



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

CIVIL APPEAL NO. 145 OF 1984

NDUNYU MUTUNGA.....APPELLANT/RESPONDENT

VERSUS

JAMES NDEMTWA ITULI.....RESPONDENT/APPLICANT

RULING

1. In the Application dated 29th August, 2016, the Respondent/Applicant is seeking for the following orders:

a. That this Honourable Court be pleased to order the Kitui District Lands Registry to issue a Title Deed to the Respondent/Applicant in respect of Plot No. 312 Nzauni Adjudication Section.

b. That this Honourable Court be pleased to issue an order of eviction against the Appellant/Respondent evicting him from the suit premises being Plot No. 312 Nzauni Adjudication Section.

c. That this Honorable Court be pleased to issue an order of permanent injunction restraining the Appellant /Respondent, his servants, agents or anyone claiming under him or through him from entering upon, cultivating, trespassing or committing acts of waste, destruction or interference with the suit premises being Plot No. 312 Nzauni Adjudication Section.

d. That this Honourable Court be pealed to mark the Appeal herein as concluded.

2. The Application is premised on the grounds that the Respondent/Applicant filed in Kitui District Magistrate's Court Civil Suit No. 142 of 1997 against the Appellant seeking recovery of Plot No. 312 Nzauni Adjudication Section; that Judgment was entered against the Appellant on 22nd November, 1980; that the Appellant sought to set aside the Judgment; that his Application was dismissed and that the Appellant filed the current Appeal against the said dismissal.

3. It is the Respondents/Applicant's case that the Appeal was heard and determined and a Judgment was delivered on 21st June, 1994 dismissing this appeal.

4. According to the Applicant, the Appellant/Respondent obtained an order of the court in Machakos HC. Misc. 268 of 2001 seeking that the issuance of the Title Deed in respect to the suit property should be stayed pending the hearing and determination of the Appeal; that the Application was heard and allowed on 14th September, 2001 and that the Appellant's counsel proceeded to register the said orders.

5. It is the Applicant's case that when the Appellant filed Machakos Misc. 175 of 2012 seeking to

reconstruct this file, he did not supply to the court a complete record of appeal; that the Application for reconstruction of the file was never served on the Respondent and that it was not until 28th January, 2013 that the Respondent's counsel was served with the Application for reconstruction.

6. According to the Applicant, there is no appeal pending before the court.

7. In his Replying Affidavit, the Appellant deponed that the orders sought by the Applicant cannot be granted; that the appeal herein is still pending and that the purported Judgment did not emanate from this court.

8. It is the Appellant's case that the annexed Judgment is neither signed nor dated and that it has not been indicated when it was certified by the Deputy Registrar as a true copy of the original.

9. The Appellant/Respondent deponed that the Applicant wants to use the court process to aid fraud and that the court should not entertain the Application.

10. The Applicant's advocate submitted that although Order 21 Rule 3 of the Civil Procedure Rules provides that a Judgment should be signed and dated, an innocent litigant should not be penalized for the failure of the court to sign and date a Judgment.

11. Counsel submitted that the failure by the Judge to sign and date the Judgment is a procedural technicality that can be cured by Article 159 of the Constitution; that there is no requirement in law that the Deputy Registrar should indicate the date when certification was done and that the Respondent is acting in bad faith.

12. The Appellant's advocate submitted that the purported Judgment in this matter is a product of fraud because the said Judgment is neither signed nor dated; that the failure to date or sign a Judgment is not a procedural technicality and that it is not indicated on the purported Judgment when the same was certified by the Deputy Registrar.

13. The Application by the Applicant is premised on the ground that there is no appeal.

14. According to the Applicant, this Appeal was finalized when Osiemo J (*as he was then*) delivered his Judgment.

15. On the other hand, the Appellant has deponed that the Appeal has never been heard and determined and that the purported Judgment by Osiemo J is a fraud.

16. It would appear that the original file in respect of the appeal herein could not be traced. This file is in respect to "*a reconstructed file.*"

17. According to the documents in the Record of Appeal, the Appellant herein filed a Memorandum of Appeal challenging the decision of the District Magistrate II at Kitui in DMCC No. L.42 of 1977 dated 25th June, 1984.

18. The Appeal emanates from the decision of the magistrate, in which he dismissed the Appellant's Application to set aside the ex-parte Judgment of 22nd November, 1980.

19. In his Ruling, the learned magistrate dismissed the Appellant's Application and reiterated that the Judgment of 22nd November, 1980 which awarded the Respondent the suit land is valid.

20. The Judgment of 22nd November, 1980 that the Appellant unsuccessfully attempted to set aside is part of the Record of Appeal.

21. According to the said Judgment, the court was satisfied that the Plaintiff (*the Respondent herein*) had

proved that he bought the suit land.

22. In his effort to show that the Appeal herein was decided in his favour and that the Appeal was dismissed, the Respondent/Applicant has annexed on his Supporting Affidavit a copy of an unsigned and undated Judgment.

23. In the said Judgment, J.L.A. Osiemo purportedly agreed with the trial court and reiterated that the trial court properly dismissed the Appellants' Application.

24. From the impugned Judgment of Osiemo J, it would appear that both the Appellant and the Respondent's advocates appeared before the Judge and argued the Appeal.

25. I have not been told who were the advocates who appeared before the Judge, and on which date, to argue the Appeal.

26. Even if the original court record is missing, the party who is alleging that indeed the appeal was heard should have retrieved from his office file the notes showing exactly when the appeal was heard and which advocates argued the appeal. Indeed, if the said advocates are still alive, it would have helped a great deal if they filed Affidavits in this matter.

27. As things stand now, no one knows when the said advocates argued the Appeal to culminate into the Judgment that is before the court.

28. Indeed, the Judgment that has been exhibited by the Respondent is neither dated nor signed.

29. Although some judicial officers do not sign the copies of their Judgments and Rulings except the original, they always date them.

30. If indeed the Respondent's advocate attended court when the Judgment was delivered, it behoved him to obtain a copy of the signed and dated Judgment from the court.

31. Order 21 Rule 23(1) of the Civil Procedure Rules, 2010 provides as follows:

“3(1) 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.”

32. The purported Judgment by Osiemo J is neither signed nor dated, thus offending the provisions of Order 21 Rule 3(1) of the Civil Procedure Rules.

33. In the case of ***William Kinyanyi Onyango vs. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR***, the Court of Appeal held as follows:

“Dating a Judgment or Ruling is a requirement of law. It is a matter of substance and not a technicality. It engenders certainty of the decree or order...”

Order 21 Rule 3(1) of the Civil Procedure Rules, 2010 for example provides that a Judgment pronounced by the Judge who made it shall be dated and signed by him in open court at the time of pronouncing it. The language there is mandatory. The date of judgment impacts on the rights of parties: the time to lodge an appeal starts to run for example.”

34. In the ***William Kinyanyi Ongango case (supra)***, the Court of Appeal quoted with approval the Halsbury's Laws of England, 4th Edition, paragraphs 545 and 546 in which the author states as follows:

“The date of the Judgment or order is important in that the Judgment or order generally takes effect from the date.”

35. In the case of *Kola Chacha vs. Kenya Commercial Bank & Another (2006) eKLR*, the Court of Appeal also reached the conclusion that failure to date the impugned Ruling vitiated it.

36. In the absence of a signed and dated Judgment, this court is unable to arrive at a conclusion that the Appeal herein was heard and determined.

37. It is for those reasons that the Applicants' Notice of Motion dated 29th August, 2016 is dismissed with costs.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE