



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 80 OF 2010

BETWEEN

SUMBEIYO PRIMARY SCHOOL..... 1ST APPELLANT

PAUL CHEBIEGO..... 2ND APPELLANT

JACOB BARMAO..... 3RD APPELLANT

MICHAEL MAIYO..... 4TH APPELLANT

AND

KIPSAIT AYABEI..... 1ST RESPONDENT

KANGONGOCHEBIATOR..... 2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Nambuye, J) delivered on her behalf by Dulu J, on 24th April 2004

in

Eldoret H.C.C.C. NO. 48 of 1998)

JUDGMENT OF THE COURT

In this appeal, the appellants, *Sumbeiyo Primary School, Paul Chebiego, Jacob Barmao and Michael Maiyo* seek for orders that:-

- a) *The decision and decree of the High Court given on 27th April 2007 be set aside;***
- b) *The case be remitted for retrial before another judge;***
- c) *The appellants be awarded costs in the appeal.***

By way of a plaint dated 21st February 1998, the appellants prayed for judgment against the respondents

as follows:-

a) A declaration that L.R No. Plateau/Chepkongony Block 2 (Sumbeiyo) 65 was fraudulently transferred to numbers Plateau /Chepkongony Block 2 (Sumbeiyo) 72 and 73 hence null and void and that the 1st plaintiff is the rightful owner;

b) Special Damages;

c) General Damages;

d) Costs of and incidental to this suit together with interest thereon at court rates;

e) Any further or other relief this Honourable court deems fit and expedient to grant.

On 24th April, 2004, a judgment was delivered by Dulu, J on behalf of Nambuye, J (as she then was) in which the learned judge found that the appellants stood non-suited as they lacked *locus standi* to bring the suit for the reasons given, the allegation of fraud was not proved; the appellants did not pray that the title registered in the names of the respondents be held upon trust for the respondents and that the title be registered in the name of the 1st appellant.

One of the grounds of appeal in the present appeal is that the learned judge erred in law in delivering the judgment contrary to the provisions of **Order XX** of the **Civil Procedure Code**. Their contention is that the judgment that was delivered was not dated or signed by either the judge who wrote it, or the judge who delivered it.

When the parties appeared before us **Mr. Mathai**, learned counsel for the appellants, submitted that the judgment was written by Nambuye, J and pronounced on the same day by Dulu, J and that it was neither signed nor dated by either the judge who wrote it or the judge who pronounced it contrary to the requirements of the previous **Order XX rule 2 (2)**; and that **Order XX rule 3(1) and (2)** requires the countersigning of the judgment; that in the absence of these requirements the judgment was null and void and of no legal effect.

Order XX rule 2(2) of the **Civil Procedure Rules** (the previous rules) enacted thus,

“ A judge of the High Court may pronounce a judgment written and signed but not pronounced by another judge of the High Court.”

Order XX rule 3[1] and [2] also enacts thus,

“ 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.”

“ A judgment pronounced by a judge other than the judge by whom it was written shall be dated and counter-signed by him in open court at the time of pronouncing it.”

In the case **of Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited [2001] eKLR** it was stated thus,

“ Ordinarily a judgment is dated and signed in open court at the time of delivery by the judge who wrote it. {See Order XX rule 3 (1)} Order 3 (2) of the CPR, however, does recognize that situations may arise where a judge who wrote a judgment is not able to pronounce that judgment. In that event the judge who wrote the judgment is required to sign and date the judgment for delivery by another judge, in which case the judge who would eventually pronounce it is required to date and counter sign it.”

This Court went on to state that,

“... It is trite law that where rules of court prescribe a procedure for the doing of any act, a departure from or a variation thereof may render the act done a nullity. Mr Gatonye conceded this and the fact that the decision appealed against is a nullity on that ground.”

In the instant case, it is evident that the judgment was neither dated nor signed by Nambuye J, who wrote it, or Dulu J who pronounced it. As the prescribed procedure was not complied with we find that the judgment appealed from is a nullity on that ground.

In the result, and having regard to the circumstances of the case we order that the suit be returned to the High Court for retrial and each party shall bear their own costs.

Orders accordingly.

Dated and delivered at Eldoret this 25th day of June 2015.

D.K.MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A.K.MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR