMCA No. 1298 of 2004** it was held as follows:

***"The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all proceedings is that persons who are likely to be affected by the proposed/ likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence..."***

23. In **Hon. Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others, SC Petition No. 7 of 2018**, in its ruling, the Supreme Court expressed itself as follows:

***"[87] ....In this regard, what then are the norms or components of a fair hearing? In the matter of Indru Ramchand Bharvani & others -v- Union of India & Others, 1988, SCR Supl. (1) 544, 555, the Supreme Court of India found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing Bal Kissen***

*Kejriwal -v- Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460). It is important to restate that a literal reading of the provisions of the Constitution of Kenya shows that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court of Human Rights (European Court) has severally explained that: “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” (See *Steel and Morris -v- United Kingdom [2005] ECHR 103, paragraph 59*).*

24. Arising from the above emerging principles, the issue for our analysis and determination is whether the appellant was given an opportunity to be heard and if the opportunity was reasonable. The answer to this question is discernible from the record of proceedings before the magistrate’s court on 11<sup>th</sup> May 2001 and in the ruling by the learned magistrate delivered on 14<sup>th</sup> December 2001. We have reproduced the record of the proceedings before the magistrate’s court on 11<sup>th</sup> May 2001. It is manifest from the proceedings that both the appellant and his advocate were not present in court when the *ex parte* hearing took place.

25. The legal issue is whether the appellant and his advocate were aware that the matter had been allocated time for hearing at 2.00 pm. Learned counsel for the respondent stated that indeed, at 12.30 pm the matter was called out for hearing in the absence of counsel for the appellant but in the presence of the appellant. That when the matter was called out the magistrate advised the appellant to come with his advocate for hearing at 2.00 pm. The learned magistrate in her ruling dated 14<sup>th</sup> December 2001 likewise stated that she advised the appellant who was present in court to come with his advocate for hearing at 2.00 pm.

26. In her ruling, the learned magistrate stated:

*“I have perused the record and find that the averments in the affidavit of Mr. Luka Kimaru are true. The defendant was present in court and was informed that the case would proceed at 2.00 pm. This is confirmed in paragraph 8 of the affidavit. It is therefore not true that the defendant was not aware that the case would proceed at 2.00 pm. In the absence of explanation as to why the defendant and his advocate were not present, I find that the court was entitled to proceed with the hearing....”*

27. The learned Judge in the judgment dated 20<sup>th</sup> April 2012 when considering the issue whether the appellant was accorded an opportunity to be heard expressed herself as follows:

*“This court notes that the trial magistrate did not enter a Coram in the morning. The Coram in the record of appeal for the date of 11<sup>th</sup> May 2001 reads like it was made in the afternoon session.”*

28. On our part, we have examined the record of proceedings before the trial magistrate on 11<sup>th</sup> May 2001. As correctly noted by the High Court, there is no record of proceedings for the morning session of 11<sup>th</sup> May 2001. There is no record to indicate that at 12.30 pm the matter was called out. There is no record to indicate that the learned magistrate told or advised the appellant to come with his advocate for hearing at 2.00 pm. The official court record is contained in the court file and not in the averments and affidavits by counsel. The trial magistrate in the ruling dated 14<sup>th</sup> December 2001 stated that she had perused the record and found that the averments in the affidavit of **Mr Luka Kimaru** advocate were true. We have not seen the record allegedly perused by the learned magistrate. There is no record of proceedings held in the morning of 11<sup>th</sup> May 2001. The statement by the learned magistrate that she had perused the record is erroneous given that no such record exists.

29. In addition, the magistrate fell in error by delving into contentious factual disputations. Whether the appellant was given an opportunity to be heard in this matter has now transmuted into a dispute as to what the learned magistrate told the appellant. There is no record as to what the magistrate said. There is no record of any court proceedings in the morning of 11<sup>th</sup> May 2001. Further, the dispute now relates to whether or not the learned magistrate stated she would not sit in the afternoon of 11<sup>th</sup> May 2001 and whether the magistrate told the appellant in person that the hearing would be conducted at 2.00 pm. We strongly advise judicial officers and all courts of record that all proceedings must be recorded in the court file. We further advise that as far as possible, a judicial officer or a judge should not delve into contestations of disputed facts and then proceed to hear and determine the matter in dispute. In this matter, the learned magistrate fell in error in delving into contested facts.

30. The learned Judge correctly appreciated that there was no record of what transpired before the magistrate’s court in the morning of 11<sup>th</sup> May 2001. This by itself was sufficient basis for the Judge to set aside the judgment of the magistrate’s court. Convinced by the sanctity of the record of proceedings before the magistrate’s court, we find that there is a concrete factual basis for the appellant’s contention that he was denied an opportunity to be heard. For this reason, we are satisfied that the learned Judge erred in law in failing to set aside the judgment of the learned magistrate dated 13<sup>th</sup> August 2001.

31. Another ground that has been urged in this appeal is that the two courts below erred in the exercise of their discretion in declining to set aside the judgment delivered by the magistrate’s court on 13<sup>th</sup> August 2001. That the two courts below erred as they failed to appreciate the appellant was not accorded the right to be heard.

32. In the Uganda case of **National Enterprises corporation vs. Mukisa Foods Ltd; CA Civil Appeal No. 42 of 1997** quoting the case of **Evans vs. Bartlam [1937] AC 473 at 480**, it was stated that *unless and until the court has pronounced a judgment upon the merits of the case or by consent of the parties, it has power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure. (Emphasis supplied).*

33. In the Tanzania case of **Abbas Sherally and another vs. Abdul Fazalboy**, Civil Application No. 33 of 2002, the importance of the right to be heard was emphasized as follows:

***"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "***

34. In Kenya, in **Tana & Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**, this Court held that in determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled *vis-a-viz* the prejudice to be visited on the opposing party.

35. In this appeal, our take is that the respondent stood to suffer no prejudice if the suit before the magistrate court proceeded for hearing *inter partes* on merit. The appellant was locked out of the seat of justice through the *ex parte* hearing of the suit. In the absence of record of proceedings for the court session of the morning of 11<sup>th</sup> May 2001, there was no reason grave enough that would warrant the locking out of the appellant from pursuing his claim and allowing the trial to proceed *inter partes* to its logical conclusion. For this reason, the interest of justice warrants this Court's intervention. (See **Patriotic Guards Ltd vs. James Kipchirchir Sambu [2018] eKLR**).

36. Accordingly, we are satisfied that the two courts below erred in failing to accord the appellant the right to be heard. The upshot is that this appeal has merit and is hereby allowed. The final orders of this Court are that we hereby set aside the judgment of the High Court delivered on 20<sup>th</sup> April 2012. We further set aside the judgment of the magistrate's court delivered on 13<sup>th</sup> August 2001 in **Eldoret Civil Case No. 329 of 1998** and direct that **Eldoret Civil Case No. 329 of 1998** proceed for hearing *inter partes*. Each party shall bear the costs before the High Court and in this appeal.

***Dated and delivered at Eldoret this 17<sup>th</sup> day of October, 2019.***

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**J. OTIENO ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**