



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU

CORAM: TUNOI, O'KUBASU & AGANYANYA, J.J.A.

CIVIL APPEAL (APPLICATION) NO. 225 OF 2007

BETWEEN

JAMES NYAMBOGA MASOGO RESPONDENT/APPELLANT

AND

KIPKEBE LIMITED APPLICANT/RESPONDENT

(An application to strike out the record of appeal in an appeal from the judgment & decree of the High Court of Kenya at Kericho (Kimaru, J) dated 8th June, 2007

in

HCCC NO. 56 OF 2004)

RULING OF THE COURT

The Court is being moved under ***rule 80 of the Court of Appeal Rules*** for an order that the appeal, that is, Civil Appeal No. 225 of 2007, be struck out on the ground that the decree is wrongly dated 8th June, 2007 instead of 7th June, 2007 when judgment was delivered.

The brief facts giving rise to the application are as follows. On 7th June, 2007 Kimaru, J delivered a judgment by which he awarded the respondent both special and general damages in respect of injuries allegedly sustained by him whilst in the employment of the applicant.

It is plain from the record of appeal that the judgment was delivered on 7th June, 2007 and is so dated. However, the decree extracted thereafter erroneously indicates that the said judgment was delivered on 8th June, 2007.

Mr Olando, learned counsel for the applicant, contends in the main that the decree which is wrongly dated being a primary document renders the record of appeal fundamentally defective and hence the appeal should be struck out.

Mr Ochieng, learned counsel for the respondent, on the other hand avers that the error is excusable and is not so fatal as to warrant striking out the record of appeal. Mr Ochieng further submits that having

discovered the irregularity he wrote to the applicant's counsel asking him to approve an amended decree which had then been corrected but the said counsel declined to approve and so the applicant should not move the Court to strike out the appeal.

The main issue herein is whether the decree which bears the wrong date of 8th June, 2007 instead of 7th June, 2007 should be deemed so fatally defective as to cause the appeal to be struck out.

As was said by this Court in ***SIMON KINYUA V EVERREADY BATTERIES (K) LTD Civil Application No NAI 281 of 2004 (Nakuru) (Unreported)*** where there is a conflict of dates in the judgment and the decree like in this case, the date of the judgment as shown in the judgment takes priority.

It is not in dispute that there exists one judgment only being the subject of the appeal and it is correctly dated 7th June, 2010. The conflict of dates was discovered by the respondent's counsel and he attempted to correct it before the appeal consummated but the applicant's counsel objected. We must point out that under ***rule 92 of the Rules*** the applicant could have lodged a supplementary record of appeal to incorporate the correct document so as to enable the appeal being properly determined. It did not do so but instead opted for the present course of action.

In our view, being cognizant of the overriding objective and not permitting technical objections to hinder the interests of justice we decline to grant the application. It is in the best interest of both parties that the appeal be heard and disposed of on merit.

We dismiss the application. Costs shall be in the appeal.

We order the respondent to file and serve a supplementary record of appeal containing the amended decree within 30 days hereof. We so order.

Dated and delivered at Nakuru this 24th day of February, 2011.

P. K. TUNOI

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR