REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 543 OF 2003

EUROCRAFT AGENCIES LIMITED..................................PLAINTIFF

VERSUS

TRADE WINDS EXPRESS LIMITED....................... 1ST DEFENDANT

BARRY MICHAEL TOMLINSON............................. 2ND DEFENDANT

R U L I N G

1. By a Motion on Notice dated 29/07/2020, the applicant sought that the Judgment delivered on 21/9/2018 be set aside *ex debito justitiae* and the matter be heard de novo. The application was brought under***, sections 1A, 1B & 3A of the Civil Procedure Act and Order 21 Rule 1 of the Civil Procedure Rules.***

2. The grounds for the application were contained in the body of the Motion and the supporting affidavit of **Nimo Kering'** sworn on 29/07/2020. These were that; the Judgment was delivered on 21/09/2018 without notice to the parties. That neither of the parties was present in court during delivery and that none consented to the manner of the said delivery.

3. It was further contended that the Judgment did not qualify as a judgment as pronounced within the meaning of ***Order 21 Rule 1 of the Civil Procedure Rules.***

4. The application was opposed by the defendants vide the replying affidavit of **John M. Ohaga** sworn on 24/09/2020. He contended that the suit was instituted against the defendants on 4/09/2003. That the parties had tendered evidence from their respective witnesses and filed submissions detailing the issues for determination and therefore both parties were heard before the impugned judgment was delivered.

5. He further averred that the application did not fault the impugned judgment on substantive grounds. That ***section 25 of the Civil Procedure Act and Order 21 Rule 1 of the Civil Procedure Rules*** does not require the Court to issue notice to the parties before pronouncing judgment and the failure to do so can only be deemed an irregularity and not a nullity.

6. He further contended that the defendants had demonstrated the prejudice they had suffered by the delivery of the impugned judgment without notice.

7. I have considered the record in its entirety, the depositions of the parties and their written submissions, although at the time of writing this opinion the plaintiff had not filed its submissions.

8. The application before me seeks the determination as to whether the Judgment made on 21/09/2020 should be set aside for having been delivered without notice to the parties. The defendants contended that the Judgement was irregular and should therefore be set aside.

9. ***Section 25 of the Civil Procedure Act*** provides: -

> ***"The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow:***
>
> ***…".***

10. On the other hand, ***Order 21 of the Civil Procedure Rules*** provides: -

"In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.

Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment."

11. It is clear from the foregoing that a judgment is required to be delivered with notice to the parties. The provisions do not state the effect of failure to comply with the said requirement. The Court cannot speculate on the same. Only that it can construe the same and seek to ascertain the spirit of the provision or, what the Legislature intended.

12. In their submissions, the defendants relied on the case of **Mathew Kangora v Maretee Kotha [2016] Eklr,** where the court observed: -

"This is the import of Order 21 rule 1 of the Civil Procedure Rules. Court of Appeal discussed the constitutional vitality of this requirement in the case of Ngoso General Store Ltd vs. Jacob Gichunge Civil Appeal No 248 Of 2001 [2005] eKLR that:

'The law under Order 20 r 1 is explicit in terms and mandatory in tone. A judgment which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates…. an order…. directing the party in attendance to inform the other side does not cure the fragrant breach of a mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which our Constitution safeguards'.

Therefore, I do not consider the requirement in Order 21 rule 1 of the Civil Procedure Rules a trifle; but a matter of a fundamental nature and of due process. Thus, any judgment delivered without notice to the parties is completely irregular and should be set aside by the court as a matter of judicial duty to uphold the integrity of the judicial process itself- ex debito justitiae".

…

If the recommended procedure is employed much time would be saved and the overriding objective of the law to dispose cases expeditiously will be achieved with much enthusiasm".

13. I appreciate the Learned Judge's exposition but that decision is not binding on this Court. In my view, the best route to take is to seek the intention of the Legislature in the aforesaid enactments.

14. To my mind, the intention was that decisions of the court should be made immediately, if possible. Where circumstances do not permit, a notice should be given to both parties to attend court the day of delivery. This is meant to safeguard the principal of natural justice. That a determination of any dispute should be made in the presence of both parties. That no decision should be given to one party in the absence of the other.

15. I believe that the circumstances in the **Mathew Kangora v Maretee Kotha (supra)** were different. In that case, the court gave notice to one party who was supposed to inform his adversary of the judgment date. That party attended and collected the Judgment ex-parte. In such circumstances, it can be argued that the party who was given notice was favored and an issue of bias could be imputed.

16. In present case, the suit was fully heard by Ochieng J who then directed the parties to file the final submissions in the matter on 27/7/2017. There were several appearances thereafter when the parties were not ready with the submissions. Finally, Ochieng J was transferred to Kisumu. The file was sent to the Judge who wrote a reasoned judgment and had the same delivered and published on 21/9/2018. In this case, none of the parties was notified of the judgment. They both came to learn of the same from the Deputy Registrar on 6/2/2020.

17. In this regard, my view is that; although there was no notice to the parties for the delivery of the judgment, that did not vitiate the validity of the judgment. That was a technical irregularity that is curable under ***Article 159 of the Constitution.***

18. There was no prejudice that was demonstrated to have been suffered as a result of the failure to issue a notice to the parties. If there was any prejudice, the same is curable. The prejudice was the passage of the timelines as to the filing of an appeal, if any.

19. In **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & Others (2013) Eklr**, the Supreme Court of Kenya held: -

"Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injunctive by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to the provisions of procedural law which at times create hardships and unfairness."

20. The failure to issue notice affected both parties. No party gained advantage over the other, unlike in the case of **Mathew Kangora v**

Maretee Kotha (supra). The defendants did not offer any evidence or allege any prejudice that they had suffered over and above the plaintiff by the said delivery of the judgment without notice.

21. Further, I have considered that the judgment was entered after all the parties had been given an opportunity to be heard on their respective cases. The judgment is not being attacked for any impropriety. This is a very old case which was properly determined on merit. As contended in the replying affidavit, the witnesses may now be old and may have lost memory. The case was filed in court over 17 years ago. Litigation must come to an end. Since the only prejudice suffered is the time for appeal, the applicant can well easily apply for extension of time.

22. In this regard, I find that the application has no merit. The same is hereby dismissed with costs to the respondent.

DATED and DELIVERED at Nairobi this 11th day of February, 2021.

A. MABEYA, FCIArb

JUDGE