



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA NO 113 OF 2017

SUSAN NJERI NJOROGE.....APPELLANT

VERSUS

MWANGI KIARIE.....RESPONDENT

(Appeal from the Judgement of the Learned Hon S Mbungi SPM delivered on the 9/6/2015 in CMCC NO 1331 of 1999-Thika)

JUDGEMENT

1. The Appellant and the Respondent were the Defendant and Plaintiff respectively in **CMCC No 1331 of 1999**. In that case the Plaintiff sued the Defendant in 1997 and sought orders for eviction, permanent injunction and damages for the destruction of the Company. It was his case that he acquired land parcel No RUIRU/MUGUTHA/BLOCK1/T.443 from a member of the Nyakinyua Investments Limited in 1992. That without his knowledge and consent, the Defendant encroached onto the suit land and destroyed the foundation of his house and begun to dig huge holes on his property for purposes of installing petroleum tanks thereon.
2. In denying the Plaintiff's claim, the Defendant filed her defence and counterclaim in 1999 (amended in 2011). The Defendant claimed ownership of the land having purchased it from a member of Nyakinyua Investments Limited namely, Rose Wanjiku Thuo in 1993 and took possession of the land and started developing a petrol station. It was her case that the Plaintiff acquired the land through fraud and particularized the alleged fraud. She sought orders that the suit be dismissed with costs, the title in the name of the Plaintiff be cancelled and registered in her name and costs of the counterclaim.
3. The Hon trial Court heard and determined the suit vide its judgement delivered on the 9/6/2015 in favour of the plaintiff.
4. Aggrieved with the decision of the Court, the Defendant, now the Appellant, filed an appeal premised on 14 grounds set out in the Memorandum of appeal.
5. On the 24/3/2021 the parties elected to canvass the appeal by way of written submissions. The Appellant's submissions are dated the 6/5/2021. The Respondent failed to file written submissions despite the directions of the Court.
6. Before delving into the grounds of appeal, I would like to look into the validity or otherwise of the judgement, the subject of this appeal. One of the grounds of impugning the judgement of the Honourable Court was succinctly captured in the submissions of the Appellant, which is that the judgement has an anomaly. It is erroneously dated the 9/6/2015 and yet it was delivered on the 24/7/2015.
7. **Black's Law Dictionary** defines judgement as the official and authentic decision of the Court of justice upon the respective rights and claims of the parties to an action or suit resolving the dispute and determining the rights and obligations of the parties.
8. Order 21 rule 3 of the Civil Procedure Rules provides as follows;

“A judgment pronounced by the judge who wrote it shall be dated and signed by him in open Court at the time of pronouncing it.”
9. The Court in **Refrigeration Contractors Limited Vs James O Lieta (2005) 1 KLR** stated that a judgement that is not dated and or signed at the time of delivery is a nullity. Failure to date a judgement is contrary to the provisions of Order 21 rule 3 of the Civil Procedure Rules.
10. I have perused the trial Court record, the handwritten judgment and the typed judgement on record and make the following observations;

- a. **The hearing of the suit ended on the 3/3/2015.**
- b. **On the 14/4/15 the plaintiff had complied with directions to file written submissions. The Defendant was given additional time to file written submissions.**
- c. **On the 28/4/15 the Court reserved the judgment date for the 30/6/2015.**
- d. **There is no record of what transpired on the 30/6/2015.**
- e. **A judgement was delivered thereafter which judgment has conflicting dates. The date on the typed judgement is the 9/7/2015.**
- f. **The handwritten judgement is signed but undated.**
- g. **The typed judgement contains a whole paragraph which on perusal is omitted in the handwritten judgement. It states;**

“Save that no damages is awarded for destruction of the Plaintiffs foundation for no evidence was tendered to prove the cost of putting up the foundation. Ordinarily I would not order the defendant to pay cost of the suit for she was not to blame for the double allocation but I took her to pay costs of the suit for there is evidence construction on the plot continued in total disregard of Court orders stopping construction.”
- h. **The handwritten judgement is paginated from pages 1 -10 (J1-J10) leaving the next three pages unpaginated and written in blue ink unlike pages 1-10 that are in black.**

11. It is alleged by the Appellant’s counsel that the judgement was delivered on the 24/7/2015 but erroneously dated the 9/6/2015. Taken the record as set out above, there is no record of any Court activity on the 9/6/2015. If the judgement was truly delivered on the 9/6/2015, there was no necessity for the Court to give the parties a date of delivery of judgement on the 30/6/2015 according to the record of 28/4/15.

12. It is trite that a pronouncement of a decision is given legal effect by the dating and signing thereof at the time of such dating and pronouncement. In this case the validity of the judgement has been put into doubt as to when it was dated and pronounced. According to the Appellants counsel it was pronounced on the 24/7/15 and according to the typed judgement it was pronounced on the 9/6/15. Was it dated on the 9/6/15 and delivered on the 24/7/15, a month later?

13. The judgement of a Court must speak for itself. Section 99 of the Civil Procedure Act permits the Court to correct any errors in the judgement on its own or on application by a party. In this case the Court did not exercise this power to correct its judgement either suo motu or on application by a party.

14. On a balance of probability, it is the view of the Court that no judgement was delivered on the 9/6/2015. The judgement on record is therefore bereft of any validity. Being a nullity, neither party can take advantage of it.

15. Order 42 rule 13 (4) (f), a judgement is one of the key documents that form the record of appeal. In this case having held that there is no valid judgement before the Court, and no steps having been made to correct the same under Section 99 of the Civil Procedure Act, it follows that the appeal is incompetent.

16. It is unfortunate that this is the second time the appellate Court is declaring a mistrial in this suit. The 1st having been on the 24/6/2010 because the trial magistrate failed to date the judgement. Though the Court is sympathetic to the party’s predicament, it is constrained with the blatant irregularity. I am guided by the case of **Mcofy Vs. United Africa Company Limited [1961] 3 ALLER 1172.**

17. On this ground I declare a mistrial and strike out the appeal for being incompetent and make the following orders;

- a. **The judgement dated the 9/6/2015 is a nullity and for purposes of effect, hereby set it aside.**
- b. **The file is remitted back to the Hon trial Court for hearing and determination before another Hon. Magistrate other than Hon. S. Mbungi, SPM.**
- c. **This matter having been in Court for the last 24 years, I order that the same be heard on priority basis.**
- d. **The file to be placed before the Hon Chief Magistrate, Thika on the 7th March 2022 for further orders and directions.**
- e. **I make no order as to costs.**

18. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Ms. Odongo for the Appellant

Mr. Mutahi holding brief for Macharia for Respondent

Ms. Phyllis – Court Assistant