REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

(CORAM: OMOLO, O'KUBASU AND WAKI, JJ.A)

CIVIL APEAL NO. 248 OF 2001

BETWEEN

NGOSO GENERAL CONTRACTORS LTD.....APPELLANT

AND

JACOB GICHUNGE.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Meru (Tuiyot, J.)

dated 19.07.2001

in

H.C.MISC.C.A NO. 81 OF 2001)

****

JUDGMENT OF THE COURT

Order 20 r 1, Civil Procedure Rules as amended by ***Legal Notice No. 36/00*** provides as follows: -

> **"In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within 42 days from the conclusion of the trial of which due notice shall be given to the parties or their advocates".**

And ***Order 20 r 3(1***) provides: -

> ***"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".***

"Judge" under the Act, means the presiding officer of a court. The primacy and import of those provisions shall become apparent shortly. First the appeal before us and the background to it.

It is an appeal which arises from the ruling of the superior court (the late Tuiyot J.) who rejected an application made by the appellant herein for extension of time to file an appeal. The intended appeal was from the judgment of Meru Chief Magistrate's Court (Mutitu C.M; as he then was).

The appellant here was the defendant in the trial court. It had been alleged in a suit filed in September 1997 by the respondent here, who was the plaintiff, that the appellant had obtained an assortment of building materials from the respondent worth Shs. 1,010,810/= but had only paid Shs.884,290/= for them leaving a balance of Shs.146,520/= (sic) for which judgment was sought. The debt was denied and the suit was fully heard before Mutitu C.M. There is no record of proceedings of that court before us, but both parties agree that the learned Chief Magistrate in the presence of the parties and their advocates reserved the judgment for delivery on 20.09.00. It was not delivered on that day and there was no order fixing a definite date for delivery of the judgment. The central issue before the superior court, as it is before us, is when the judgment was delivered and whether the appellant was aware of it.

The appellant swore before the superior court that he was not aware of the date of delivery of the judgment by the trial court and that there was no communication to him relating thereto. He further swore that he had, through his advocates, written to both the respondent's advocates and the Executive Officer of the trial court enquiring about the judgment on 24.11.00 and 25.01.01. No response to those letters was received until the appellant was served with a notice to show cause why he should not be committed to civil jail on 19.03.01. That is when he obtained a copy of the judgment and went before the superior court on 14.04.01 to seek extension of time for filing an appeal.

Responding to those averments, the respondent swore before the superior court as follows: -

> *"3. THAT the applicant is out to mislead this Hon. Court as it was aware of the judgment passed against it in MERU CMCC 982 of 1997.*
>
> *4. THAT while it is correct that judgment was delivered in the absence of counsel for the applicant, I wrote to the firm of M/S KIANGOI & COMPANY ADV on the 23rd October 2001(sic) informing them of the outcomes (sic). (see FK1).*
>
> *5. THAT I further sent a copy of the same letter on the 13th November, 2000 together with an application for taxation on the 22nd November, 2000.(see FK2)*
>
> *6. THAT the applicant ignored to appear in court for taxation and the same proceeded whereupon the respondent applied for warrants of executions (sic) and sate (sic) and same issued on the 16th January, (see FK3)"*

In dealing with those rival contentions, the learned Judge of the superior court stated:

> ***"It is quite clear from the respondent (sic) counsel replying affidavit that the applicant was quite aware of the judgment of the lower court and he even applied for the proceedings and judgment. It is clear that the respondent's counsel wrote several letters to the applicant's advocates informing them of the outcome of the case and about the judgment. It is clear that the applicant has been giving misleading information to his advocates over the position of this case in relation to the date of judgment. The revelation of what transpired in this case which caused the delay of the appellant to appeal within the time was caused by the applicant himself. It is quite clear that the applicant deliberately failed to appeal and for this reason his application for extension of time to appeal must fail."***

The approach we must adopt in dealing with this appeal has been variously stated by this Court and summarized succinctly by Sir Charles Newbold P, in **Mbogo v Shah** [1968] E.A 93 as follows: -

> **"We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has**

misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice".

Was there any misdirection on any matter of fact or law which led to a wrong exercise of discretion in this matter? We think there was, and the most serious is the failure to consider, as a matter of law, whether the appellant, who was admittedly absent when the judgment was delivered, was served with notice of delivery of the judgment. The preoccupation of the learned Judge was whether the appellant was informed by the respondent's advocate about the delivery of the judgment *ex post facto*. But that is to miss the point, which is this:

The law under ***Order 20 r 1*** which we have set out fully at the opening of this judgment, is explicit in terms and mandatory in tone. A judgment which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates. It is common ground in this matter that it was only the advocate of the respondent, the successful party in the judgment, who had prior knowledge of the delivery date. No apparent reason was advanced for failure to serve or attempt to serve the appellant or his advocate. A copy of the judgment is exhibited in the record but it bears no date on which it was delivered. That alone is contrary to ***Order 20 r 3(1)*** which is also reproduced above. That an order was made by the learned magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of a mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which our Constitution safeguards. We would imagine that the appellant or his advocates would have, if given the opportunity to be present at the delivery of the judgment, made any representations to safeguard the interests of the appellant or taken early steps to prefer the appeal they belatedly expressed the wish to prefer. The appellant's undoubted right of appeal was grossly compromised. It is a matter that the learned Judge expressed no view upon, and on this, he was wrong. The dateless judgment affected the calendar of events that would have led to the timous filing of an appeal and it matters not that the respondent's counsel communicated the order of the trial court since that order was most irregular in the first place. At all events the respondent's advocates admit that they received the appellant's advocate's letter enquiring about the delivery of the judgment as late as November 2001 which letter they never responded to although it suggested that there was no earlier communication from the respondent's advocates. There was no mention of that letter in the ruling of the learned Judge and it is not clear whether it would have affected the exercise of his discretion if he had considered it.

On those grounds we must interfere with the discretion exercised by the learned Judge and allow the appeal. We substitute the order of dismissal of the appellant's notice of motion dated 24.04.01 with an order granting the application and ordering further that the intended appeal, shall be filed within 30 days of this ruling. The costs of this appeal shall be borne by the respondent, but the costs of the application shall abide the result of the intended appeal, if any is filed. Those are our orders.

Dated and delivered at Nyeri this 10th day of June, 2005.

R.S.C. OMOLO

……..….

JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

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