



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 116 OF 2012

BETWEEN

NATIONAL BANK OF KENYA..... APPELLANT

AND

THOMAS OWEN ONDIEKI.....RESPONDENT

***(An appeal from the judgment and decree of High Court at Eldoret of Nambuye, J.) dated
25th May 2004***

in

HCCC No. 115 of 1999)

JUDGMENT OF THE COURT

The appeal before us arises from a judgment of the High Court, where ***the appellant, National Bank of Kenya***, claims that the court wrongly found that the respondent's employment had been unlawfully terminated, and that as a consequence, he was entitled to terminal benefits under the contract of employment, the amount of which was to be computed by the Deputy Registrar of the court.

The appellant was aggrieved by the decision of the court and filed this appeal which is before us. One of the grounds of appeal was that the judgment was a nullity as it did not comply with the provisions of ***Order XX*** of the ***Civil Procedure Rules*** as it was neither signed nor dated by the judge who wrote and pronounced the judgment.

In his submissions, ***Mr. Nyairo***, learned counsel for the appellant, submitted that the judgment of the High Court was neither dated nor signed contrary to the provisions of ***Order XX rule 3 (1)*** and ***3 (2)*** of the ***Civil Procedure Rules***, and as a consequence was a nullity.

Mr. Miyianda, learned counsel for the respondent, submitted that he would adopt the respondent's position and submissions as specified in the record, that the appellant had already been paid the amounts ordered in the judgment, and that the appeal had already been overtaken by events.

We have carefully considered the submissions of counsel and consider that the issues for consideration in

the main are whether the judgment was a nullity, and if so, what orders the court should make as a consequence.

We have looked at the judgment on the record and it is without doubt neither dated nor signed by the judge that wrote and delivered it and as a consequence, this rendered the judgment a nullity. See **Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited [2001] eKLR.**

Since the judgment has not complied with the laid down requirements of **Order XX rule 3(1) and 3(2)** of the **Civil Procedure Rules**, we find that it is not a valid judgment, and as such it is a nullity.

In the light of such determination, what order should the Court make in respect of this appeal?

The general powers of this Court are set out in **rule 31** of the **Court of Appeal Rules** which stipulate;

“On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings of the superior court with such directions as is appropriate, or to order a new trial, and to make any incidental or necessary orders, including orders as to costs.”

Since there is no valid judgment, there is no decision upon which this Court may confirm, vary or reverse such decision. **Rule 31** further provides that, this Court may in the alternative, remit the proceedings back to the High Court with such directions as may be appropriate, or order a new trial.

In **Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited (supra)** it was stated that since the rule does not specify the circumstances to which a retrial may be ordered, a decision one way or the other would to a great extent require to be determined by the existing circumstances in each case. See also **Muiruri vs Republic [2003]KLR 552.**

In the instant case, the main issue in contention was whether the respondent’s employment was lawfully terminated, and whether or not he was entitled to general damages for wrongful termination of the employment.

Nambuye, J. (*as she then was*), heard the entire evidence in proceedings that commenced on 30th April, 2001, and were concluded on 27th March, 2002. Only the respondent and one other witness testified on behalf of the claimant, while the defence called 4 witnesses. Judgment was then reserved for 28th June, 2004. Subsequent to this, the record does not show if the appellant was notified of the date of delivery of the judgment.

What happened next was that on 17th January, 2001, the respondent filed a Notice of Motion for the assessment of the respondent’s terminal dues pursuant to the orders in the impugned judgment, which application was placed before the learned judge for hearing on 27th July, 2004. The Court file was not available prompting Nambuye, J. to state thus:-

“In the absence of the original file, this court cannot proceed to hear the Notice of Motion dated 25/6/2004. This Court will only hear this application where the original court file is available. The applicant is relying on an unsigned and uncertified judgment. There is no copy of the signed and certified judgment in this skeleton file and hence there is no judgment from which this court can confirm the orders of the honourable Judge. Matter is therefore marked ‘SOG’.”

The matter did not end there, the respondent went ahead to have the application heard, this time before Hon. V. Wandera, Deputy Registrar, in the absence of the appellant, though the court was informed that it had been served. A final ruling computing the amount to be paid by the appellant to the respondent as terminal dues was delivered on 6th July, 2005, despite the learned judge’s words of caution to the respondent to ascertain whether or not a valid judgment existed.

From this brief outline of the circumstances surrounding the case, it is clear to us that, unless the High Court renders a decision, and delivers a valid judgment in respect of the employment dispute between the parties, the interests of justice will not have been served. Until such time, this obligation will continue to remain outstanding to the parties as a basic legal entitlement.

In the result, we allow the appeal and order that the suit be remitted back to the High Court for retrial, and we direct that it be heard on a priority basis. We order that each party bears its own costs.

Orders accordingly.

Dated and delivered at Eldoret this 5TH day of FEBRUARY 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR