



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPEAL 342 OF 2001

KOLA CHACHAAPPELLANT

AND

KENYA COMMERCIAL BANK 1ST RESPONDENT

DAMCO AUCTIONEERS 2ND RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Kisii (Mbito, J) delivered on 4th April, 1996

in

H.C.C.C No. 158 of 1988)

JUDGMENT OF THE COURT

In a plaint dated 4th August, 1988 and filed in the superior court at Kisii as Civil Case No. 158 of 1988, the appellant in this appeal, Kola Chacha, sought judgment against the first and second respondents, Kenya Commercial Bank and Damco Auctioneers Limited as follows:

“(a) That the 1st Defendant do transfer that piece or parcel of land known as BUKIRA/BWISABOKA/258 to the plaintiff.

(i) Special damages 89,921.40

(ii) Deposit 27,000.00

(b) General Damages

(c) Costs and interest

(d) Any other alternative relief which this Honourable Court deems fit to grant.”

That judgment was sought on the grounds that the first respondent had put up a piece of land for sale as the mortgagor of that land could not meet the mortgage terms. The appellant was interested in buying the land and was shown the alleged piece of land which he bought, paying Ksh.27,000/= as the sale price at

an auction conducted by the second respondent. Later it turned out that the land allegedly sold to the appellant was not the land for sale and the appellant was removed from the same land and branded a trespasser to that land. That piece of land was parcel No. BUKIRA/BWISABOKA/258. The respondents admitted that the payment of Ksh.27,000/= was made to it but it denied that the same was paid in respect of the sale of land parcel No. BUKIRA/BWISABOKA/258. It maintained that the payment was in respect of the purchase of property No. BUKIRA/BWISABOKA/820. They thus denied any liability for any losses, special or general damages that the appellant might have suffered as a result of the appellant's occupation or possession of property BUKIRA/BWISABOKA/258. The first respondent thereafter filed chamber summons seeking to strike out the plaint but the same was dismissed by Patel, J. (as he then was) and the suit was set down for hearing and was eventually heard by the superior court (Mbitio, J) who in a purported judgment delivered by the learned Deputy Registrar on 4th April, 1996 found that the transaction was void for lack of consent of the Land Control Board but entered judgment for the plaintiff against the defendant (sic) for Ksh.27,000/= being the price paid to the first respondent plus costs and interest from "issued" dates at court rates. Except for that, the rest of the suit was dismissed with no order as to costs. That judgment was not dated by the learned Judge.

The appellant, though he won part of the claims he had sought, was not satisfied with the judgment and filed this appeal in which he has raised four grounds of appeal namely:

- “1. That the said judgment is a nullity in law having been delivered by the Deputy Registrar rather than the judge.**
- 2. That the learned Trial Judge erred in finding that the appellant was not entitled to special damages.**
- 3. That the learned Trial Judge erred in relying on matters which were not pleaded in arriving at his decision.**
- 4. That the learned Trial Judge's decision has occasioned a miscarriage of justice.”**

In their submissions, Mr. K'owinoh, the learned counsel for the appellant, and Mr. Lang'at, the learned counsel for both the respondents, concurred that the judgment delivered by the learned Deputy Registrar and which was not dated by the Judge who apparently wrote it, was a nullity, if anything because it did not comply with the provisions of **Order XX rule 3(2)** of the Civil Procedure Rules. Their only point of departure was as to whether the matter should have been brought to this Court by way of an appeal or whether it should have been presented to the superior court by way of a review application. Mr. Lang'at contended that as the judgment was a nullity, the appeal based on the same judgment is incompetent and should be struck out; they are ready to pay the decretal amount and see an end to it all. Mr. K'owinoh's position, however, is that the appeal is properly before the Court and as the judgment is a nullity, it should be allowed, judgment set aside and the matter be remitted to the superior court for hearing afresh.

We have perused the record before us. It is not in doubt that the judgment appealed from was not dated. It is also not in doubt that it was read by the Deputy Registrar of the High Court at Kisii and not by the learned Judge who purportedly wrote it. We shall deal with the effect of non-dating of the purported judgment first.

Order XX rule 3(1) and (2) states as follows:

“3(1) 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.

(2) A judgment pronounced by a judge other than the judge by whom it was written shall be dated and countersigned by him in open court at the time of pronouncing it.”

These provisions are clear that a judgment must be dated and it follows that a judgment which is not dated is a nullity. We do agree with the learned counsel for the parties that the judgment appealed from is a

nullity on the ground that it was not dated.

The next aspect we need to decide is whether to strike out the appeal as being incompetent or to allow the appeal on the basis that the judgment, not having been dated, is a nullity. The respondents did not apply to strike out the appeal on account that, as it was not dated, the judgment was a nullity. The learned counsel for the respondents raised that point in his reply to the appellant's submissions. We have considered the authorities to which we were referred. First was the ruling in this case on a reference. In that ruling, the Court did not and could not decide finally on whether the judgment could be struck out or dismissed as it was not dealing with the main appeal. All the Court could say and did say at that stage was that in all probabilities, the appeal would be struck out on account of the acknowledged deficiency in the superior court's judgment. It did not make any decision that could be binding on any other court. In the case of **China Jiangsu International Economic Cooperation Corporation vs. Edward Kings Onyancha Maina t/a Matra International Associates – Civil Appeal Nos. 193 of 1995 and 194 of 1995**, the Court was dealing with appeals that were incompetent as the records did not contain copies of the ruling appealed against as required by **rule 85(1) (g)** of the Court of Appeal Rules. That was a different matter from what is before us in this appeal. In the case of **Herbert Asava & 10 others vs. Timothy Bilindi & 3 others – Civil Appeal No. 196 of 2000**, the judgment of the superior court was delivered by a Senior Resident Magistrate. This Court did not strike out the appeal but allowed it, set the judgment aside with costs, although it treated it as a nullity. In the case of **Kabitao Karanja vs. Attorney General – Civil Appeal No. 310 of 1997 (unreported)**, this Court declared the order of the Resident Magistrate a nullity but proceeded to allow the appeal and set aside the order of the superior court dismissing a notice of motion lodged before the superior court.

In our view, the applicant had two options open to him. He could have proceeded by way of a review application before the superior court or he could lodge an appeal in this Court. In both ways, he was entitled to seek a declaration that the undated judgment was a nullity.

If this appeal is struck out, the judgment of the superior court which is a nullity will remain and will form the basis of the payment of Ksh.27,000/= recorded therein as it will be too late to apply for review to rectify the position. That situation may be unjust and unfair in the circumstances of this case.

For what we have stated above, it must be clear that we are for allowing this appeal on grounds that as the purported judgment of the superior court was not dated, it offended the provisions of **Order XX rule 3(2)** of the Civil Procedure Rules. We need not go into the other limb of this appeal, namely, that the judgment was read by the Deputy Registrar of the superior court. It goes without saying that if the judgment was a nullity on account that it was not dated, then it did not matter who read it, for whoever read it, read a document that was a nullity. That being our view of the matter, the question of whether in law the Deputy Registrar could read it or not is neither here nor there.

For the foregoing reasons, this appeal is allowed, the purported judgment declared a nullity, and the suit remitted to the superior court for hearing afresh before another judge of that court. Each party shall bear its own costs of the appeal and of the superior court. Judgment accordingly.

Dated and delivered at Kisumu this 14th day of July, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR