Case Number:	Civil Appeal 86 of 2019
Date Delivered:	29 Jan 2021
Case Class:	Civil
Court:	Court of Appeal at Malindi
Case Action:	Judgment
Judge:	Wanjiru Karanja, Patrick Omwenga Kiage, Kathurima M'inoti
Citation:	Protus Evans Masinde v Chengo Katana Koi & 3 others [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	ELC Civil Case 102 of 2009
Case Outcome:	appeal allowed
History County:	Kilifi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & M'INOTI, JJ.A)

MALINDI CIVIL APPEAL NO. 86 OF 2019

BETWEEN

PROTUS EVANS MASINDE.....APPELLANT

AND

CHENGO KATANA KOI.....1ST RESPONDENT

CHAIRMAN NATIONAL LAND COMMISSION.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATIONS AND SETTLEMENTS.....4TH RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment & Land Court

at Malindi (J.O. Olola, J.) dated 11th October, 2018

in

ELC Civil Case No. 102 of 2009)

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JUDGMENT OF THE COURT

By a judgment dated 11th October 2018, the Land and Environment Court at Malindi (J.O. Olola, J.) allowed the claim by **Chengo Katana Koi**, the 1st respondent herein. His claim, as captured in an amended plaint dated 12th May 2009, was that he be declared the legal and absolute owner of land known as **Kilifi/Madeteni/396** then registered in the name of **Protus Evans Masinde,** the appellant herein, whose title he prayed be cancelled and it be registered in his name instead. He prayed that *"the allotment of the suit property to the appellant by the Chairman''* National Land Commission, the Chief Land Registrar and the Director of Land Adjudications and Settlements sued as the 2nd, 3rd and 4th defendants (and respondents herein of the same listing), respectively, be declared *ultra vires*, arbitrary and illegal, and be revoked.

There is no indication from the record whether any of the 2nd, 3rd and 4th respondents filed a defence to the amended plaint, which introduced them to the suit, or whether the appellant filed any amendment to his defence and counterclaim filed on 19th December 2009. In it he had denied the 1st respondent's claim *in toto* including the particulars of fraud levelled against him alleging; among other things, that he had taken advantage of his access to government records *by virtue of his duty as an officer employed by the Ministry of Lands stationed at Ardhi House*, a capacity and place he said he had never worked in or at. In the counterclaim, he asserted that he was issued with a title deed to the suit property and was the absolute owner thereof with an indefeasible title. He sought a permanent injunction against the 1st respondent, and an order that he vacate the suit land.

Whereas the appellant raises a dozen complaints in the memorandum of appeal, the first two are potentially dispositive of the appeal and warrant our consideration *in limine*;

"1. The learned Judge erred in law by denying the appellant a reasonable opportunity to present his case and evidence.

2. The learned Judge erred in law by failing to give the justification for denying the appellant an opportunity to be heard and proceeded to determine the case in complete disregard of the other parties' presence in the case."

When urging that aspect of the appeal during its virtual hearing necessitated by the Covid-19 global pandemic, learned counsel for the appellant **Mr. Khaseke** drew our attention to the record of proceedings and submitted that on 25th July 2917, when the suit proceeded to hearing, a **Mr. Obaga** appeared, holding brief for **Mr. Njeru,** then on record for the appellant, and sought an adjournment. **Mr. Khaseke** criticized the learned Judge for not making a ruling on that application for adjournment. Instead, the learned Judge later stated, incorrectly in counsel's view, that **Mr. Obaga** had agreed to an adjournment, before proceeding to take the evidence of the 1st respondent, order the hearing closed and thereafter render judgment.

Mr. Khaseke argued that the appellant was thereby denied an opportunity to offer his defence and to prosecute his counterclaim, which the learned Judge made no decision on.

In responding to those submissions, **Mr. Ondieki,** the 1st respondent's learned counsel took the position that on the day in question, an adjournment was applied for and opposed. He did concede, however, as he had to, that the court's decision thereon is not on record and that *"there is no clear indication that the court said the matter was to proceed later."* He also made this concession in response to our question on how the learned Judge dealt with the counterclaim: *"No I have not seen any order on or mention of the counterclaim."*

We have given this aspect of the appeal anxious consideration precisely because the complaint being raised by the appellant touches on his right to a fair hearing in the context of civil proceedings. As the court below is a superior court of record, our determination of whether there is substance in the complaint must start from the record itself, and this is what is captured regarding the proceedings of the material day;

"25/7/17

Coram: Hon. Olola-Judge

Court Clerk : Joan/ Galgalo

Mr. Ondieki for the plaintiff

Mr. Obaga holding brief for Njeru for the 1st defendant

Mrs Lutta for the 3rd and 4th defendant

Mr. Ondieki: Matter coming up for hearing. I have two witnesses in court.

Mr. Obaga: We apply for an adjournment. Mr. Njeru called Mr. Ondieki indicating they are willing to consider settlement. We pray for another date. Mr. Lutta: I will be ready to proceed.

Later

Mr. Shujaa: I hold brief for Njeru Gichori. My instructions are to apply for adjournment.

Court: We had agreed in the morning the matter would proceed when Mr. Obaga was holding Mr. Njeru's brief. Matter to Proceed."

This was followed by the evidence in-chief of the 1st respondent who was his own sole witness. At the end of that direct examination, it would seem that **Mr. Shujaa** was invited to cross-examine him and his answer was *"I have no instructions to cross-examine."* Mr. Ondieki thereupon closed the plaintiff's case and Mr. Shujaa, continuing in what appears to have been a piqued and petulant tone stated; "I have no instructions to proceed". At that point the learned Judge marked both the plaintiff and the defence cases as closed and proceeded to give directions as to the filing of written submissions.

It would seem that after that date there was no participation in the proceedings by any of the four defendants. When the matter was listed for further directions before the learned Judge on 12th February, 2018, only the 1st respondent's advocate appeared and the learned Judge, being satisfied that a mention notice had been given to the absent parties, fixed judgment for 6th June 2018. It was in fact delivered four months later on 11th October 2018 in the presence of counsel for the plaintiff, only.

As is evident from the excerpt of the proceedings of 25th July 2017 that we have set out above, and properly conceded by Mr. Ondieki, there appears not to have been a ruling on the appellant's application for adjournment. Granted that trial courts are extremely busy and much pressed for time, it is nonetheless imperative that all that transpires during proceedings be captured on the record. An application for adjournment and the reasons advanced must be captured as well as the Court's decision on the said application and the reasons therefor. Therein lies the accuracy of the record and the confidence that must be reposed in the judicial process.

In the instant case all we have is an application for adjournment by counsel holding brief for the appellant's advocate, followed by responses thereto by counsel for the other parties.

There is no decision on the same by the learned Judge. The record only shows that "latter," and there is no telling when exactly that was, there was a repeat application for adjournment this time by a different advocate, holding brief for the appellant's counsel. To this the learned Judge merely stated *"we had agreed in the morning the matter would proceed"* and he proceeded to hear the plaintiff.

In the face of the application for adjournment on which there was neither ruling nor order, and there having been no agreement on record that the matter was to proceed, and the appellant contends that there was no such agreement, the matter is left in an unsatisfactory state. The learned Judge may well have had perfect reasons for denying the application for adjournment, but we do not see them on record. That the appellant ended up having his title to land cancelled on the basis of the plaintiff's sole testimony that was not subjected to cross-examination under those contested circumstances does not lend assurance that justice was done and was manifestly seen to have been done in the case. And this Court is duty bound to intervene so as to uphold the right fair hearing.

We agree with the appellant's contention that in the circumstances of this case the valued right to be heard, a key element of natural justice, may have been denied him and it is not clear, absent reasons for the refusal of the adjournment sought, that the appellant was not improperly locked out of pursuing his defence and counterclaim. See ***MBAKI & OTHERS vs. MACHARIA*** & ***ANOR [2005] EA 206*** and ***PATRIOTIC GUARDS LTD vs. JAMES KIPCHIRCHIR SAMBU [2018] eKRL.***

We are further fortified in our conclusion by the plain fact that even though there was present in the court an advocate for the 2nd to 4th defendants, one **Ms. Lutta,** who had expressed her readiness to proceed on the material day, there is no record of her involvement. She does not seem to have been invited to cross-examine the plaintiff or to lead evidence. Indeed, the judgment at times seems to proceed as if there was only one defendant, which leads credence to the complaint in the memorandum of appeal that the trial court determined the case "*in complete disregard of the other parties' presence in the case."*

Finally, we note that in disposing of the case before him, the learned Judge simply granted the suit *as prayed in the plaint* but made no dispositive order on the appellant's counterclaim. This was an omission which calls for our intervention as well.

In the result, we allow this appeal. We set aside the judgment and decree dated 11th October 2018 and direct that the suit be

remitted to the Environment and Land Court at Malindi to be heard and disposed of by a judge of that court other than J.O. Olola, J.

Even though the appellant has succeeded in the appeal, we do not think that he is entitled to costs all things considered. We accordingly order that each party shall bear its own costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR