



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 25 OF 2012

BETWEEN

PETER BIWOTT.....1ST APPELLANT

AND

SAMUEL BIWOTT.....1ST RESPONDENT

PHELIMON BIWOTT.....2ND RESPONDENT

WILSON BIWOTT.....3RD RESPONDENT

DINAH CHESANF BURUKO.....4TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Eldoret (Osiero, J.) and delivered by Ang'awa, J. on 15th July 2010,

in

Eldoret H.C.S.C. NO. 174 of 2005)

JUDGMENT OF THE COURT

In this appeal, the appellants seek orders that the appeal be allowed, that the judgment and decree of Osiero, J. be set aside with costs to the appellant.

In the memorandum of appeal, one of the grounds is that the learned judge erred in law in failing to date and countersign the judgment contrary to the requirements of **Order 21** of the **Civil Procedure Rules** after it was pronounced.

When the parties appeared before us, **Mr. Mathai**, learned counsel for the appellant submitted that the judgment was written by Osiero, J. and pronounced by Ang'awa, J. but that it was neither signed nor dated by the judge who wrote the judgment; that in the absence of these requirements the judgment was null and void.

Mr. Birech, learned counsel for the respondents conceded that the judgment was neither signed nor dated. It was counsel's view that, since the judgment did not comply with **order 21 rule 3** of the **Civil Procedure Rules**, the suit should be referred back to the High Court for retrial.

Order 21 rule 2 (2) of the **Civil Procedure Rules** stated 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 21 rule 3(1) and (2) also provides 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*** this Court observed that since the decision appealed against was neither signed nor dated, as prescribed by the rules, the failure to comply rendered that decision a nullity.

In the instant case, Osiemo, J. who wrote the judgment did not date nor sign it, and Ang'awa J. who pronounced it also failed to date or countersign it, which was contrary to the legal requirements of **Order 21 rule 2** of the **Civil Procedure Rules**. As a consequence, we find that the judgment appealed from is rendered a nullity.

As to whether the suit should be referred back to the High Court for retrial. 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.”

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.

This matter concerns a petition that was filed in respect of the Estate of Kibiwot Arap Buruko (deceased), where the beneficiaries were unable to agree on the manner in which the estate of their late father was to be distributed. The deceased had two wives. The first wife, Mary Chemaiyo Biwott was blessed with five children, three of whom had since died, and Leah Buruko, the second wife who was blessed with eight children, one of whom is since deceased.

From these facts, since the beneficiaries are unable to resolve the dispute on their own, it is essential that the court decisively conclude the issue brought before it. We consider that it is incumbent upon the High Court to discharge the obligation of rendering a valid judgment in respect of this succession dispute.

In the result, and having regard to the circumstances of the case, we order that the suit be referred 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 10th day of December, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR