REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL 76 OF 2002

REFRIGERATION CONTRACTORS LIMITED ……….....…...…… APPELLANT

AND

JAMES O. LIETA ……….…………………..……………………. RESPONDENT

(Appeal from Ruling and Order of the High Court of Kenya at Kisumu (Wambilyangah) dated 29th November, 2001

in

HCCC NO. 11 OF 1997)

****

JUDGEMENT OF THE COURT

This appeal raises interesting issues arising from the failure of the superior court Judge (Wambilyangah J.) both to sign a judgment (hereinafter "*the judgment*") on the day it was delivered and to state the correct date as the date of its delivery. The judgment was in favour ***James O. Lieta*** who was the plaintiff in the superior court and is the respondent before this Court. The defendant (the appellant before us) was ***Refrigeration Contractors Ltd.*** which was ordered to pay the respondent Shs.3,411,870/= together with interest at 28% from the date of the plaint being 13th January 1997 until payment in full.

This judgment is not the decision the subject of the present appeal. This appeal is against a ruling of the superior court (Wambilyangah J.) dated 29th November 2001 in which the superior court declined to review its decision in the judgment. Before examining the appeal against the ruling it is necessary to set out the chronology of relevant events leading up to it.

On the ***27th of May 1999*** the Judge delivered his judgment. This date was the actual date of delivery and is not now in dispute. One of two copies of the judgment appearing in the record of appeal is expressed to be "***Dated and delivered in Kisumu this 26th day of May, 1999***" and bears the signature of the judge over his name typed in brackets. The other copy of the same ruling which appears in the record of appeal is identical to the first in every respect except it is unsigned.

A notice of appeal dated 28th May 1999 against the judgment signed by Siganga & Co advocates for the appellant was lodged on 3rd June 1999. In that notice the judgment is described as having been delivered on 27th May 1999.

On 15th September 1999 the Deputy Registrar of the superior court issued the decree in respect of the

judgment which decree was therein stated to be dated 27th July 1999.

On 12th October 1999 Siganga & Co exhibited to an affidavit, in support of an application for stay of execution of the judgment, a draft Memorandum of Appeal against the judgment which was described as having been delivered on 26th May 1999.

A stay of execution was granted by consent upon a security bond being issued in December 1999. The security bond (dated 16th December 1999) referred to the judgment as being dated 26th May 1999.

On 31st July 2000 Siganga & Co filed a Notice of Motion under ***Section 99*** of the Civil Procedure Act and ***Order XX rule (1)*** of the Civil Procedure Rules in the superior court seeking the following principal relief:-

1. This Honourable court do correct the date of delivery of the judgment in this case.

The grounds were:-

a) The judgment in this case was delivered on 27th May 1999;

b) The typed judgment of the court indicates that the judgment was delivered on 26th May 1999;

c) The defendant intends to lodge an appeal from the said judgment but cannot do so unless the said error is corrected.

The application was supported by an affidavit of Mr. Siganga in which he deponed the judgment had originally been scheduled for delivery on 26th May 1999 but when he appeared on that day before the judge he was told by the judge that the judgment was still being typed and that it would be delivered on 28th May 1999. However Mr. Siganga was present in court on the 27th May 1999 on another matter before the judge who indicated that the judgment was then ready and that he would then deliver it. The judge proceeded to do so in the presence of Mr. Siganga together with Miss Esther Jowi advocate for the respondent.

A replying affidavit was sworn by Mr. John Olago-Aluoch Advocate, now having conduct of the matter on behalf of the respondent. He deponed that he honestly believed that the judgment was delivered on 26th May 1999. He had no first hand direct evidence to give but relied on the various references in the documentation already mentioned above to the judgment having been delivered on 26th May 1999. No reference was made in the replying affidavit to Miss Esther Jowi.

On 22nd August 2000 Wambilyangah J delivered his ruling on the application for clarification as to the date of delivery of the judgment in the following terms:-

"***In this application Mr. Siganga has marshalled his supporting evidence quite clearly. He has shown copies of his diary, of his application for stay of execution and a copy of Security Bond. All these documents show that the judgment of this court was actually delivered on 27th May and not 26th May 1999.***

In paragraph three the replying affidavit sworn by advocate John Olago Aluoch advocate for the respondent it was deponed:-

" ***I honestly believe that judgment in this case was delivered on the 26 May, 1999"***

But the grounds from which Mr. Olago's belief is delivered (sic) (derived?) are not at all stated. It would appear to be an arbitrary naked statement by the advocate so much so that in the light of the formidable arguments supported with facts as made out by Mr. Siganga, it is impossible for one to find that there is

any truth in Mr. Olago-Aluoch's statement which has not been substantiated.

Accordingly, I conclude and declare that my judgment in this case was indeed delivered on the 27th May, 1999 but was only inadvertently dated 26th May, 1999; and therefore, it means that the Notice of Appeal correctly stated the actual date when the judgment was delivered.

It is ordered accordingly.

Dated and delivered at Kisumu this 22nd day of August 2000."

In this ruling the superior court clarifies the factual position as to the date the judgment was delivered thus confirming that the judgment was wrongly dated but it does not make any finding as to whether the judgment was a nullity as a result of what happened with regard to the dating nor does it make any reference to the lack of signature by the judge on the day of delivery.

The application giving rise to this ruling was made under, *inter alia,* ***Section 99*** of the Civil Procedure Act. That Section reads as follows:-

"***Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either on its own motion or on the application of any of the parties."***

We consider that the insertion at the end of a judgment of the wrong date as the date of delivery of a judgment is an error arising in the judgment from an "*accidental slip"* within ***Section 99*** and therefore the learned judge could have expressly ordered the judgment to stand corrected by the substitution of the correct date for the incorrect date. He did not make any such specific order. If he had done so, it would have not been possible for either party to succeed in claiming that the judgment was a nullity because of the dating error, but it would not have solved the lack of signature on the day of delivery.

In these circumstances we find that the judgment was a nullity, or in other words, ineffectual, as a result of both the acknowledged, but uncorrected, wrong dating and the non signing of the judgment at the time it was delivered in breach of ***Order XX rule (7)(1).***

Mr. Siganga then filed a Motion dated 29th September 2000 under ***Order XLIV rule 1*** and or under ***Sections 3A*** and **100 Civil Procedure Act** and ***Order L rule 1.*** The principal orders sought in this application were:-

"*1.* ***That*** *this Honourable Court be pleased to review the judgment and decree passed herein or, alternatively, the proceedings herein be amended by declaring the judgment pronounced and all consequential steps and orders taken and/or made, including the decree dated 27th July 1999, to be a nullity.*

2. ***That*** *this Honourable Court do pronounce its judgment afresh in terms of* ***Order XX rule 3*** *of* ***the Civil Procedure Rules*** *and thereafter to issue a decree to accord with the said judgment."*

Three grounds were relied upon in support of the application as follows:-

"*(1) That the judgment pronounced on 27th May, 1999 was neither dated nor signed by the Honorable Mr. Justice Wambilyanga J. at the time of delivery in accordance with* ***Order XX rule 3*** *of the Civil Procedure Rules. Accordingly the said judgment and all consequential steps and orders taken and/or made in pursuance thereof are a nullity.*

(2) That furthermore, the decree extracted by the Plaintiff's advocates is dated 27th July 1999 when the judgment was delivered on 27th May, 1999. This contravenes the mandatory provisions of ***Order XX r.7*** *of the Civil Procedure Rules in that it did not bear the date of the day on which the Judgment was*

delivered. Accordingly the decree is also a nullity.

(3) That the above matters constitute new and important matters, which after exercise of due diligence, were not within the applicants knowledge at the time the judgment was pronounced or at the time the decree was passed; alternatively, the orders applied for are necessary for the end (sic) of justice and to enable the question or issue raised by these proceedings to be properly and finally determined."

In its ruling dated 29th November 2001 the superior court recited the findings made by it in the ruling dated 22nd July 2000 and continued as follows:-

"***Mr. Inamdar in his submission did not at all allude to the earlier application to which I gave an order stating the actual date when I delivered the judgment. Nor does he say why this application for review was not brought at that time instead of the earlier one (adverted to above).***

So I hold that there has been an inordinate delay in bringing this application who bona fides are also suspect (sic).

Secondly I am certain that the slip as to the date when the judgment was actually delivered was rectified in the first rulings and whatever fresh problems that the judgment debtor has recently encountered in his bid to appeal against the judgment (of this court) do not legally warrant me to embark on redelivering a judgment that was admittedly delivered long ago.

Also I do not see any reason why my first ruling could not be presented to the Court of Appeal to remove any doubt on issue (of the date when the judge was delivered).

For these reasons I decline to accede to the application by the Notice of Motion dated 29 September 2001. I dismiss it with costs."

It is this ruling that is now the subject of appeal before us.

It will be seen that the superior court dismissed the application for review for two reasons. The first was that there had been inordinate delay in bringing the application. The court felt that the application for review of the judgment should have been made at the time when the earlier application for correction of the judgment was made on 31st July 2000. We do not consider this to be a valid argument since if the superior court had made the corrections to the judgment sought in that application it would not have been necessary to file the application for review. The above criticism in the ruling on the review application as to the failure of Mr Inamdar to allude to the earlier finding on the 31st July 2000 application does not, in our view, carry any weight given that the latter application was referred to in the supporting affidavit of Mr. Siganga dated 29th September 2000.

Order 44 (1) requires an application for review to be made "*without unreasonable delay*". The errors made by the learned judge as to the date of delivery and the lack of signature were not discovered by the appellant's counsel until just over a year after the errors occurred when the appellant's counsel obtained the proceedings and began to prepare the record of appeal.

The application for review of the judgment was filed about three months later after the application for correction had been filed at the end of July, 2000. The judge had given his ruling at the end of August and thereafter legal advice was sought. Given the unusual circumstances and the fact that the problems arose from the initial error by the learned judge, we have come to the conclusion that the delay was not so unreasonable as to warrant dismissal of the application for review on this ground.

The superior court's second reason for the dismissal of the review application was, as we have seen, that the learned judge was certain that the slip as to the date of judgment had been rectified in the ruling dated 22nd August 2000 on the correction application. For the reasons already given above in our treatment of the 22nd August 2000 ruling we do not agree that that ruling "*rectified*" the judgment.

The first three of the following quotations from relevant authorities make it very clear that failure to date and sign judgments or rulings in accordance with ***Order XX*** will result in the judgments or rulings being nullities.

The case of ***Chief Kofi v. Barima Kwabena Sefah*** *(1958) All E.R. 289* demonstrates that a judgment, which is a nullity as a result of the judge lacking jurisdiction, while being ineffectual, can nevertheless be subject to review under rules similar to our ***Order 44***. The Privy Council in that case also approved the procedure of the judgment being pronounced afresh by the same judge who lacked jurisdiction at the time he first delivered it, provided that he had jurisdiction at the time he delivered it afresh. We see no reason why that decision, which arose in an appeal from Ghana, should not be followed in Kenya.

1. *Palace Dry Cleaners Ltd v. Abdi Ahmed Abdi Civil Appeal 265 of 1996* (unreported) this Court stated:-

"***This appeal is against the ruling of the superior court (Ringera J) which ruling is not dated. Such dating is required by the provisions in O.20 rule 3(1) as read with O. 20 7(6). This is a mandatory requirement. In the absence of such dating this appeal is incompetent and is ordered struck out with no order as to costs."***

2. In ***China Jiangsu International Economic Co-op v.Edward Kings Onyacha Maina. Civil Appeals 193 and 194 of 1995*** (unreported) it was said:-

