



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Civil Appeal 139 of 2003**

**GODFFREY GATERE KAMAU.....APPELLANT**

**AND**

**PETER MWANGI NJUGUNA.....RESPONDENT**

*(Being an Appeal from an order of High Court of Kenya at Nyeri (Ombija, J) dated 20<sup>th</sup> February 2003)*

**in**

**H.C.C.C NO. 396 OF 1993 (O.S.)**

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**JUDGMENT OF THE COURT**

The appeal herein arises from the order of Ombija, J, granted in Nyeri Civil Case No. 396 of 1993, on 26<sup>th</sup> March 2003, in which the learned Judge made an order that **“The suit is dismissed with costs of the application and the suit to the applicant/defendant”**.

The matter before the learned Judge was the Notice of Motion application dated 30<sup>th</sup> January 2002 seeking the dismissal of the suit for want or prosecution, filed by Mr. Waiganjo Gichuki, learned counsel for Peter Mwangi Njuguna, (respondent). The application was allowed with costs.

Godfrey Gatere Kamau (the appellant), was aggrieved by the order dismissing his suit, and filed the present appeal citing four grounds in his memorandum of appeal, namely,

- 1. The Learned Honourable Judge erred in law in not considering the replying affidavit dated 7<sup>th</sup> June 2002 despite the wide reference to it by the respondent’s advocate in the superior court and despite the said affidavit having been filed within time on 8<sup>th</sup> February 2002 since the application dated 30.1.2002 was not heard on 30<sup>th</sup> January 2002 but on 20<sup>th</sup> February 2003.**
- 2. The Learned Honourable Judge in refusing to consider the said affidavit wrongly restricted the appellant’s advocate to points of law only hence shutting out material in reply.**
- 3. The Ruling of the superior court made on 26<sup>th</sup> March 2003 and which amounted to a final judgment of the suit was not in conformity with the mandatory provisions of Order XX Rule 4 of the Civil Procedure Rules.**
- 4. The Learned Honourable Judge in not complying with the provisions of Order XX Rule 4 of the Civil Procedure Rules failed to make a specific finding as to why the appellant’s offer to pay**

**costs was not sufficient in lieu of dismissing the suit.**

The suit in the superior court began by way of Originating Summons filed on 11<sup>th</sup> August 1993, seeking a declaration that Godfrey Gatere Kamau, appellant, had become entitled, **“by adverse possession for over twelve years to 1.9 acres out of land parcel No. Loc.8/GATUYA/157, registered under Land Act (Cap. 300) Laws of Kenya and situated at Kiharu Division of Murang’a District”**. He sought a further order that, **“he be registered as the proprietor of the said 1.9 acres of Land Parcel No. LOC.8/GATUYA/157, since he has been in occupation of the above land uninterrupted for a period of (15) years”**. He also prayed for costs of the Originating Summons, which was supported by his affidavit, as well as affidavits of two other persons, namely, James Mwangi Maina and Njuguna Waweru.

The learned Judge heard the Notice of Motion application on 20<sup>th</sup> February 2003. He reserved his ruling to be given on notice. He subsequently gave an order on 26.3.2003. The record for that day’s proceedings reads:

**“26.3.2003**

**Coram : N.R.O. Ombija – Judge**

**J.M. Gikaria – Court Clerk**

**Mr. Mbuthia for the**

**plaintiff/respondent**

**N/A for the applicant/defendant**

**ORDER: The suit is dismissed with costs of the application and the suit to the applicant/defendant”.**

Mr. Mbuthia, learned counsel for the appellant argued grounds 1 and 2 of the aforesaid memorandum of appeal together, and referred us to the record of appeal, particularly the replying affidavit which he submitted was not considered by the learned Judge. This was an affidavit sworn by Mr. Jeremiah N. Mbuthia, advocate, who had the conduct of the suit on behalf of the appellant then. It was a response to the application for dismissal of the suit for want of prosecution. Paragraph 9 thereof reads,

**“That I would pray, that since the delay in fixing the suit for hearing is mine, it would not be in the best interest of justice to visit such mistake upon the plaintiff”.**

Submissions made before the learned Judge by Mr. Gichuki, learned counsel for the respondent, was to the effect that the appellant was in breach of the provisions of Order L Rule 16(1) of the Civil Procedure Rules, and should therefore not be heard. Mr. Mbuthia, learned counsel for the appellant, sought the court’s leave to be allowed to argue the application on points of law, which leave was granted. He complained, however, that despite this, his arguments were not considered in the final order granted.

On grounds 3 and 4 of the memorandum of appeal, Mr. Mbuthia referred us to Order XX Rule 4 of the Civil Procedure Rules on the format of a judgment, which he said also applies to rulings. He submitted further that the appellant suffered injustice by the failure of the learned Judge to consider the replying affidavit. He urged us to set aside the dismissal order, and allow the suit to proceed to hearing.

Mr. Gichuki, conceded that the order granted by the learned Judge on 26<sup>th</sup> March 2003, did not contain any reasons, but because he did not attend court on that day, he did not know what went on, but his office was subsequently served with a certified copy of a considered ruling, at his request. He submitted further that when he received the record of appeal, he noticed that it did not contain the ruling a copy of which he had been supplied with. He did not, however, draw this to the attention of Mr. Mbuthia, learned counsel for the appellant, though one of the grounds of appeal was that no reasons were given for the order.

Instead he decided to wait until the hearing of the appeal where he intended to raise the issue whilst opposing the appeal because he had a copy of a considered ruling sent to his office from the court.

The matter of the typed considered ruling being in the court file, came up during the hearing of the appeal. This us peruse the superior court's record, and indeed we found a typed ruling dated 26<sup>th</sup> March 2003, signed by the learned Judge, and allegedly delivered "**in presence of Mr. Mbuthia for the respondent/plaintiff**". There was no appearance for the "**applicant/defendant**".

Mr. Mbuthia who was present in court on that day denied that a typed considered ruling was delivered. He did not have a copy of it and that is why he did not include it in the record of appeal filed in this Court. It remained a mystery to us therefore how the typed considered ruling found its way into the court file, especially when there was no reference, to it in the proceedings before the superior court. We therefore felt that we had to decide on its fate, and in so doing, relied on a decision by the predecessor of this Court, the Court of Appeal for Eastern Africa in **B.G. SAINT vs KEVIN HOGAN [1953] EACA 89** where it was held:

**1) "Reasons prepared subsequent to a judgment and not delivered in open court are not part of the judgment".**

Though what was found in the file was a typed ruling and not a judgment, we are of the view that the same principle applies to rulings as we do not have a definition of a ruling in the Civil Procedure Act. In a recent decision of this Court in **TRANSOUTH CONVEYORS LTD vs KENYA REVENUE AUTHORITY & OTHERS CIVIL APPEAL NO. 89 OF 2007, CONSOLIDATED WITH STUNTWAVE LTD vs KENYA REVENUE AUTHORITY AND TWO OTHERS** (unreported), the Court said *inter alia*,

**"the practice in all civil courts in East Africa is that suits commenced by plaint give rise to a judgment while civil proceedings commenced in any other manner give rise to a ruling which is concluded by the making of an order. That would explain why we do not have any definition in the Civil Procedure Act or Rules made thereunder of the term "ruling".**

From the foregoing, we have come to the conclusion that the absence of reasons for the learned Judge's ruling delivered in court must have been because the reasons were prepared subsequently, so they did not and cannot form part of the ruling in the "**order**" he gave on 26<sup>th</sup> March 2003. We therefore disregard that ruling. Having done so, we consider that the only order in this appeal is the one of 26<sup>th</sup> March 2003, which order does not have any reasons for it as required by Order XX R 4, which provides

**"Judgments in defended suits shall contain a concise statement of the case, the points for determination thereof and the reasons for such".**

And Order XX Rule 5 of the Civil Procedure Rules provides that:

**"In suits in which issues have been framed, the court shall state its findings or decision, with the reasons therefore, upon each separate issue".**

This court had occasion to deal with this point in several cases in the past, one such case being, **WAMUTU vs KIARIE [1982] KLR 480**, where it was held *inter alia*:

**2) "Judgments in defended suits shall contain a concise statement of the case points of determination, the decision thereon and reasons for such a decision as required by Order XX Rule 4 of the Civil Procedure Rules".**

Again in **Civil Appeal No. 179 of 1997 J.P. MACHIRA t/a MACHIRA & CO. ADVOCATES vs WANGETHI MWANGI & ANOTHER** (unreported), which was a majority decision, Akiwumi, JA said,

**“I think that as is required by Order XX rule 4 of the Civil Procedure Rules in respect of judgments, a ruling in an application which is opposed such as the one made by the Appellant and opposed by the Respondents, must be self contained and should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. This, I fear he did not endeavour to do. He therefore exercised his discretion improperly”.**

In the result, we allow the appeal on all four grounds; set aside the order allowing the Notice of Motion application dated 30<sup>th</sup> January, 2002, and substitute therefor an order dismissing the said Notice of Motion. We order that the suit be heard on its merits. Costs of the Notice of Motion and of the appeal, be costs in the suit.

**Dated and delivered at Nyeri this 6<sup>th</sup> day of June 2008.**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.M GITHINJI**

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**JUDGE OF APPEAL**

**J. ALUOCH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**