



**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, BOSIRE & OWUOR, J.J.A.
CIVIL APPEAL NO. 154 OF 2000**

BETWEEN

ORARO & RACHIER ADVOCATES APPELLANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

(Appeal from a judgment of the High Court of Kenya at
Nairobi (Mbitio J) dated 23rd November, 1999

in

H.C.C.C. NO. 755 OF 1996 [O.S.]

JUDGMENT OF THE COURT

The appellants are a firm of advocates. Their appeal is against a judgment dated 23rd November, 1999, and signed by Mbitio, J. The said judgment was not, however, delivered by him, but by a Principal Deputy Registrar, on 10th December, 1999, at Nairobi.

Order XX rule 2 (2) of the Civil Procedure Rules (hereinafter referred to as the CPR), enacts that:

"A judge of the High Court may pronounce a judgment written and signed but not pronounced by another judge of the High Court."

One of the grounds of appeal in the present appeal is that the learned trial Judge erred in law by requiring the Principal Deputy Registrar to deliver the aforesaid judgment in contravention of the provisions of **Order XX rule 2 (2)** aforesaid.

Ordinarily a judgment is dated and signed in open court at the time of delivery by the judge who wrote it - {see **Order XX rule 3 (1)**}. **Order XX rule 3 (2) of the CPR**, however, does recognize that situations may arise where the judge who wrote a judgment is not able to pronounce that judgment. In that event the judge who wrote the judgment is required to sign and date the judgment for delivery by another judge, in which case the judge who would eventually pronounce it is required to date and countersign it.

In the judgment appealed against, the trial Judge did date and sign it. However, the judgment was pronounced by a Deputy Registrar instead of a judge, and the Deputy Registrar then dated and countersigned it. Pronouncing a judgment is not one of the recognized ministerial acts which a Deputy

Registrar may perform pursuant to the provisions of **Order XLVIII of the CPR** . Besides, **Order XX rule 2 (2)** , aforesaid, clearly stipulates that it is only a judge of the High Court who may pronounce, date and countersign a judgment written, dated and signed by another judge of the same court.

Mr Gatonye for the appellant, recognized the foregoing fact and properly conceded the aforesaid ground of appeal. It is trite law that where rules of court prescribe a procedure for the doing of any act, a departure from or a variation thereof may render the act done a nullity. Mr Gatonye conceded this and the fact that the decision appealed against is a nullity on that ground.

The decision is a nullity for another reason, which Mr Gatonye also conceded. This suit was commenced by originating summons pursuant to the provisions of Order LII rule 7 of the CPR, which, in pertinent part, provides that: "LII (1)An application for an order for the enforcement of an undertaking given by an advocate shall be made:

(a)

(b)..... by originating summons in the High Court.

(2)Save for special reasons to be recorded by the judge, the order shall in the first instance be that the advocate honour his undertaking within a time fixed in the order, and only thereafter may an order in enforcement be made." As we stated earlier the respondent commenced its suit by originating summons. The main prayer opens with the following words: "THAT this Honourable Court be pleased to enforce the professional undertaking given by"

Order LII rule 7 (2) sets out the procedure for the enforcement of a professional undertaking by an advocate. That procedure as in the case of dating, signing and pronouncing a judgment which we dealt with earlier in this judgment, is mandatory and unless it is strictly followed any order made in contravention thereof becomes a nullity. This too, Mr Gatonye conceded as the correct position in law.

In the matter before us the learned trial Judge did not record down special reasons or any reasons for departing from the procedure set out under the aforesaid rule. What he did was to make a final order in the matter in the following terms:

"In the upshot and for the aforesaid reasons I enter judgment for the plaintiff against the defendant as prayed in paragraph (a) and (b) of the plaintiff's originating summons. Orders accordingly."

The appellant raised the issue of non-compliance with the mandatory wording of Order LII rule 7 (2) as their first ground of appeal.

Mr Gatonye conceded before us, quite properly so, that the omission went to the root of the judgment and rendered it a nullity. It was the second ground he proffered for conceding the appeal against the judgment. That was a commendable act. The judgment is clearly a nullity and it must therefore be set aside.

The issue that was hotly contested is whether in view of the facts and circumstances of this case what order should be made on the matter. Mr Gatonye submitted before us that the errors the trial court made were not blameable on either party, and consequently, this Court should order a retrial. It was also his submission that in the circumstances of this case no order should be made on costs both of the appeal and the proceedings in the superior court. Mr Oraro, who incidentally is a partner in the appellant firm, did not share the same view. In his submissions before us, he does not think this Court has the jurisdiction to order a retrial, for two main reasons. First, that in absence of a cross-appeal this Court would not have a basis for making such an order. Second, while **rule 31 of the of Court of Appeal Rules** , confers wide discretionary jurisdiction to make, among other orders, an order for a retrial of a matter, it is a power which may only be exercised to cure mere irregularities. In his view, the rule does not confer jurisdiction to deal with matters which are a nullity. For that proposition he cited two authorities, the first one being

PRESCHAND V DEACON & ANOTHER (1963) 2 WLR 685 , which is an English decision. The **ratio decidendi** of the majority decision appears to us to be that an act done in legal proceedings, in contravention of a statutory provision cannot be regularised by order of the court unless specific provisions exist empowering the court to do so. Mr Oraro specifically referred to remarks by Upjohn L.J. at p. 701 where he rendered himself thus:

"If the proceeding is issued from the wrong office and the statute and the rules give power to transfer to the right office, that may cure the defect, but there are no such powers in this case." He also cited remarks by Danckwerts L.J. who stated on the same page as follows: "

The defect cannot be cured. It is impossible to transfer the proceedings to the Central Office because there are no operative proceedings to be transferred." The second authority Mr Oraro specifically cited, is the Kenyan case of **GOVINDJI POPATLAL MADHAVJI V NASSER ALIBHAI & ANOTHER [1960] EA 167** . Mr Oraro cited that decision, in our view, to support the proposition he put forward that our jurisdiction only extends to setting aside the judgment and order of the superior court on the motion of the aggrieved party.

Those are the rival submissions. The powers of the Court in the hearing of appeals are set out under **rule 31 of the Court of Appeal Rules** , which enacts that:

"On any appeal the court shall have power , so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial and to make any necessary incidental or consequential orders, including orders as to costs."

The rule does not spell out circumstances under which a retrial may be ordered. The rule, however, clothes the court with wide judicial discretion to consider when an order for a retrial should be made. So a decision one way or the other will largely depend on the facts and circumstances of each case.

It is noteworthy that neither side is complaining about the manner the hearing of the case was handled before judgment. Indeed a careful perusal of the record reveals that the hearing proceeded regularly as provided in the relevant law. And to our minds therefore, the trial was properly concluded. Problems arose in the judgment as earlier on pointed out. The trial Judge was in error by his failure to follow the procedure laid down in enforcing a professional undertaking by an advocate. Besides, instead of personally pronouncing his decision or asking another judge with equal jurisdiction to pronounce it, he handed over his written opinion to a person without jurisdiction to do so on his behalf.

In every case which comes before any court, the court has the jurisdiction to decide either correctly or wrongly. Where the decision in the opinion of the appellate court is correct, that court will normally confirm the decision. Otherwise it will reverse it or vary it if in its opinion the decision is incorrect or partially correct. But whether or not to order a fresh hearing of a matter is a power which must be exercised sparingly. That is because our judicial system is adversarial and courts must guard against taking steps which although correct, might be viewed as geared towards assisting one party in the litigation. Besides, the respondent and its counsel must have known that the judgment appealed against was a nullity and should have, but did not, take any steps to have it set aside. Better still, we suppose that the respondent was represented when the judgment was read out by the Principal Deputy Registrar of the superior court. Objection should have been raised in bar of the action. Because no such objection was raised or any other step taken to regularise the position an order for a retrial, we think, will be inappropriate.

This matter, unlike the case of **Preschand v Deacon & Anor** (ibid) which Mr Oraro cited to us, or the Ugandan case of **KAGANYI V MUSIRAMO & ANOTHER [1968] EA 43** , in which the High Court of Uganda held that an incompetent suit cannot be transferred, does not concern the question of transfer of or the dealing with an incompetent suit. The suit in the superior court was competent. The proper procedure was followed throughout the proceedings. The errors which the trial judge committed cannot be differently classified from errors which any court may commit within its jurisdiction in any matter

before it. This is a case of a court misapprehending the law, and that per se is not a sufficient reason for ordering a retrial.

Besides, during the hearing of this matter we asked Mr Gatonye whether it was proper for us to consider the merits of the respondent's case before coming to a decision whether or not to order a retrial. His answer was in the affirmative. Pursuant to that affirmative answer we have looked at the respondent's case and prima facie, even if a retrial were to be ordered, we are unable to say that the respondent's chances of success are credible. A retrial might only serve to overburden the parties and particularly the respondent in costs.

Before we leave the matter, we have one more thing to say. During our consideration of the matter, the question of whether the appellant had an automatic right of appeal arose. The issue was not canvassed by either side. However, as the issue goes to the jurisdiction of this Court to hear this appeal it is necessary and proper for us to deal with it. The respondent's originating summons, as we have seen, was brought under **Order LII Rules 7 (1) (b), 2 and 10 (1) and (2) and Order 36 Rule 7 of CPR** . Prior to 1996 Order LII had Rule 6A and if the originating summons had been brought in 1996, it would have been brought under Order LII Rule 6A , instead of under Rule 7 . But by Legal Notice No. 5 of 1996, the Rules Committee deleted Rule 6A and substituted it with Rule 7. Under Order 42 Rule 1 (dd) there was an automatic right of appeal against orders made under Rule 6A . The current **Rule 7 of Order LII** is not included among those orders from which one can appeal without leave - **Order 42 Rule 1 (dd)** . What has happened since 1996 is that Rule 6A was deleted and replaced with Rule 7. Rule 6A had conferred an automatic right of appeal and we do not think the law maker intended to take away that right by the simple device of re-numbering, that is, removing 6A and replacing it with 7. We note that in Order 42 Rule 1 (dd) Rule 6A has never been deleted despite the fact that it was deleted in 1996 and its provisions transferred to Rule 7 . We are satisfied the appellant has an automatic right of appeal. If any authority is necessary there is **Section 23 (2) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya** , which enacts that:

"Where a written law repeals and re -enacts, with or without modification, a provision of a former written law, r eferences in another law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re -enacted."

Section 32 of the same Act , provides that a reference to a written law in another written law shall include a reference to subsidiary legislation under the written law to which reference is made.

In the result, we hold that this is not a proper case for a retrial. As regards costs, the general rule is that costs follow the event. In view of what we have stated above, we find no basis for ordering otherwise. The appellants shall have the costs of the appeal and of the proceedings in the superior court.

Dated and delivered at Nairobi this 13th day of July, 2001.

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR