



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 15 of 2012

(Appeal from the Judgment and decree of Hon. K. Ngomo Senior Principal Magistrate in Bungoma Civil Case no.53 of 2001)

HENRY WAFULA KHAEMBA.....APPELLANT

~VRS~

NZOIA SUGAR COMPANY LTD.....RESPONDENT

PARTIAL JUDGMENT

INTRODUCTION

The Appeal

[1] I will only determine ground No.1 of the Memorandum of Appeal and then pronounce judgment in respect of the primary case upon the evidence on record and the submissions of the parties to be made in accordance with the directions of the court as shall be borne out shortly.

[2] Ground No.1 of the Memorandum of Appeal reads:

1. *That the learned trial magistrate erred in law and in fact in delivering judgment without due notice to the Appellant, contrary to Civil Procedure Rules.*

[3] Where judgment is not delivered at once on completion of the case, notice of delivery of the judgment at some future date must be given to all the parties in the suit. The requirement is a mandatory one under Order 21 Rule 1 of the Civil Procedure Rules. See the decision of the Court of Appeal in the case of in **NGOSO GENERAL STORE LTD v JACOB GICHUNGE CIVIL APPEAL NO 248 OF 2001 [2005] e KLR** that

The law under Order 20 r 1 is explicit in terms and mandatory in tone. A judgment which is 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.

[4] As such, any judgment that is delivered without notice to the parties, where notice is required, is a nullity, and should be set aside *ex debito justitiae*, even by the court which delivered it, which means that an appeal is not really necessary to undo such judgment. See the case of **BGM HCCA NO 124 OF 2010 ANTHONY KALAMU & 14 OTHERS v GEORGE PAUL WAFULA**

[5] It is clear from the record that the judgment herein was not delivered at once on the conclusion of

the case. It was to be delivered on 11/10/2006 – a date that had been fixed in the presence of the parties. But it was not delivered on the appointed date. It was then delivered *ex tempore* on 5/12/2007 without notice to the Plaintiff. Failure to give notice of the delivery of judgment to the Plaintiff makes the judgment a nullity and the judgment delivered on 5/12/2007 is hereby declared as and is a nullity. It is accordingly set aside.

[6] Following the above order of the court, there is no judgment which can be subjected to any or further scrutiny of the court. But this is not a proper case for re-trial. I am satisfied:-

- 1) *That there is sufficient evidence upon the record to enable the appellate court to pronounce judgment;*
- 2) *Issues are clear and settled as it is not necessary to settle the issues; and*
- 3) *I should finally determine the suit.*

[7] I am however alive to the fact that I did not see or heard the witnesses. That is a substantial limitation on the part of the Appellate court as there are allegations of forgery by the defence. In the circumstances, I wish to have the advantage of the submissions of the parties on their respective causes of action in the primary suit. The submissions will constitute further information and shall be tendered in form of written submissions within the following bounds. The submissions:

- 1) *Should be directed to the primary suit and limited to the evidence as tendered before the trial court;*
- 2) *Should not address the judgment of the trial court as it has been declared a nullity; and*
- 3) *Should not introduce any new issue that was not before the trial court for determination.*

[8] The written submissions by the parties should be able to give the court an overall impression of the essence of the evidence each party tendered in court and the law they relied upon in support of their cases.

[9] In light thereof, I order that the Appellant to file and serve written submission together with any judicial authorities they may wish to rely on in support of their case within 14 days. On such service, the Respondent to file and serve written submissions together with any judicial authorities they may wish to rely on in support of their defence within 14 days. The appeal to be mentioned in a month's time to confirm compliance with the orders of the court and take a date for final judgment.

Dated, signed and delivered in open court this 28th day of January, 2013

F. GIKONYO

JUDGE

In the presence of:

Alusa the Court Assistant

Murunga for the Respondent

Appellant present

Court: Judgment delivered in open court. Mention on 28/2/2013.

F. GIKONYO

JUDGE