REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
Civil Appeal 17 of 2003

GEOFFREY NDWATI WAINAINA……...….APPLICANT

V E R S U S

JOSHUA GITHUKU NGWENYI

ATTORNEY GENERAL……..RESPONDENTS

J U D G M E N T

This is an appeal arising from a ruling of the Kitale Senior Resident Magistrate, Mrs. Susan Shitubi. The said ruling was delivered on 14th August 2003, on an application for review.

The Appellant had set out six grounds of appeal, which can be summarized as follows:

(i) The learned trial magistrate erred in law and in fact by refusing to review her judgment dated 2nd May 2003, yet there was sufficient reason to do so.

(ii) The trial court erred in declining to apportion liability between the Appellant and the Attorney General.

(iii) The trial court erred in finding the Appellant liable for damages, in the light of the evidence.

(iv) There was no basis for the award of KShs.60,000/= as damages payable by the Appellant.

(v) The trial court erred in law and in fact by dismissing the claim against the 2nd defendant.

(vi) The findings of the trial court were against the weight of the evidence.

When the appeal came up for hearing, Mr. Wanyonyi Advocate decided to argue all the six grounds together.

He said that on 28th March 2003, the parties herein appeared before the trial court, with a view to getting the judgment in ***GEOFFREY NDWATI WAINAINA V JOSHUA GITHUKU NGWENYI & THE ATTORNEY GENERAL SPMCC NO.25 OF 2001.***

It is common ground that the judgment was scheduled for 28th March 2003, and also that it was not delivered on that date. Instead, the judgment was delivered on 2nd May 2003.

As the Appellant and his advocates were not present in court when the judgment was delivered, and because they both contend that they had had no notice of the date for the judgment, the Appellant lodged

an application for a review of the said judgment.

As far as the Appellant is concerned, his application for review was premised on the failure by the trial court to issue a notice of the date when the judgment was to be delivered. Secondly, the Appellant complains about the failure by the trial court to apportion liability between the two defendants.

The view expressed by the appellant was that the special damages amounting to KShs.25, 000/=; and the general damages for malicious prosecution amounting to KShs.60, 000/=, ought to have been apportioned between the two defendants.

Following the dismissal of the application for review of the judgment, the appellant now submits that that decision was wrong, as there had been sufficient reason to warrant review.

The two grounds set out by the Appellant were to the effect that the trial court had not given notice of the judgment, as required by Order 20 Rule l of the Civil Procedure Rules; and secondly, that the trial court had founded its verdict on the decision of a criminal court, had not made a finding attributed to it. The said finding was said to have been to the effect that the appellant had changed the course of the river which formed the boundary between the farms belonging to the two parties herein.

As far as the appellant is concerned, there was no finding in the judgment in Kitale SPMCR. Case No.229 of 1999, that he had changed the course of the river. Therefore, the appellant believes that it was wrong for the trial court, in Kitale SPMCC. NO.25 of 2001, to have concluded that there had been such a finding in the criminal case.

The appellant submitted that there was no basis for the award of damages for malicious prosecution. He also submitted that as the trial court had dismissed the claims for defamation, there was no basis for awarding damages to the respondent.

In any event, the appellant believes that the claim for malicious prosecution should have been dismissed because the respondent had failed to demonstrate to the trial court, that the investigations by the police were not well founded.

Finally, the appellant submitted that the case against him should have been dismissed after the court had come to the conclusion that the 2nd defendant was not liable. It was for those reasons that the appellant faulted the trial court for declining to review its judgment.

In answer to the appeal, the respondent submitted that the learned trial magistrate was right to have dismissed the application for review. The first ground upon which the dismissal was being justified was that the application had been brought under the wrong procedure.

It was the respondent's contention that pursuant to Order 50 rule 1 of the Civil Procedure Rules, the application for review ought to have been brought by way of a Notice of Motion. Instead, it was brought by Chamber Summons.

In that regard, the respondent had cited the authority of ***SALUME NAMUKASA VS- YOZEFU BUKYA {1965} E.A. 433***, to back his submissions before the learned trial magistrate.

A reading of that authority reveals that it was in relation to an application for setting aside a judgment.

Sir Udo Udoma C.J. came to the conclusion that the application ought to have been made by Notice of Motion, and not by Chamber Summons. As that point had been raised and argued at length, yet the respondent thereto had not sought either to amend or withdraw the application, the learned Chief Justice concluded that the defect was a serious one. He held that the said defect went to the very rout of the application, and that therefore there was no competent application before the court. He stated as follows, at page 435;

*"**Counsel must understand that the Rules of this court were not made in vain. They are intended to regulate the practice of the court. Of late a practice seems to have developed of counsel instituting proceedings in this court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this defective, disorderly and incompetent application being struck out?"***

For those reasons, the preliminary objection was upheld, and the application was duly struck out.

Whilst that authority may have spelt out the correct legal position, as regards procedure, I must remind myself that at this stage of the case, I am not called upon to re-determine the application for review.

Whereas, the respondent did ask the learned trial court to strike out the application for review, on the grounds that it was improperly before the court, the trial court did not strike out the said application. Instead, the application was given substantive consideration, and was thereafter dismissed on the grounds that there were no errors apparent on the face of the record.

As the respondent did not file any grounds for the affirmation of the ruling which is being challenged by the appeal herein, this court cannot go beyond the scope of the Appeal before it.

The learned trial magistrate did not express any view on the issue as to whether or not the application for review was improperly before the court. Therefore, if I were to make a finding on that issue, I would not be sitting on an appeal. If anything, I would be making an original adjudication on that issue. That I cannot do on an appeal.

The respondent also submitted that the trial court was right to have dismissed the application for review because the court could not have granted the prayers sought in that application.

To that end, the respondent pointed out that the Appellant had asked the court to set down a date when it could read out the judgment.

In that regard, I share the view expressed by the respondent, because I cannot find any justification for reading a judgment a second time.

In my considered view, whether or not there was a procedural lapse in the manner in which the judgment was delivered, that would not be reasonable enough to warrant its being pronounced again.

By virtue of the provisions of Order 20 Rule l of the Civil Procedure Rules, judgment is supposed to be pronounced either at once on within 42 days from the conclusion of the trial. In the event that the judgment was not pronounced at once, the court is supposed to give due notice to the parties or their advocates.

In this case, the respondent indicated that when the trial court set the 2nd of May 2003 as the date for judgment, both parties were in court.

In that regard, the respondent pointed out that in the course of his submissions on the application for review, he did draw the attention of the trial court to the fact that on 25th April, 2003, the advocates for the respective parties herein had been in court when the court set the 2nd of May 2003 as the date for judgment.

Whilst it is true that the respondent's advocate did so submit, and also that the appellant's advocate did not dispute that submission, it is equally true that there is no record of the coram on 25th April 2003. In effect, this court is unable to verify the accuracy or otherwise of that which may have transpired on 25th April 2003.

When it is borne in mind that the High Court is a court of record, there can be no doubt that the failure

by the learned trial magistrate to record the coram of 25th April 2003 was an error.

However, when the respondent did not dispute the appellant's assertion that his advocate was present in court, on that date, I have no reason at all to doubt the appellant. In other words, I find that it was more probable then not that the respondent's advocate had due notice that judgment was to be delivered on 2nd May 2003. Therefore, the alleged failure to give notice of the judgment could not have been reasonable enough to review the judgment.

The respondent did submit that the appellant failed to demonstrate to the trial court that he had discovered any new evidence which had not been available to him during the trial. For that reason, the respondent contends that the trial court was right to have refused to review the judgment. He also said that the said application for review should have been struck out because the affidavit upon which it was founded, was defective.

Whilst it is true that the respondent had raised the two issues before the trial court, I find that the said court did not base its decision on them or either of them. Accordingly, as already earlier stated herein, if I were to make a pronouncement on the two issues or either of them, I would not be sitting on an appeal over the decision of the learned trial magistrate. I therefore decline to express my own views on the said issues, at this appellate stage.

However, the court would be failing in its duty if it failed to make the point that the learned trial magistrate ought to have set out the points for determination, the decision therein, and the reasons for such decision. When the court did not say anything about various issues which had been canvassed before it, on the application for review, the said court did not discharge its full mandate as set out in Order 20 Rule 4 of the Civil Procedure Rules.

Does that imply that I ought to upset the ruling, and if so what would be the effect?

In my understanding, an inadequacy in the ruling or judgment of a court is not by itself necessarily sufficient to upset it. In this case, the alleged inadequacies would, if so held, form the basis for re-affirming the decision of the trial magistrate. And as there was no cross-appeal before me, I cannot say anything more on them.

Meanwhile, I have come to the conclusion that the learned trial magistrate was correct to have concluded that the appellant had failed to prove that there was an error apparent on the face of the judgment.

I also do find that the trial court did not err, in principle, when it did not apportion liability as between the two defendants. I say so because, once the action against the 2nd defendant was dismissed, the court could not thereafter have apportioned any liability to him.

In effect, the ruling in issue is upheld, and the appeal herein is dismissed with costs.

In arriving at this decision, I have been careful to say nothing about the contents of the judgment dated 2nd May 2003, as that judgment was not the subject of the appeal before me.

Dated and Delivered at **KITALE** this 10th day of May, 2007.

FRED A. OCHIENG

JUDGE