IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 28 OF 2007

BETWEEN

LIKHANGA SHIKAMI…….1ST APPELLANT

KIPNGENY KIPNGETICH……..……..2ND APPELLANT

AND

ILLIANA INGASIALI REGINA..……1ST RESPONDENT

FLORA MAKOKHA KUNDU…….……2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (Nambuye, J) given on 21st September 2004,

in

Eldoret H.C.C.C. NO. 123 of 1991)

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JUDGMENT OF THE COURT

In this appeal, the appellants seek orders that the appeal be allowed, that the judgment and decree of the Nambuye, J. (as she then was) be reversed, and in its place be substituted an order dismissing the respondents suit in the High Court with costs to the appellants.

By way of an Originating Summons dated 28th June 1991, the respondents prayed for orders against the appellants as follows:-

a. *A declaration that the plaintiffs having been in occupation lungus usus nec per vim, nec clam, nec precario of land parcel number **Uasin Gishu/Ndalat/12** for a period of over twelve (12) years have acquired title to the said parcel of land by right of prescription.*

b. *An Order directing the Land Registrar, Uasin Gishu District, to register the plaintiffs as proprietors of land parcel number **Uasin Gishu/Ndalat/12** in place of Kipngeny Kipngetich Arap Gorir, the second defendant herein.*

c. *An order against the Defendants jointly and severally for costs of and incidental to this suit.*

The appellant filed twelve grounds of appeal, of which one was that the learned judge fell into error when she failed to date and sign the judgment contrary to the stipulations of ***Order XX*** of the retired ***Civil Procedure Code***. The complaint was that after the judgment was pronounced, it was not dated or signed either by the judge who wrote the judgment or the judge that pronounced 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 by Gacheche, J., but that it was neither signed nor dated by the judge who wrote it, contrary to the requirements of the previous ***Order XX rule 2 (2***) nor signed by the judge who pronounced the judgment contrary to ***Order XX rule 7*** counsel argued that the failure to comply with these requirements rendered the judgment null and void.

Mr J.I. Nyarotso, learned counsel for the respondents conceded that the judgment was not signed, but nevertheless took the position that the failure to sign and date the judgment was not fatal. Counsel referred us to ***Article 159*** of the ***Constitution*** and submitted that the dating and signing of a judgment is a procedural technicality which the Court should not have undue regard. In any event, counsel continued, the respondents were entitled to the fruits of their judgment and being an old matter, such an error should not be visited upon the parties.

We have read the record of this appeal and considered these submissions.

Order XX rule 2 (2) of the ***Civil Procedure 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,

> ***"…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.***

In the instant case, the judgment was neither dated nor signed by Nambuye J. who wrote nor was it dated and countersigned by Gacheche J. who pronounced it. We reject Mr. Nyarotso's invitation to consider this omission as a technicality which we should ignore under ***Article 159*** of the Constitution. A judgment which is not signed by the judge who wrote it is no judgment. It is a nullity.

Having said that, the question we must address is, what orders should be made so as to determine this appeal?

Rule 31 of the ***Court of Appeal Rules*** sets out the general powers of this Court when dealing with appeals. It provides as follows;

> ***"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."***

In the case ***Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited (supra)*** it was stated thus;

> ***"The rule does not spell out circumstances under which a retrial may be ordered. The rule, however, clothes the court with wide judicial discretion to consider when an order for retrial can be made. So the decision one way or the other would largely depend on the facts and circumstances of each case."***

From the record this is an old dispute dating back to 1991, and for which the parties have awaited a determination by the court. The case concerned a claim for adverse possession filed by way of Originating Summons by the respondents, in respect of *land parcel number* ***Uasin Gishu/Ndalat/12.*** The appellants' position is that the respondents occupied the suit premises as mere licencees, and did not at any time settle peacefully and continuously on the land in question. Given the nature of the dispute, and the predicament in which the parties find themselves, the circumstances of this case are such that, since no judgment exists, the High Court must proceed to discharge its obligation and to render a judgment, so that the suit may be determined. As observed by this Court in the case of ***David Kinyua Maingi & 2 others vs Republic [2013] eKLR*** when considering the legal effect of an appeal in which the judgment of the High Court was missing, and could not be traced, ***"…The trial process in civil or criminal case must*** *ipso jure* ***end in a judgment. "***

Accordingly, we find that the prudent approach would be to order a retrial so that the parties can obtain a final determination of their suit from the High Court.

In the result, and having regard to the circumstances of the case we order that the matter re remitted 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 10th day of December, 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