



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Madan, Law JJA & Simpson Ag JA )**

**CIVIL APPEAL NO. 41 OF 1980**

**BETWEEN**

**KIBOGY.....APPELLANT**

**AND**

**CHEMWENO.....RESPONDENT**

**JUDGMENT**

**Madan J** A suit filed in the High Court in which the appellant as the plaintiff prayed for judgment against the respondent as the defendant for (a) possession of the suit premises (b) arrears of rent (c) mesne profits (d) Kshs 28,500 and (e) certain specific damages was dismissed with costs by Nyarangi J.

On appeal to this court the decree of the High Court was reversed, judgment entered for the appellant for possession of the suit premises and Kshs 45,000 the total of arrears of rent and mesne profit as stated in the following extract from my judgment delivered in that appeal with which the other two members of the court agreed:

“I would therefore allow this appeal and vary decree of the High Court to the extent I have stated. In order to avoid any dispute arising in the future, I would formally order that the defendant deliver possession of the land to the plaintiff in whose favour I would also enter judgment for Kshs 45,000 with interest and costs of the suit in the High Court”.

After his victory in this court the appellant applied under Section 3A of the Civil Procedure Act for restitution of Kshs 35,042.50, the costs of the suit in the High Court which he had paid to the respondent under the order of Nyarangi J. Platt J dismissed the appellant’s application. He quoted the foregoing passage from my judgment and also said in his ruling:

“It is clear that the plaintiff is to have the costs of the suit, that the judgment is one whereby the decree of the High Court is varied, and not set aside. Had it been set aside, one could have said that the High Court order for costs had been set aside. As it is, it is not quite clear that that is so. Some part of the High Court’s judgment still stands also. In these circumstances I do not think it lies within the province of this court to interpret the Court of Appeal’s judgment. I do not think that I can say that the Court of Appeal has specifically varied the High Court’s order as to costs, and therefore it would be presumptuous of this court to do so ... I understand the Court of Appeal entertains applications to give consequential orders upon its judgments. That is what I think the appellant should do in this case.”

The appellant returned to the attack for restitution with a relevant Section 91(1) of the Civil Procedure

Act which was heard by Mead J who also dismissed it with costs saying during the course of his ruling that the same consideration would have to be given to the terms of the Appeal Court judgment as were given on the hearing of substantially the same previous application supported by the same facts upon which the court had come to a decision; the previous application was dismissed because of the court's incompetence to interpret a judgment of the Court of Appeal with which he could not interfere and the matter was res judicata.

This is an appeal against the ruling of Mead J.

The logic even the disposition of our judgment in the first appeal between these parties quite clearly showed that the order made by Nyarangi J dismissing the appellant's suit against the respondent was set aside by being varied as stated in my judgment, instead, judgment was entered for the appellant for three items of his claim with interest and costs of the suit in the High Court. Perhaps not precise, the expression "vary the decree of the High Court" was obviously not understood in its true meaning. The gist of it was clear as expounded in the immediately preceding sentence. With respect Platt J erred when he said the decree of the High Court was varied and not set aside and some part of the High Court's judgment was still standing also. The whole of the decree of the High court was set aside, cast away and substituted as stated in our judgment and no part of it was excepted or left standing, not even the order for costs. The issue for decision before Platt J was whether the appellant was entitled to an order for restitution. It was altogether a new issue between the parties which the learned judge could have decided irrespective of whether some part of the High Court's judgment was still standing or not. Although he heard the issue, he did not finally decide it, he merely referred the parties back to the Court of Appeal.

True the matter directly and substantially in issue before Mead J had been directly and substantially in issue before Platt J between the same parties but it was still an open issue, it was not res judicata not having been finally decided by the court which is a condition precedent to res judicata as required in Section 7 of the Civil Procedure Act reading as follows:

"7. No court shall try any or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

I would allow this appeal with costs, set aside the order made by Mead J and substitute therefore an order for restitution of the sum of Kshs 35,042.50 by the respondent to the appellant with interest augmented by the costs of the application heard by Mead J.

As **Law JA** and **Simpson Ag JA** agree, it is so ordered.

**Dated and Delivered at Nairobi this 12th day of January 1981.**

**C.B.MADAN**

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**JUDGE OF APPEAL**

**E.J.E.LAW**

.....

**JUDGE OF APPEAL**

**A.H.SIMPSON**

.....

**AG. JUDGE OF APPEAL**

I certify that this is a true copy of the  
original.

**DEPUTY REGISTRAR**