



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 264 OF 2018**

**(FORMERLY HIGH COURT CIVIL APPEAL No. 19 OF 2016)**

**ADDI MAINGI GITAU.....APPELLANT**

**VERSUS**

**LOICE WANJIRU MWANGI.....RESPONDENT**

***(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Molo***

***(Hon. J. Wanyanga, Resident Magistrate) delivered on 4<sup>th</sup> February 2016 in Molo***

***CMCC No. 332 of 2010 Loice Wanjiru Mwangi v Nderitu Kirongothi & 3 Others)***

**JUDGMENT**

1. This appeal traces its roots to 20<sup>th</sup> August 2010 when the respondent herein filed the plaint in Molo CMCC No. 332 of 2010, suing as the administrator of the estate of John Mwangi Gachie, her late husband. She filed the case against Nderitu Kirongothi, Nguma Gitau, Mary Wanjiru Njogu and David Ngunjiri Maira as first to fourth defendants respectively. She averred that on 7<sup>th</sup> July 1977 her deceased husband bought a one third share of a parcel of land known as L.R 533/329 Molo Township together with all improvements thereon including a sawmill from one Erastus Gitau. The remaining two thirds share of the land were owned by Fredrick Kirongothi and Charles Njogu who had also passed away by the time the suit was filed. She further averred that her late husband took possession together with his family in 1977 and that by the time of his death, the vendor had not transferred to him his share despite him having fully paid the purchase price. She added that the defendants who she described as family members of Erastus Gitau, Fredrick Kirongothi and Charles Njogu trespassed on the suit land in the year 2010 and started to subdivide it with a view to disposing of it in disregard of her rights. She therefore sought judgment against the defendants for a declaration that her late husband's estate is the owner of a one third share of the suit land, a perpetual injunction restraining the defendants from dealing with the said portion of the suit land and costs.

2. The defendants jointly entered appearance through an advocate and filed a defence in which they admitted the existence of the purchase transaction dated 7<sup>th</sup> July 1977 and added that the said agreement was varied by two subsequent agreements dated 25<sup>th</sup> April 1998 and 21<sup>st</sup> November 1989. They added that the respondent's late husband breached both subsequent agreements and therefore lost any rights over the suit land. They urged the subordinate court to dismiss the case with costs.

3. The record shows that the defendants were represented by an advocate until 30<sup>th</sup> October 2012 when the first to third defendants filed notice of intention to act in person. It is not clear how and in what capacity the appellant herein came into the matter. The record shows that he wrote a letter dated 20<sup>th</sup> February 2013 to the subordinate court seeking proceedings. On 19<sup>th</sup> December 2013 he filed a document titled "Defendants' Supplementary List of Documents" and another document titled "2<sup>nd</sup> Defendants Final Statement" on 13<sup>th</sup> January 2014. The suit later proceeded to hearing at which the appellant testified and described himself both as a "son of Erastus Gitau who is the 2<sup>nd</sup> defendant" and as "the 2<sup>nd</sup> defendant". My perusal of the record has not revealed any formal joinder of the appellant in the matter. Upon hearing the matter, Hon. J. Wanyanga (Resident Magistrate) delivered judgment on 4<sup>th</sup> February 2016 in favour of the respondent by allowing all the prayers she had sought with costs. There was a further order that the respondent could move the court through an application for specific performance to force the defendants to transfer the one third share of the suit land.

4. Being dissatisfied with the judgment, the appellant still acting in person, filed this appeal on 18<sup>th</sup> February 2016 in the High Court. The appeal was admitted for hearing on 6<sup>th</sup> October 2017 by the said court. Subsequently, it was transferred to this court on 18<sup>th</sup> July 2018. The grounds listed in the memorandum of appeal are the following:

1. That the learned magistrate erred in law and fact in finding that the plaintiff had a case despite the plaintiff failing to produce the list of documents, witness statements, and/or call witnesses to evince (sic) exhibits as required by law.
2. That the learned magistrate erred in law and fact in failing to consider and/or disregarded most of defendants (sic) evidence and/or submissions.
3. That the learned magistrate erred in law and fact in admitting the plaintiff's allegations having not supported (sic) by any document and/or witness.
4. That the learned magistrate erred in law and fact in failing to find that the plaintiff's case was a sham from the onset.
5. That the learned magistrate erred in law and fact in failing to accept the fact that judgments are based on documents filed in court.

5. The appeal was canvassed through written submissions. Although served, the respondent did not file any submissions.

6. A perusal of the copy of the memorandum of appeal in the record of appeal shows that it is both undated and unsigned. Concerned by that development, I perused the original memorandum of appeal that was filed on 18<sup>th</sup> February 2016 which is in the file together with its court fees receipt for KShs 1,550. To my surprise, it is equally undated and unsigned. As a result, I have had to contend with the question of whether there exists a valid appeal. The appellant who is acting in person did not address this issue. It is nevertheless a fundamental and jurisdictional issue that I must determine.

7. A memorandum of appeal is a pleading. It is for that reason that **Order 42 Rule 1 (1)** of the **Civil Procedure Rules** provides that every appeal shall be in the form of a memorandum of appeal signed in the same manner as a pleading. Consequently, a memorandum of appeal should comply with the mandatory requirements of **Order 2 Rule 16** of the **Civil Procedure Rules** which provides:

***Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person.***

8. Since the appellant herein is acting in person it was incumbent upon him to date and sign the memorandum of appeal. The requirement of signature is obvious: a litigant especially one who moves the court must own his case by vouching for the matters he claims to be in controversy as well as the positions that he takes in the matter. In the same way that a plaintiff starts litigation, a memorandum of appeal starts the appellate process in an appeal from the subordinate court. It is such a fundamental pleading that cannot be compared to some application in or other interlocutory pleading in ongoing proceedings. It virtually determines whether or not an appeal exists. Therein lies the need to ensure that whoever claims to be seeking a reversal of a decision made by a court is in fact appealing against the decision. It would be a tragedy for the courts to be swamped by dummy cases in this day and age when the system is suffocating under the weight of genuine disputes that are yearning for early resolution. The Court of Appeal stated in **Vipin Maganlal Shah & another v Investment & Mortgages Bank Limited & 2 others** [2001] eKLR as follows:

***... a pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent. The reason for this was stated in the ancient case of Great Australian Gold Mining Co v Martin (1877) 5 Ch D1 at pg 10 to be a "voucher that the case is not a mere fiction"...***

***Here in Kenya this Court dealt with the case of Samaki Industries (Nairobi) Ltd v Samaki Industries (K) Ltd, Civil Appeal No 203 of 1995 (Unreported). There a suspended advocate filed an appeal on behalf of a party signing the memorandum of appeal and the other relevant documents. This Court had no difficulty in holding, indeed it was conceded, that the appeal having been filed by an unqualified advocate on behalf of an appellant was incurably defective and was struck out. The Court did not call upon the appellant to come and sign the memorandum of appeal and thus validate it.***

9. It may be argued that failure to sign a memorandum of appeal is a mere procedural misstep that is curable by invoking the court's duty under **Order 2 Rule 14** of the **Civil Procedure Rules**, **Section 3** of the **Environment and Land Court Act**, **Sections 1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2) (d)** of the **Constitution** to see to it that the just, expeditious, proportionate and accessible resolution of disputes is attained and that substantive justice prevails. I do not think so. Compliance with rules of procedure, as has been reiterated severally by various courts, is not antithetical to the mission of the court to do substantive justice. See **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR. Failure to sign a memorandum of appeal is a substantive issue that goes to the very core of the appeal. It cannot be cured by simply looking the other way or merely getting the appellant to belatedly sign the memorandum of appeal with a view to validating it. An unsigned pleading is a nullity and as is abundantly clear, nothing can be founded on a nullity.

10. While the decision of the Court of Appeal in **Vipin Maganlal Shah & another v Investment & Mortgages Bank Limited & 2 others** (supra) was made prior to the advent of the **Constitution of Kenya 2010**, the High Court recently considered the import of an unsigned pleading in the new constitutional dispensation in **Southern Engineering Co. Limited v Heady Berge Limited & another** [2019] eKLR. The court observed:

***... Article 159 2(d) of the Constitution and even the inherent jurisdiction of the court or the overriding objectives of the law cannot be resorted to by a party whose act is declared a nullity under the law.***

***... The requirement to have a pleading signed is a mandatory requirement and it is not a procedural technicality but is a substantive issue going to the very root of the pleadings. The object of the statute requiring the pleading to be signed by the***

*pleader or his counsel is to make a party signing or filing any of the pleading take ownership and responsibility for the contents of the pleading. ... The so called motion before this court is a nullity and ought to be struck out for non-compliance with the law. In this application the unsigned notice motion is a nullity for all purposes and intention.*

11. I have said enough to demonstrate that the memorandum of appeal herein is a nullity for being both undated and unsigned. There is simply no appeal herein and the matter cannot be salvaged. I strike out the memorandum of appeal filed herein on 18<sup>th</sup> February 2016. Since the respondent did not file any submissions in response to the purported appeal, I make no order as to costs.

**Dated, signed and delivered at Nakuru this 1<sup>st</sup> day of October 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the appellant

No appearance for the respondent

Court Assistants: Beatrice Jelimo & Julius Lotkomo