



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 113 OF 2009

BETWEEN

COTTON BOARD OF KENYA APPELLANT

AND

JOHN M.N. MUTUTHO RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Rawal, J.) delivered on 17th November, 2008

in

HCCC No. 1285 of 2001)

JUDGMENT OF THE COURT

John M.N. Mututho, the respondent herein, was the successful bidder at an auction held on 8th November, 2000 in respect of Land Reference Number 209/4389/3 Riverside Estate, Nairobi. That auction resulted from the exercise of a statutory power of sale by the Co-operative Bank of Kenya. The said property had been charged by the appellant, **Cotton Board of Kenya**, for a loan that had been advanced by the said bank. The respondent's offer of Kshs.21,500,000/= being the highest bid was accepted by the auctioneer at the said auction. The terms of sale which appeared in an advertisement in the issue of The East African Standard of 6th November, 2000 were *inter alia* that:

- i. ***All interested purchasers are requested to view the properties and verify the details for themselves as these are not warranted by the auctioneers or the advocates.***
- ii. ***A deposit of 25% must be paid in cash or bankers cheque at the fall of the hammer and the balance be paid within 30 daysto the chargee's advocates.***
- iii. ***Sale is subject to a reserve price.***

The respondent paid Kshs.5,375,000/= at the fall of the hammer being 25% of the bid. It would appear that the balance was not paid within 30 days of the auction as required and what followed was a complex situation which we shall try to unravel in this Judgment.

By a plaint filed at the High Court of Kenya at Nairobi, the appellant sued the respondent. Various averments were made in the plaint to the effect that the appellant was advanced a loan as already stated; that the suit premises were sold at the said auction; that the respondent had by the time the suit was filed paid Kshs.8,375,000/= towards purchase price; that the appellant was in occupation of the suit premises which were used as the residence of its Managing Director; that the respondent had issued an eviction notice to the appellant; that the said eviction notice was illegal, null and void and for all that it was prayed that an injunctio do issue to restrain the respondent from evicting the appellant from the said premises until determination of the suit and it was also prayed that a declaration do issue to the effect that the respondent had not paid to the appellant the full purchase price and was therefore not entitled to possession of the premises. The respondent entered appearance to the suit through a firm of advocates, on 22nd August, 2001 but no defence was filed on behalf of the respondent at all.

By a letter dated 5th September, 2001 to the Deputy Registrar of the High Court which was signed on behalf of the appellant and the respondent by their respective advocates a consent had been entered and was duly set out in that letter and that consent culminated in the Court Order given on 22nd August, 2001 but dated the 30th of August, 2001. By that order which adopted the said consent it was ordered that:

“1. THAT' this matter be marked as settled under the following terms:

- a. **The defendant to pay the balance of the purchase price for the premises known as LR 209/4389/3 Nairobi directly to the Cotton Board of Kenya the plaintiff herein.**
- b. **Upon receipt of Khs.2,000,000 the plaintiff to give vacant possession of the said premises to the defendant and the balance to be paid within 6 months.**
- c. **The defendant to redeem in full the plaintiffs account with the chargee's cooperative Bank of Kenya Ltd.**
- d. **Upon execution of transfer by the said chargee the plaintiff's advocates to call for the title document together with the said transfer from the chargee and to hold the same for the facilitation of completion of the transaction in terms of this consent.**
- e. **In default each party to be at liberty to apply.”**

That order was followed by another order given on the 26th September, 2001 but issued two days later on 28th September, 2001. By this order which seemed to vary the earlier order it was ordered by consent:

“1. THAT this suit be and is hereby marked as settled with no orders as to cost.

2. THAT the Plaintiff to give vacant possession of the premises known as LR 209/4389/3 RIVERSIDE ESTATE NAIROBI upon payment of a substantial portion of the outstanding balance.

3. THAT the outstanding balance thereafter be paid in six months instalments.

4. THAT the Plaintiff's Advocates to liase with the Co-operative Bank of Kenya Limited as the chargee for the said suit premises, appropriately for the release of the title documents so as to facilitate completion of the transaction.

5. THAT in the event of non-compliance by either party, there be liberty to apply.”

Neither of these orders appeared to have made much impression and what followed was a flurry of correspondence that were written by the two parties either to each other or to the Ministry of Agriculture relating to the matter of the subject property. This went on for 4 years.

By a Notice of Motion dated and filed in the High Court on 8th July, 2004 which was said to be brought “under the provisions of **Section 3A of the Civil Procedure Act, Order III rule 9A and Order L rule 1 of the Civil Procedure Rules** and the court order dated 26th September, 2001” it was prayed in the main that a law firm be allowed to come on record on behalf of the respondent; that the appellant be directed to complete the sale of the suit property to the respondent by accepting the balance of purchase price and execute transfer documents within 14 days of the order; that in the alternative the respondent be at liberty to deposit the outstanding balance of the purchase price being Shs.8,700,000/= into court within 14 days for collection by the appellant thereafter transfer documents be executed by the Deputy Registrar of the High Court and costs be provided for.

In the grounds in support of that motion the respondent stated that the appellant had since recording the consent that resulted from the letter of 5th September, 2001 frustrated the respondent's efforts to conclude the sale; that the appellant was wasting away the property; that the appellant denied the respondent access to the premises despite the respondent having paid Kshs.8,375,000/=; that the respondent was suffering loss and damage and was not benefiting from the said sum paid to the appellant and that the appellant had approached the court with clean hands; that it was in the interests of justice that the court grants the orders prayed. Those same issues were recapitulated in an affidavit sworn by the respondent in support of the application. This affidavit in addition to the matters stated in the grounds went on to say, *inter alia*, that:

“11. THAT as a consequence of the afore recited agreements, an agreement for sale dated 30th August 2001 was prepared and executed by the parties (sic) hereto. A copy of this Agreement for sale is now exhibited hereon and marked JM – 5.

12. THAT hitherto the foregoing, the plaintiff had all along denied me access to the suit property and I had not inspected the same. Later when I got to view the property, I discovered that the same was not worth the auction price of shs.21,500,000/= and the Ministry of Agriculture duly called on the Ministry of Public Works to do a valuation thereof which valuation was done and a value of Shs.17,000,000/= was posted therefor. It was this value that I was now required to pay and having already paid a deposit of Shs.8,375,000/=, I have always been willing and ready to pay the outstanding balance of Shs.8,700,000/= as I have already demonstrated elsewhere herein.

13. THAT even though the plaintiff has ever since continued to enjoy the benefit of the Shs.8,375,000/=, the same plaintiff has callously refused to complete this transaction to my untold detriment thereby necessitating the filing of this application.”

Various letters and documents were attached to that affidavit. One of those annexures was an agreement for sale entered into on 30th August, 2001 between the appellant and the respondent in respect of sale of the subject property. The purchase price was given as Kshs.21,500,000/= and a deposit of Kshs.8,375,000/= was recognized as having been paid. As part of the Special Conditions of the sale it was stated that the balance of the purchase price being Kshs.13,200,000/= was to be paid as follows: Kshs.2,000,000/= on execution of the agreement and the balance by monthly instalments of Kshs.350,000/= until payment in full. It was also provided that since the appellant's Managing Director had been in occupation of the premises a valuation for rent purposes was to be undertaken before execution of the agreement to establish rent arrears payable from 8th November, 2000 to the date the respondent was granted vacant possession. That sum was to be set off against the balance of the purchase price. Nothing much seems to have happened thereafter until the year 2003.

By a letter dated 24th October, 2003 advocates acting for the respondent wrote to the Permanent Secretary, Ministry of Agriculture forwarding a cheque for Kshs.8,700,000/= written in favour of the appellant which was said to be the balance of the purchase price. By a letter dated 27th October, 2003 the respondent wrote to the appellant forwarding an agreement for sale and a transfer. It is not clear whether that was the agreement dated 30th August, 2001 or another.

By a letter dated 21st November, 2003 to advocates acting for the respondent, the Permanent Secretary,

Ministry of Agriculture returned the aforesaid cheque taking the position that the Ministry did not act for the appellant and that the appellant was an independent entity distinct from the Ministry. Then there is a letter of 3rd February, 2004 by the Permanent Secretary, Ministry of Agriculture which countermanded the previous letter from the Ministry, the Permanent Secretary taking the view that although the appellant could enter into contracts it required approval of that Ministry and the Ministry of Finance if it was to sell a public asset.

Going back to the Motion filed on 8th July, 2004 the appellant filed a replying affidavit on 22nd July, 2004 sworn by its acting Managing Director, **Mary Githaiga**. It was deponed that the application was made in bad faith; that the application was malicious and the orders sought could not be granted. It was also deponed that the respondent had concealed material facts to the court in that the respondent had failed to disclose to the court that he had since the year 2000 not paid the balance of purchase price being Kshs.13,125,000/=; that the respondent had been given ample time but had not paid the said balance; that there had never been any agreement to reduce the purchase price; an agreement had been reached where the respondent was to be refunded what he had paid in respect of the property; that payment was to be made in exchange for title documents; that instead of that exchange taking place the respondent had filed suit in court; that there was no authority from the government to sell the property to the respondent; that the respondent had breached terms and conditions of the sale agreement already adverted to; that the respondent could not apply for an order of specific performance by way of Notice of Motion; that the agreement for sale dated 30th August, 2001 was in fact a forgery as the appellant did not execute the same and that the appellant had never agreed to sell the suit premises to the respondent for Kshs.17,000,000/=.

For completion of the record there is a supplementary affidavit sworn and filed by the respondent on 7th June, 2005. In this affidavit the respondent says that it is the appellant who had delayed in concluding the sale; that at the intervention of the Ministry of Agriculture the property had been valued at Kshs.17,000,000/=; that the respondent was entitled to monthly rent at Kshs.80,000/= from the appellant; that the respondent had been threatened by the Attorney General in a meeting attended by the respondent and others and that a letter written by an advocate after that meeting was false and had been written without the respondent's instructions.

Daniel Maanzo an advocate of the High Court swore an affidavit on 7th June, 2004 which was filed in court the same day. In this affidavit the said advocate confirmed attending with his client, the respondent, the meeting at the Attorney General's Chambers and that proposals made at that meeting were not acceptable to the respondent. He also deponed that the meeting was hostile and that he and his client were not allowed to speak. Also deposed, strangely, we should say was that he wrote that letter without his client's instructions. Good lawyers do not act without instructions – but that's for another day.

We have travelled the long journey through the record of appeal because it is our duty as the first appellate court to reevaluate the evidence. This Court has variously held that it is the duty of a first appellate court to do so. In **Mwanasokoni v Kenya Bus Services Limited (Mombasa) Civil Appeal No. 35 of 1985 (ur)** Hancox, JA, speaking for the court, stated of the duty of a first appellate court:

“...Although this Court of Appeal will not lightly differ from the Judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary.”

The Notice of Motion filed on 8th July, 2004 was heard by Rawal, J. (as she then was). The learned judge in the Ruling which is dated and signed at Nairobi on 25th November, 2008 held *inter alia* that:

“In the premises, aforesaid, I direct that the plaintiff/respondent herein do complete the sale of suit property herein being LR. No. 209/4389/3 to the Defendant/Applicant by accepting the balance of purchase price and execution of the transfer documents within 14 days from the date of this order.

I further direct that the sum of balance of the purchase price be arrived at after off-setting the monthly rent arrears up to the date of vacant possession and/or execution of transfer document as directed

hereinbefore.

I have directed as aforesaid because the initial deposit of Shs.8,375,000/= has been with the plaintiff and because the defendant respondent is deprived of its interest as well as user of the suit premises.

Orders accordingly.

In the peculiar circumstances of this case, I shall not make any order as to costs.”

The record shows that the Notice of Motion dated 8th July, 2004 came for hearing before the same judge on 23rd April, 2008 when it was marked as a part heard. It was then adjourned to continue for hearing on 3rd May, 2008 at 2.30 p.m. It appears not to have been listed on the said date. It was listed on 18th June, 2008 when it was ordered to be heard on 16th September, 2008 at 2.30 p.m. It was not listed on that day but was listed the following day 17th September, 2008 when it was ordered to be heard on 8th October, 2008. On that day counsel holding brief for Mr. Kimamo Kuria for the appellant (plaintiff) applied for adjournment on the ground that the advocate was unable to get Mr. Kimamo Kuria on telephone. That application was opposed on various grounds. The learned judge considered the application for adjournment but declined the same stating:

“I do agree with Mr. Mun gla that no sufficient reason is given for the adjournment for an application pending since 2004. Mr. Kimamo was aware of today’s hearing even if it was not listed he ought to have made inquiry either from the registry or from the court when the dates were taken in the court. (underlining added).

Mr. Mun gla did so and got the confirmation which he kindly relayed to Mr. Kimamo’s office. The total silence from Mr. Kimamo despite several calls made to him by Ms. Wambui since 11.54 a.m. has not been responded. In the premises I decline to grant the adjournment.”

The matter proceeded for hearing but the advocate holding brief for Mr. Kimamo Kuria for the appellant was not able to effectively participate in the matter. Ruling was reserved to be delivered on the 25th November, 2008. Before the ruling could be delivered Messrs Kimamo Kuria advocates for the appellant filed a Notice of Motion dated 24th October, 2008 where it was prayed in the main that the court order made on 9th October, 2008 closing the proceedings before the appellant was heard be set aside and that the appellant's counsel be allowed to make submissions on behalf of the appellant in response to the application dated 8th July, 2004. That Motion was supported by a lengthy affidavit of Mr. Kimamo Kuria advocate which set out reasons for his failure to attend court. Salient of these reasons was that: that the advocate attended court on 16th September, 2008 but was informed through a telephone conversation by Mr. Mun gla advocate for the respondent that the matter would not proceed because the Judge to hear it was engaged elsewhere on official business and that he had himself not received that communication; that the matter was mentioned in court the next day on 17th September, 2008 when a hearing date was given for 9th October, 2008; that on the 8th October, 2008 he prepared for the hearing but upon checking the cause list for the 9th October 2008 the matter was not listed; that on the said 8th October, 2008 he received an urgent message that his elderly father was seriously ill at their rural home in Nyeri; that on the morning of 9th October, 2008 upon reconfirming that the Motion was not listed in the daily cause list he travelled to Nyeri to attend to his sick father; that upon return to the office he learnt that information had been relayed by counsel for the respondent through a short message service ('SMS') that the matter would proceed although it was not listed; that his associate attended court but an applicaiton for adjournment was refused; that his inability to attend court was caused by factors beyond his control; that he wished to address the court to highlight issues of fact and law relevant to the application and the said affidavit went on to set out the history of the whole matter of the intended sale of the subject property. A medical certificate from Outspan Hospital was attached to show that the advocate's father was sick at the material time.

Paul Otieno Mun gla advocate replied to the said application through an affidavit sworn on 11th

November, 2008. It is deponed in that affidavit, *inter alia* that:

“4. THAT the application dated 8th July, 2004 was to come up for hearing on 16th September, 2008 at 2.30 p.m. before the Hon. Rawal, J. On the said date, I got a call from the court clerk advising me that the matter will be mentioned on the 17th day of September 2008 at 9.00 o'clock as the Judge was attending the judiciary open day that afternoon. The insinuation at paragraph 4 of the supporting affidavit is not well founded as the communication by the registry was not in any way special but merely courteous.(underlining added)

5. THAT paragraph 5 of the supporting affidavit is correct. Save to add that on that very day the court advised the parties to attend on the scheduled date whether or not the matter appeared on the cause list for the day. This direction was given at my request as the file had on previous occasions not been listed despite dates having been given by the court.

6. THAT paragraphs 14 and 15 of the supporting affidavit are correct. I contacted the plaintiff's advocates merely out of professional courtesy as I had no obligation to do so in light of the direction made by the court on 17th September 2008.”

The said application was placed before Rawal, J. on 17th November, 2008 when both counsel for the appellant and respondent appeared in court. There is no record of the advocates having addressed the court at all but the record shows:

“COURT

The application before me today is that of 24th October 2008 seeking to review my order made of (sic) 9th October, 2008 closing the proceedings in absence of the learned counsel Mr. Kuria. The matter was heard on 9th October, 2008 and the record of the court speaks for itself.

Looking at the supporting affidavit I may find that Mr. Kuria had reasons not be able to come before the court. But that is the water under the bridge as today I have the ruling already prepared and Mr. Kuria can then make an appropriate application if deemed fit. At present Mr. Munjla objecting, I refuse to grant the application with no order as to costs.”

So the application which was placed before the learned judge was not heard but the Judge found it fit in the presence of both counsel to instead deliver the substantive ruling on the earlier application which was now delivered on 17th November, 2008 instead of its scheduled date of 25th November, 2008.

That is the concatenation of events that led to this appeal.

Twelve grounds are set out in the Memorandum of Appeal drawn by the advocates of the appellant. In essence the appellant complains that the learned judge erred in failing to appreciate that it was the respondent who had failed to complete the sale; that the learned judge erred in ordering that balance of purchase price be arrived at after offsetting monthly rent arrears which was an order not prayed for; that the learned judge failed to make a full and complete review of all the material facts and applicable law relating to the dispute between the parties; that the learned judge had erred in failing to make a finding that the respondent had not come to court with clean hands; that the learned judge in failing to make a finding that Order No. 5 in the Consent Order of 26th November, 2001 "liberty to apply" did not contemplate and could not extend to the bringing of a substantive application as the one made by the respondent; that the learned judge erred in failing to find that it was against public policy to make an order to take away the property which was public property and place it in private hands without hearing the appellant; that the learned judge erred in finding that the appellant had not sought to cross examine Daniel Maanzo advocate and the respondent on their affidavits of 7th

June, 2005 when in fact such an order was sought and granted and the deponents were cross examined;

that that failure led to leaving out crucial evidence in arriving at the ruling; that the learned judge erred in delivering a ruling on the main application before its due date thus pre-empting the appellant's application and finally that the learned judge erred in finding that the appellant's counsel had given good reasons for failing to attend court and yet the application was denied.

When the appeal came up for hearing before us on 30th June, 2015 Mr. Kimamo Kuria advocate appeared for the appellant while Mr. Ngumba advocate appeared for the respondent. Learned counsel for the appellant repeated the history of the matter submitting that the purchasers at the auction were required to visit and view the property before the auction and a successful bidder had to pay 25% of the bid price at the fall of the hammer and the balance thereof in 30 days. Counsel submitted that the respondent had not paid the balance within 30 days as required and in any event had not paid the same by the time the suit was filed. Counsel further submitted that the consent order issued on 28th September, 2009 superceded the previous consent order. According to counsel this latter order was not capable of implementation because it was vague. Counsel faulted the learned judge for finding that the respondent had always been ready and willing to pay the balance when according to counsel that was not so. Counsel further submitted that "liberty to apply" clause in the court order could not be used to apply for substantive orders.

On the issue of the application by the appellant for submissions to be allowed before closure of the matter counsel faulted the learned judge for refusing an adjournment when a valid reason had been made for adjournment. Counsel wondered why the learned judge delivered a ruling on 17th November, 2008 when it was scheduled for hearing on the 25th November, 2008 while the learned judge refused to entertain the application for taking submissions which application was before the learned judge. Finally, learned counsel thought that the learned judge issued orders that were not prayed for or issued orders that were contradictory.

Mr. Gumba thought otherwise. According to counsel the consents on record were made by respective advocates and were binding on the parties unless it was shown that they had been made through fraud or misrepresentation. On the learned judge refusing to entertain the application by the appellant for giving submissions before ruling, learned counsel thought that the learned judge was entitled to refuse to hear that application and because both counsel were present it was in order for the ruling to have been delivered before its due date. He therefore asked that the appeal be dismissed.

Having considered the record of appeal, the memorandum of appeal, submissions of counsel and the law we take the following view of the matter. The main complaint would appear to be that the learned judge gave positive orders in favour of the respondent when the respondent had not met its part of the bargain with respect to the auction that took place on 8th November, 2000. The material placed before the learned judge included the advertisement that was published in the press notifying the public that the subject property was to be sold at a public auction. There were conditions attached to the way the auction would be conducted and what was expected of a successful bidder at the said auction. We have set out some of these conditions as part of this judgment. A successful bidder in addition to payment of 25% of the bid price at the fall of the hammer had to pay the balance of the bid price within 30 days. Such bidder was required before the date of the auction to view the property and verify the details for themselves as these were not warranted by the auctioneers or the advocates.

In this case there was no evidence placed before the learned judge or at all that the balance of the purchase price was offered within 30 days of the auction or at all. The respondent instead said that he entered into an agreement dated 30th August, 2001 with the appellant for the sale of the same property. No evidence was placed before the learned judge that even the conditions of that agreement – the agreement was disputed by the appellant and was claimed to be a forgery – were met. By the time the suit was filed by the appellant on 31st July, 2001 there was no evidence that the balance of purchase price was available at all. The respondent did not file a defence to the suit. Instead there were two orders one issued on 30th August, 2001 and the other one 28th September, 2001. If we may focus on the latter which says that the suit be marked as settled with no orders as to costs; that the plaintiff (appellant) do give vacant possession of the premises upon payment of a substantial portion of the outstanding balance and that

instalments thereafter be paid in six months instalments – we fully agree with counsel for the respondent that consents entered such as the ones made before the High Court have contractual effect on the parties. They are binding. But what was the intention of the parties in entering this consent? What was meant where a suit was being compromised, vacant possession was to be given upon payment after an unstated sum of money which was just called “substantial portion of the outstanding balance” - what was meant by this? And it will be noted that this was coming nearly 10 months after the balance of purchase price was supposed to have been paid after the auction.

What is curious here is that the respondent had not met his part of the bargain because he had not paid the balance of purchase price within 30 days of the auction or at all. The consent orders entered were vague. It was not stated in certain terms how the balance of purchase price was to be paid. We agree with learned counsel for the appellant that the order was vague and was not capable of being enforced. The consent was not in the event binding on the parties at all.

We then come to the Notice of Motion which was heard by the learned judge and upon which the ruling was based. It was said to have been made pursuant to provisions of **Section 3A** of the **Civil Procedure Act Order III rule 9A** and **Order L rule 1** of the Civil Procedure Rules and it was also said to be based on the order made on 26th September, 2001. Starting with **Section 3A** that was a general provision in the Civil Procedure Act restating the inherent power of the court to make necessary orders for the ends of justice or to prevent abuse of the process of the court. **Order III Rule 9A** related to a change of advocate after judgment had already been passed where an order of the court was required before such change was effected. **Order L rule 1** provided the procedure where there was no express provision in the rules which application was to then said it will be by Motion. The application was also said to be brought pursuant to the order dated 26th September, 2001. We have already discussed that order. It would appear that the respondent was relying on the part of the order giving each party liberty to apply to the court.

That omnibus application prayed for advocates to be allowed on record; that the court order sale of a suit property to be completed and in the alternative that a balance of purchase price as determined by the respondent be deposited in court. The respondent in the supporting affidavit blatantly stated that he had discovered at a time which he does not state that the property which he had bid for and been declared highest bidder was not worth what he offered at the auction. We do not know of any provision of law statutory or otherwise that would give a bidder at such an auction an opportunity to bid, offer price, be declared highest bidder, pay 25% of the bid price as required and many months or years later unilaterally decide to go and value the same property and find that he offered more than its worth. That cannot be and the learned judge erred in failing so to find.

The appellant has complained that the learned judge erred in finding that the appellant had not asked to cross examine Mr. Maanzo advocate and the respondent. Indeed in the said ruling the learned judge holds:

“To make the matter worse, since 23rd January, 2008, when Mr. Kimamo Kuria the learned counsel for the plaintiff/respondent asked for time to respond to the sub mission made by Mr. Mungla the learned counsel for the defendant/applicant, no steps are taken either to apply for leave to cross-examine the former Managing Director or Mr. Daniel Maanzo on their affidavits (mentioned herein before) or any affidavit in response from the officials involved in the meeting of 7th June, 2004 is filed. Thus the contents of both the aforesaid affidavits do remain uncontroverted. I further do note that Mary Githaiga has no personal knowledge as regards events of the previous suit or the present suit.”

When we look at the record it paints a totally different picture.

The record shows that on 22nd March, 2007 the matter was before Ang'awa J. and the said advocates were in court. Mr. Kimamo Kuria advocate applied for leave to call and cross examine Mr. Daniel Maanzo. The court ordered:

“Subject to court we have a consent ‘By consent, Mr. Daniel Maanzo, the deponent of the affidavit

shown (sic) on 7.6.05 be cross examined on that entire affidavit.

The defendant applicant be cross examined on para 4-15 of affidavit supporting of (sic) 8.7.04 and para 4-10 of supplementary affidavit sworn on 7.6.05.”

Application granted and orders accordingly. Costs in the cause.”

On 3rd of October, 2007 the matter was before Rawal, J., when Mr. Daniel Maanzo and the respondent were cross examined at length by consent for the appellant. That cross examination runs for a good seven pages recorded by the said learned judge. It was therefore with respect, a misdirection for the learned judge to hold as she did that the appellant had neither asked for nor cross examined the said persons.

We think we have said enough and do not have to go into the complaints by the appellant on how the application to be allowed to give submissions was treated by the learned judge. But to say in passing that the main application dated 8th July, 2004 having not been listed it was wrong for the counsel for the respondent to insist on proceeding and for the learned judge to refuse an application for adjournment. Both the respondent’s advocate and the counsel holding brief for the appellant’s advocate informed the learned judge that neither of them could raise Mr. Kimamo Kuria advocate on telephone despite many attempts to reach him. As it turns out as evidenced in the affidavit, the said counsel was attending to his ailing elderly father who later died. Suffice to say that in the absence of the matter being listed a better cause of action would have been to adjourn the hearing and set it for hearing on a date notified to the parties. Counsel for the respondent stated to the learned judge that he had been telephoned by the court registry staff to be given information on the matter but the same treatment was not accorded to the opposite side. This was not fair in the circumstances. Having taken this whole view of the matter, we set aside the ruling dated and signed on 25th November, 2008. We allow this appeal and we grant costs to the appellant.

Dated and Delivered at Nairobi this 25th day of September, 2015.

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR