REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: GICHERU, LAKHA & OWUOR, JJ.A.)
CIVIL APPEAL NO. 127 OF 1999
BETWEEN

CHARLES KARURI MBUTU ..... APPELLANT
AND
SAMUEL MUHORO ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nyeri (Mr. Justice Osiemo) dated 19th November, 1997 in H.C.C.C. NO. 193 OF 1992)

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JUDGMENT OF THE COURT:

In an application for eviction made through a Chamber Summons purportedly taken out under **Sections 3A and 98 of the Civil Procedure Act** , Chapter 21 of the Laws of Kenya, the appellant sought to have the respondent evicted from the premises comprised in **Plot No. S.6. Majengo** within the Nyeri Municipality together with all the developments erected thereon. That eviction was to be carried out by M/S. Airways Auctioneers with the assistance of the Officer Commanding **Nyeri Police Statio**n with the respondent being condemned to pay the **Auctioneers**' charges and all subsequent costs incurred in the eviction exercise together with costs of the appellant's application for eviction. This application came before Osiemo, J. on 27th July, 1997 but whereas counsel for the appellant appeared and prosecuted the appellant's application, the respondent, though served with the application, did not appear to defend the same. Ruling on this application was then reserved for 9th October, 1997.

In his ruling of the even date, the learned judge inter alia had this to say:

"As I have said earlier, I was dealing with this matter without the advantage of the origi nal file which contained the pleadings as well as the terms of the referral order. Now that I have had the opportunity to see and go through the original file in order to appreciate the issues involved, I feel compelled to state briefly the facts as conta ined in the pleadings as well as the contents and terms of the order of reference."

According to the learned judge, the proceedings before him consisted of an arbitration award filed in a skeleton file which had been opened specifically for that purpose and for the reading of the same without any inkling as to what had happened to the original file. Indeed, it would appear that from that skeleton file, the arbitration award was read on 2nd November, 1995 and the parties thereto were given 30 days to raise any objection to the award if any. Subsequently, a number of applications and rulings were made using the skeleton file culminating with the application which is the genesis of the present appeal as the original file resurfaced before the ruling out of which the order appealed from

arises and which order is predicated on the proceedings in that file.

After setting out the pleadings and the relevant proceedings from the original file, the learned judge had this to say:

"As I said earlier I had dismissed previous application to set aside the award. The application to review that dismissal order had also been dismissed, and the award had been adopted and entered as judgment of this Court. But these facts have come to light at the last stage when the original file which had not (been) lost nor misplaced (and) was kept somewhere had been sneaked into the skeleton file with which I was dealing after the application for an order for eviction had been argued but before the ruling was written."

According to the learned Judge, he could not turn a blind eye to these new facts and issue an eviction order for to do so would have amounted to perfecting injustice. To him, once an error had been detected before the final order is issued, justice demanded that it should be corrected. And that is what he did and proceeded to refuse to issue the eviction order sought by the appellant and set aside all the previous orders that he had made on 11th November, 1996, 23rd April, 1997 and 25th July, 1997. He then ordered that the suit be heard in court where all the issues raised in the pleadings shall be canvassed. It is this decision that irks the appellant who therefore appeals to this Court putting forward six grounds of appeal the gravamen of which is captured by ground 4 of his appeal which is couched as follows: "4.The learned trial Judge erred in law in not appreciating that the application before him when he made his ruling was for eviction. An application that was served and not opposed. Further, his ruling should have been confined to that application only."

This ground was the centre-point of the submissions of counsel for the appellant when the appeal came up for hearing on 31st October, 2001. Indeed, according to counsel, the application before the learned judge was for eviction and it was in connection therewith that his ruling should have been geared to. Counsel for the respondent did not offer much resistance to the appellant's appeal. Nonetheless, he submitted that the appellant's application for eviction should be heard afresh by the same court.

According to the learned judge, he had dismissed the application to set aside the arbitration award and the application to review that dismissal subsequent to which, judgment had been entered in accordance with the award. It is not clear how he was able to deal with the two applications in the absence of the original file, for with only a skeleton file whose only material content for that purpose was, according to him, the arbitration award, the non-availability of the original file must have constituted a grave impediment to his adjudication of the said applications. In any event, after the hearing of the appellant's application for eviction on 29th July, 1997 and during the pendancy of his ruling on that application which was delivered on 9th October, 1997, the resurfacing of the original file which on his perusal changed his entire approach to the application urged before him constituted a new matter which he could not legitimately have acted on without giving the parties to the application before him an opportunity to be heard on this new matter. The learned judge, however, did exactly that in contravention of one of the rules of natural justice - **audi alteram partem -** that is to say that no man should be condemned unheard and indeed, that both sides should be heard unless one side chooses not to. We think therefore that the learned judge's ruling based as it was on the alleged new matter contained in the resurfaced original file is insupportable. Consequently, we allow this appeal with the result that the orders of the superior court made pursuant to that court's ruling dated 19th November, 1997 are set aside and substituted therefor with an order that the appellant's application for eviction referred to at the beginning of this judgment be heard afresh by a Judge of the superior court other than Osiemo, J. with the parties thereto being given an opportunity to be heard on the alleged new matter contained in the

original file. Each party will bear his own costs of the appeal.

Dated and delivered at Nyeri this 2nd day of November, 2001.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR