`REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 33 OF 2012

(CORAM: F. GIKONYO J)

MATHEW KANGORA ……. APPELLANT

Versus

MARETEE KOTHA …… ..……. RESPONDENT

(Appeal from the judgment of Hon. B. OCHIENG Snr Principal Magistrate, in Tigania in SRMCC NO. 109 of 2007 delivered on 9th November 2014)

JUDGMENT

Appeal

[1] This appeal emanates from the judgment of Hon. B. Ochieng, SPM, inTiganiaSPMCC. No 19 of 2009 which was delivered on 9th March, 2012. The Memorandum of Appeal carries the following six (6) grounds of appeal.

1. The Learned Magistrate erred in law and in fact in that he showed clear bias in the matter by keeping the judgment for 3 months and reading it to only the respondent and his counsel without given notice to the appellant or/and his counsel.

2. The judgment of the learned magistrate is clearly against the weight of evidence and the applicable law.

3. The learned magistrate erred in law and in fact in finding that the plaintiff/respondent had proved his case on the required standard.

4. The judgment of the leaned magistrate is bad in law.

5. The damages awarded by the learned magistrate are excessive and had not been proved by the respondent.

6. The costs awarded by the learned magistrate without involving the appellant are not supported by the law or the advocate's remuneration rules.

[2] I have thoughtfully pondered about this appeal and I must admit it presents difficult

scenario especially when I consider Ground 1 of the appeal. Thus, after due consideration of thecore of the grounds of appeal, I think that I should determine only Ground 1 for reasons that I shall record. This almost abrupt turn should not be surprising; it is a more respectable pretence to have lost the map instead of engaging in a discussion that will eventually cause prejudice to this case. The appropriateness of this approach will become clearer later. First, the said ground is of preliminary significance and potent enough to determine the appeal. Secondly, the nature of the ground allows me to say just enough for purposes of determining the appeal without prejudicing any eventual determination of the primary suit. This second reason will be clearer in the discourse that follows and when I will be making my final decision in this appeal.

[3] Ground 1 is a twinning of a claim of bias on the part of the trial magistrate and failure to give notice of judgment. I will deal with each strand. Ordinarily, aclaim of bias against the trial court isproblematic. Consider what courts have said time and again towards that end; that for bias to be a potent ground of appeal, the Appellant must make a conscientious decision to so raise it and only where evidence of bias is patent on or readily available from the record. Conjecture or circumlocutions on alleged bias will not do. See what the court said in **CRIMINAL APPEAL NO 238 OF 2010 MPEPLESIL vs. REPUBLIC [2013] KLR** on bias, that:-

> ***Bias in its legal connotation entails prejudice on the part of the trial magistrate that he decided the case on extraneous factors rather than the law. Black's Law Dictionary, 7th Edition clearly sets out that Bias entails:-Inclination, prejudice; Judge's bias usually must be personal or based on some extrajudicial reasons. And further it states that Prejudice entails:-A preconceived judgment formed without a factual basis, a strong bias. No wonder the law requires that the facts constituting bias must be specifically alleged and established. It is a kind of allegation which requires the counsel making it to first establish presence of bias that can be proved, and then make a conscientious decision to raise the matter only where proof is readily available. The law is tailored that way, in recognition of the fact that an allegation of bias imputes a serious charge on the integrity of the trial court and the propriety of the proceeding. The word bias assumes a particular legal meaning in any judicial proceeding and it should not, therefore, be used just loosely. It is most desirable that care should be taken before making a submission such as the one made herein. We say no more on that issue. The ground fails.***

[4] Applying the above test, the fact that judgment was delivered outside the stipulated period of sixty days or that no reasons were recorded for the prolonged delay does not in itself amount to bias in the sense of the law.There is absolutely nothing which suggests that the trial magistrate deliberately contrived and held the file for other ulterior motives as it has been argued by the Appellant. Some explanations have been given by the Respondent to explain the delay and I do not doubt them. However, I do not wish to go into their merits as such explanations are fit for use by the Chief Justice under order 21 Rule 1 of the Civil Procedure Rules. But, on perusal of the record, I do not see anything which may constitute bias for purposes of this appeal. I dismiss the claim of bias.

[5] The more substantial argument on Ground 1 and which is straight-forward, isthe allegation that the judgment herein was delivered without notice to the Appellant. I need not state that a judgment which is not delivered *ex tempore* but on a subsequent date should be delivered only with notice to the parties. 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] e KLR** 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 Rulesa 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*. This principle was well enunciated by Green MR in the case of **CRAIG vs.KANSEE[1943] 1 All ER 108 at 113**and there are ample judicial authorities on this matter which I do not wish to multiply. I am aware, and this will become clearer later, that a claim that judgment was delivered without notice to a party or parties in the suitcould also be raised before the trial court for immediate remedial action without the necessity of filing an appeal on that point.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. On this see the case of**ISAACS vs. ROBERTSON [1984] 3 All ER 140** that;

> ***If an order is regular it can only be set aside by an appellate court; if it is irregular it can be set aside by the court that made it on application being made to that court either under the rules of court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warrant (e.g. where there has been a breach of the rules of natural justice)***

[6] What does the record say? I have consulted and perused the record and no notice of the delivery of judgment that was given to the Appellants as required by Order 21 rule 1 of the Civil Procedure Rules. The record shows that, on 26th August, 2011 and in the absence of the 1st Defendant and his counsel, the trial court set date of delivery of judgment to be 4th November 2011; it was never to be. On 15th November 2011, the judgment was again re-scheduled for delivery on 16thDecember 2011; it was never to be and nothing is recorded as to what happened after that date. The record just contains a judgment that was delivered on 9th March 2012 only in the presence of Mr Mokuawho holding brief for Mosota for the Plaintiff. Of significance is that there is nothing to show that notice of delivery of judgment was given to any of the defendants or their respective counsels. It is not surprising that none attended court on the material day. I must emphasize here that the requirement for Notice of delivery of judgement is a substantial matter of fair hearing and which accords with the rules of natural justice. Therefore, any judgment for which notice of delivery of judgment is required but none is given, is irregular and should be set aside *ex debito justitiae*. As such, the judgment herein was delivered without notice to the Appellant or his counsel and is, therefore, irregular. Accordingly, it is hereby set aside *ex debito justitiae.* Considering these realities of the law, and the point upon which the appeal turns, I will remit the suit for determination by a magistrate of competent jurisdiction apart from the trial magistrate herein. In view of this decision, I order that each party shall bear own costs of the appeal. It is so ordered.

Dated, signed and delivered in court at court this 14th day of July 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Rimita advocate for Appellant

M/s. Njenga advocate Mr. Mosota advocate for respondent.

F. GIKONYO

JUDGE