"*These appeals are incompetent as the records do not contain copies of the ruling appealed against as required by rule 85 (1)(g) of the Rules of this Court. The document in the records of appeal purporting to be copies of the ruling does not comply with the mandatory provisions of Order 20 (3) (1) of the Civil Procedure Rules. That document is therefore a nullity and neither party can take advantage of it. For these reasons both these appeals are struck out but with no order as to costs."*

3. In *Mohamed Omar Shunguli v. Armie Ngiana Rama Civil Appeal 16 of 1992* (unreported) it was said:-

"***Mr. K'owade, at the opening of the hearing of the appeal, contended in limine that the judgment dated 8th June, 1990 but delivered on 14th June1990 and signed on both those dates. This is a breach of the mandatory provisions of O. XX (3) (1) of the Civil Procedure Rules as it does not comply with the same and is invalid. Accordingly, the appeal before us is rendered incompetent and is hereby struck out with no order as to costs."***

4. In ***Chief Kofi Forfie v. Barima Kwabena Seifah*** (supra) it was said:-

On 10th May 1949 Mr. Spooner the President of the Chief Commissioner's Court in Ghana delivered judgment in favour of an appellant.

Spooner held office by virtue of an Order No. 84 of 1948 but on May 10th that order was rescinded so when he gave the judgment he had no jurisdiction.

Spooner was on 21st June 1949 reappointed for the period 23rd June to 30th June 1949.

On 29th June 1949 Spooner reviewed his May 10th Judgment. He said that he had no jurisdiction on that day to deliver that judgment and "stating that he was acting under his power to review, he delivered a judgment identical in terms with his original judgment.

There was an appeal from that judgment also to the West African Court of Appeal. The West African Court of Appeal held that the judgment delivered on review on June 29, 1949 must be held to be also a nullity as the judgment of May 10, 1949, was a nullity.

The Board reached the conclusion that the judgment of May 10, 1949, was a nullity on two separate and independent grounds. The first ground was that the term "judgment" in Order 41 meant nothing more than adjudication by a judge on the rights of parties. If made without jurisdiction it would be ineffectual but the effectiveness or otherwise of the judgment was not relevant to the question whether it was a judgment. Consequently a judge might, under the order, review a judgment delivered by him at the time when he had no jurisdiction and, on such review, give a second judgment. If, at the time the second judgment was delivered, the judge had jurisdiction, then that second judgment was not a nullity. The second ground is the subject of this Note."

Mr. L.M.D. DE SILVA said that their lordships would now proceed to the second ground on which they had come to the conclusion that the judgment of June 29, 1949, was not a nullity. A Court had an inherent power to set aside a judgment which it had delivered without jurisdiction. Lord Greene, M.R., in Craig v. Kanssen [1943] I All ER 108 at p.113,) after referring to several decisions, had said:-

"***Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debitio justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order: and that an appeal from the order is not necessary."***

Their Lordships were of the same opinion. Assuming that the judge had no power on June 29, 1949, to review the judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of June 29th that could be made was that, on a question of procedure, he attributed the authority to do the thing he did to source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had had power to do the thing he had done. No other error could be said to have been committed. Such an error did not, in their lordships opinion, vitiate the act done. It followed that the judgment on June 29th 1949 was not a nullity."

We have already stated above that we find the judgment to be a nullity and, following the ***Chief Kofi*** decision, we are of the opinion that it can and should have validity bestowed upon it by it being pronounced afresh in accordance with the rules.

We therefore hereby allow the appeal with costs and set aside the superior court's ruling delivered on 29th November 2001 and substitute therefor an order that the judgment, which was signed on 19th July 2000 by Wambilyangah J. in High Court Civil Case No.11 of 1997, be pronounced afresh, in accordance with ***Order XX*** of the Civil Procedure Rules. For the avoidance of doubt, we further declare that the previous delivery of the judgment on 27th May 1999 was not a valid pronouncement of the judgment.

Dated and Delivered at Kisumu this 22nd day of April, 2005

P.K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

……………………………

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR