REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 137 OF 2016

CHARLES JUMA MULWA.....APPELLANT

VERSUS

PETER MAKAU NDETI and ESTHER MBULA MAKAU

(Suing on their own behalf and as administrators of the

Estate of late **ALEX NZOMO MUENDO).....RESPONDENTS**

(Arising from the Ruling and or orders passed on 18.11.2016 in Kangundo Senior Principal Magistrate's Court Civil Case No. 60 of 2015 presided over by Hon. P.M. Chesang, Principal Magistrate)

BETWEEN

PETER MAKAU NDETI and ESTHER MBULA MAKAU

(Suing on their own behalf and as administrators of the

Estate of late **ALEX NZOMO MUENDO).....PLAINTIFFS**

VERSUS

CHARLES JUMA MULWA .....DEFENDANT

JUDGEMENT

1. This is an interlocutory appeal arising from the decision in Kangundo Senior Principal Magistrate's Court Civil Case No. 60 of 2015 made by **Hon. P.M. Chesang**, Principal Magistrate on 18th November, 2016. What provoked this appeal was that after the Respondents had closed their case, the Appellant herein called one **PC Sostin Werunga Chenani** as DW1. Before that witness could testify, an objection was taken on behalf of the Respondents that since the matter had been adjourned to enable the Appellant call the investigating officer, whose names were clearly indicated in the police abstract, that particular witness could not testify.

2. In her ruling the learned trial magistrate sustained the objection stating that the supplementary list indicated that the defendant/appellant was going to call the witness on the list and none of them had been called as the witness called was not one of them. The Court further stated that the defence had not paid court adjournment fees ordered on 28th October, 2016. The learned trial magistrate not only upheld the objection but proceeded to direct both parties to close their cases.

3. The appellant was aggrieved with the orders given and filed the instant appeal that raised the following 7 grounds:

a) The learned magistrate erred in law and fact in denying the defendant/appellant a chance to defend their case when the matter came up for defence hearing on 18th November, 2016.

b) The learned trial magistrate erred in law and fact in failing to appreciate that the police officer based at Kangundo Police

Station and being the Defendant's key witness was on the witness stand.

c) The trial magistrate erred in law and in fact by standing down the police officer from Kangundo police station who was to produce the police file and OB as evidence in CMCC 60 of 2015.

d) The learned magistrate erred in law and fact in failing to appreciate that the investigating officer had been transferred hence could not be available thus the defendant called another officer from the same police station to produce the evidence.

e) The learned trial magistrate erred in law and fact in failing to appreciate that the suit herein is a fatal claim and therefore the evidence of the police officer is crucial in determining the issue of liability.

f) The learned magistrate erred in law in failing to appreciate that the plaintiff would not suffer any prejudice if the defence was given a right to fair trial when the matter came for hearing on 18th November, 2016.

g) The learned trial magistrate erred in fact and law by compelling the defendant to close their case without defending the case despite having a witness in court.

4. The appellant's counsel prayed that the appeal be allowed; that the ruling of 18th November, 2016 be set aside and that the appellant be allowed to reopen the defence case and be allowed to adduce evidence in support of the defence case.

5. The appeal was canvassed vide written submissions that the parties filed and exchanged. It was submitted on behalf of the appellant that pursuant to the provisions of Article 50 of the Constitution the trial magistrate ought to have taken the evidence of the appellant's witness who was competent. It was submitted that the trial magistrate did not address the issue of whether the denial of the appellant to adduce evidence would occasion a miscarriage of justice. Reliance was placed on the case of **Job Obanda vs. Stage Coach International Services Ltd & Another (2002) eKLR** and **Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & Another (2019) eKLR.**

6. In opposing the appeal, it was submitted on behalf of the Respondents that the appellant sought the same police officer who was called by the respondents when the respondent called his evidence. It was submitted that the appellant's counsel attempted to dupe both the court and the respondent's counsel hence the objection was made because the evidence that the witness would give would be repetitive. It was the Respondents' position that the appellant in failing to call the investigating officer, failed to utilize his right to fair hearing. Learned counsel urged the court to dismiss the appeal, uphold the finding of the trial court and return the lower court back to the trial court so that the matter may proceed from where it was.

Determination

7. I have considered the submissions made by the appellant in this appeal. This being an interlocutory appeal, care must be taken to obviate expressing a conclusive view of the matter as the respondent's suit is still pending before the Magistrate's Court. The practice is and has always been that at interlocutory stage the court may only express its views in the matters in controversy on a *prima facie* basis. Otherwise a concluded view is likely to tie the hands of the Magistrate who would eventually hear the case, and is likely to embarrass him. See **Mansur Said & Others vs. Najma Surur Rizik Surur Civil Appeal No. 186 of 2005** and **Niazons (K) Limited vs. China Road & Bridge Corporation (Kenya) Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502.**

8. In my view the only issue for determination before me is whether the decision to bar the witness called by the Appellant was proper and lawful. In her ruling the learned trial magistrate stated that since the intended witness was not one of the witnesses whose name appeared in the witness list and was not the investigating officer, that witness ought not to be permitted to testify. On 17th December 2010, the ***Civil Procedure Rules, 2010*** came into force and under Order 3 rule 2 and Order 7 rule 5 thereof, the parties are not only enjoined to file and serve with their pleadings a list of witnesses and witness statement duly signed but also copies of the documents to be relied upon. The rationale behind these provisions is to discourage trial by ambush and to ensure that the provisions of sections 1A and 1B of the ***Civil Procedure Act*** are meaningfully implemented. In the case of **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008** the Court of Appeal held *inter alia* that the principle aims of the provisions of sections 1A and 1B of the ***Civil Procedure Act*** and sections 3A and 3B of the ***Appellate Jurisdiction Act*** include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.

9. That being the position, where a trial may still be proceeded with without disruption and where a defaulting party may still remedy the default, the Court ought to lean towards hearing of cases on merits. In **Savings & Loan Kenya Limited vs. H. Odongo & 6 Others Civil Appeal No. 22 OF 1987 [1987] KLR 294; [1988] KLR 224,** the Court of Appeal held that:

> **"The very foundation upon which our judicial system rests is that a party who comes to court shall be heard fairly and fully and a Judge who does not hear a party before him or the party's advocate offends that fundamental principle and it then becomes the duty of the [appellate] Court to tell him so as people come to court as the last resort and judges are employed to hear them and determine their cases."**

10. In **Sebei District Administration vs. Gasyali and Others [1968] EA 300,** it was appreciated that it should always be remembered that to deny the subject a hearing should be the last resort of a Court.

11. Therefore, the learned trial magistrate ought to have considered whether there was a less unjust option that she could resort to rather than denying the Appellant an opportunity of putting forward his case. The matter before the court was merely a failure to comply with procedural

rules. This is not to say that procedural rules are not important. As was held in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33,** without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. In **Onjula Enterprises Ltd vs. Sumaria [1986] KLR 651,** the Court of Appeal held that:

> **"The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs. Greenlands Limited [1916] 2 AC 15 at 38.**

12. As **Kiage, JA** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** held:

> **"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."**

13. It was however appreciated in **Dominion Farm Limited vs. African Nature Stream & Another Kisumu HCCC No. 21 of 2006** that:

> **"Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice."**

14. As was held in **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006 [2008] 2 EA 311,** in which the Court cited with approval ***The Judicial Review Handbook*** **(3rd Edn) by Michael Fordham at 361**, **Republic vs. Kensington and Chelsea Royal LBC [1989] All ER 1202 at 1215,** ***Role of a Judge*** **by J Cardozo 52 Harvard LR 361 at 363; Seaford Court Estates Ltd vs. Asher [1994] 2 All ER 155 at 164:**

> **"The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court… It is well settled that 'rule of procedure cannot be allowed to become mistress of justice; it is the handmaid of justice. Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice…A judge must think of himself as an artist who, although he must know the handbooks, should never trust them for his guidelines; in the end he must rely upon his almost instinctive senses of where the line lay between the word and the purpose which lay behind it. A Judge must not alter the material of which the Act is known but he can and should iron out the creases… Simply put, the initial stage of obtaining leave is similar to getting an entry into judicial arena so that the applicant can vindicate his rights or claims. Till that stage no serious inroads can be expected to be made in the rights of the opposite side."**

15. It was however appreciated by **Ringera, J** (as he then was) in the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460** that:

> **"Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue."**

16. Accordingly, each case must be considered on its own facts taking into account the wise words of **Sheridan, J** in **Waljee's (Uganda) Ltd Vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188** that:

> **"…there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine."**

17. Although in her ruling the learned trial magistrate did not touch on the nature of the evidence that was intended to be adduced, the Respondents have contended that since the proposed witness was the same witness that they had called, his evidence was going to be

repetitive. In my view that, even if true, was not a valid ground for baring the Appellant's witness from testifying. There is no property in witnesses particularly witness who are testifying in their official capacities and therefore the court should not bar a witness from testifying simply because he has been called by the other party or the other party has lined him as one of his witnesses. In fact, it has been held that there is even nothing inherently wrong in calling the other party as your witness. Law, JA appreciated this in **Hirji vs. Modessa [1967] EA 724** when he held that:

> **"It was conceded by counsel for the respondent, that the respondent was both a competent and compellable witness, but under Order 16 rule 1 of the Civil Procedure Code, the judge had a discretion under Order 16 rule 7 whether or not to require him to give evidence. However, in this regard the learned Judge did not exercise his discretion judicially. His reason for not requiring the respondent to give evidence for the other side was, apparently, that there was something improper or irregular in one party calling the other party as a witness in civil proceedings and the learned Judge erred in this respect. Although it may be unusual, there is nothing wrong in a plaintiff calling the defendant as a witness, especially (as in this case) when counsel for the defendant has indicated that he will not be calling his client. The learned Judge erred in not allowing the respondent to be called as a witness for the appellant, in the circumstances of this case."**

18. Apart from the foregoing, the learned trial magistrate did not just rule on the competency of the Appellant's witness to testify. She proceeded to close the case in the same ruling. That, in my respectful view, was unprocedural and improper. She ought to have made the ruling and then given the Appellant an opportunity to decide on how he wanted to proceed. The manner in which a court ought to deal with such maters was set out in **Dr. Samson Auma vs. Jared Shikuku & Another Civil Appeal No. 191 of 2002** where the Court expressed itself as follows:

> **"Where an application for adjournment was made, it needed to be dealt with on its merit first and either be allowed or rejected and whichever way the Judge was minded to decide it, it was his duty to dispose of it first. It was a matter that called for his discretionary powers…The Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the results of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is its duty to do so…To avoid deciding on an unopposed application for adjournment which was not frivolous as the appellant's counsel was before the Court of Appeal, the other counsel bereaved and the case was not yet ready for hearing as certain procedures were yet to be finalised before it could be heard, and dismissing the entire case on another ground not canvassed before it was a serious misdirection. The correct procedure that the Superior court should have adopted was first to decide on whether or not to allow the adjournment application, then the suit would proceed to hearing and then it would be up to the appellant's counsel to decide on how to prosecute his client's case in the absence of the plaintiff…The action taken by the court in this matter of failing to decide the application for adjournment on its merits and proceeding to dismiss the entire case on grounds that were not before him namely the absence of the parties at a time before the hearing proper could begin involved an incorrect exercise of the learned Judge's discretion and did result in grave injustice as the appellant's case was terminated before the appellant could be heard on its merits and therefore the Court of Appeal is entitled to interfere."**

19. It was similarly held by the Supreme Court of Uganda in **Natin Jayant Madhvan vs. East Africa Holdings Ltd & Others SCCA No. 14 of 1993** that:

> **"After the refusal of the application for adjournment, the plaintiff ought to have been asked to proceed with the case. It is not to be implied that since the plaintiff said the case was complicated, he could not proceed since the plaintiff has a right to reply to all the facts and state how he would proceed.**

20. The correct procedure therefore would have been for the learned trial magistrate to determine the objection and then leave it to the Appellant to decide on the manner it wanted to proceed but not to close the case for the Appellant before giving him an opportunity to decide on his next step. Of course if then the Appellant stated he had no evidence to offer or that it was leaving the matter to the court the court would properly be at liberty to deem the defence as closed.

21. Having considered this appeal, I am satisfied that the same is merited. In the case of **Smith vs. New South Wales Bar Association (1992) HCA 36 (1992) 176 CLR 256** the High Court of Australia observed that a case may be re-opened after Court inquiring why the evidence was not called at the hearing.

22. A holistic consideration of section 175 of the ***Evidence Act*** section 79A of the ***Civil Procedure Act***, reveals that this court can set aside the ruling of the trial court where it is demonstrated that the improper admission or rejection of evidence or error, defect or irregularity in the proceedings in the suit, affected the merits of the case or the jurisdiction of the court or occasioned a miscarriage of justice. In my view, the above scenario occasioned a miscarriage of justice. A miscarriage of justice was discussed in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where the Supreme Court of India stated:-

> **"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence….The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice"**

23. To unfairly deny a party an opportunity of presenting his in my view amounts to a miscarriage of justice.

24. In the premises, this appeal succeeds, the decision of the learned trial magistrate barring the Appellant's witness from testifying is hereby set aside and the Appellant is at liberty to adduce its evidence.

25. However, as the Appellant by his conduct contributed to the circumstances in which he found himself, there will be not order as to the costs of this appeal.

26. It is so ordered.

Read, signed and delivered in open Court at Machakos this 27th day of April, 2020.

G V ODUNGA

JUDGE

Delivered at 9.30 am in the absence of the parties having been notified through their known email addresses.

CA Josephine