



Kinyanjui (Administratrix of the Late Faith Njoki Muiru (Deceased) v Mwea & another (Civil Appeal 330 of 2019) [2022] KEHC 16345 (KLR) (Civ) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 330 OF 2019
JK SERGON, J
DECEMBER 16, 2022**

BETWEEN

LUCY NJOKI KINYANJUI (ADMINISTRATRIX OF THE LATE FAITH NJOKI MUIRU (DECEASED) APPLICANT

AND

JOSEPH MAKAU MWEA 1ST RESPONDENT

CALCIN IMODIA MUKURVI 2ND RESPONDENT

(Being an Application seeking to strike out the Appellants' Record of Appeal from the judgment in CMCC No. 6967 of 2018 delivered by Hon. D. W. Mburu, Senior Principal Magistrate on 7th June 2019)

RULING

- 1) The application dated August 9, 2021 is brought under section 79G of the [Civil Procedure Act](#) and order 42 rule 13(4) of the [Civil Procedure Rules](#). It seeks the following orders:
 - i. The record of appeal filed by the appellants on February 26, 2021 and is hereby struck out.
 - ii. Costs of this application and of the appeal be and is hereby awarded to the respondent/applicant.
- 2) The affidavit of Lucy Njoki Kinyanjui sworn on August 9, 2021 supports this application. The appellants/respondents opposed the application and filed a replying affidavit sworn by Joseph Makau Maweu on September 22, 2021. The matter was heard *inter partes* on July 15, 2021.



- 3) Counsel for the applicant submitted that the appellants/ respondents' record of appeal dated February 23, 2021 was fatally defective since it does not contain a certified copy of the decree issued by the trial court. As per order 42 rule 13(4) of the [Civil Procedure Rules](#), this is a mandatory document.
- 4) Further, the applicant's counsel submitted that the appellants' appeal is fatally incompetent for being filed out of time. Judgment was delivered on June 7, 2019. Therefore, it has been a period of more than 2 years and 2 months since judgment was delivered in the trial court and without any sufficient cause, the appellants/respondents failed to take any steps to obtain a certified copy of the decree within the 30-day statutory timeline as per section 79G of the [Civil Procedure Act](#). There is also no certificate of delay alluding to extracting the decree.
- 5) Counsel for the applicant relied on the following authorities in support of their submissions: [Lawrence Nguthiru Riccardabw v George Ndirangu](#) [2015] eKLR where Justice Ngaah Jairus dealt with both section 79G and order 42 and relied on the Court of Appeal's case [Kyuma v Kyema](#) [1988] Klr 185; [Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others](#) [2016] eKLR; [Tropicana Hotels Limited v Sbm Bank \(kenya\) Limited \(formerly Known as Fidelity Commercial Bank Ltd](#) [2020] eKLR; and [Manufaa Feeds Ltd v David Ng'ang'a](#) [2021] Eklr.
- 6) The respondents' counsel argued that it is not mandatory to file a certified decree as long as there is a certified copy of the judgment in the record of appeal. The wording of order 42 rule 13(4) (f) of the [Civil Procedure Rules](#) that reads "the judgment, order or decree appealed from..." is not couched on mandatory terms. Either the judgment or the order or the decree will suffice. The judgment of the trial court which is sufficient is part of their record.
- 7) Counsel was guided by these authorities: [Elizanya Investments Limited v Lean Energy Solutions](#) [2021] eKLR; [Nyota Tissue Products v Charles Wanga Wanga & 4 others](#) [2020] Eklr; [Ruth Anyolo v Agnetta Oiyela Muyeshi](#) [2019] Eklr; [Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others](#) [2019] eKLR; and [Daniel Kipkemboi Bett & 7 others v Margaret Wanjiku Chege](#) [2010] eKLR.
- 8) Counsel for the respondents further argued that even though the court finds that it is mandatory to file a decree, the court has the discretion to order the appellants to file a supplementary record of appeal that includes the decree.
- 9) Counsel for the applicant argues that the appellants are in breach of section 79G of the [Civil Procedure Act](#) and order 42 rule 13(4) of the [Civil Procedure Rules](#).
- 10) Section 79 G of the [Civil Procedure Act](#) reads:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”



- 11) From the above provision, it is clear that appeals from the subordinate court to the High Court must be filed within 30 days from date of the decree or order appealed against. However, what is a decree? section 2 of the [Civil Procedure Act](#) provides that:

“ Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up”.
- 12) As per section 2, a decree for purpose of appeal can include a judgment. Therefore, appealing the judgment of a subordinate court is sufficient.
- 13) This appeal is challenging the judgment of Hon D W Mburu, Senior Principal Magistrate which was delivered on June 7, 2019. Counsel for the appellants/respondents filed a memorandum of appeal dated June 12, 2019 which was filed in court on June 18, 2019. The appellants/respondents have stated on the face of memorandum of the appeal that it is pursuant to the judgment in CMCC No 6967 of 2018 delivered by Hon D W Mburu, Senior Principal Magistrate on June 7, 2019. The appeal therefore was within the 30-day statutory timeline provided by section 79G of the [Civil Procedure Act](#). Therefore, the ground put forth by the applicant’s notice of motion that the appellants’ appeal is fatally incompetent for being filed out of time fails.
- 14) The High Court case, [Manufaa Feeds Ltd v David Ng’ang’a](#) [2021] eKLR, cited by the applicant was addressing an appeal filed out of time against the magistrate’s decision delivered on December 10, 2019. The learned judge opined that the appellant should have appealed by January 9, 2020 against the judgment or sought extension of time to file out of time. Perusing the case of [Lawrence Nguthiru Riccardabw v George Ndirangu](#) [2015] eKLR, the intended appeal was against the ruling and order of the magistrate’s court. The order appealed against was not on the record, therefore informing the judge’s decision.
- 15) Counsel for the applicant also argued that the appellant’s record of appeal is fatally defective as it does not contain a certified copy of the decree/order. Reliance was placed on order 42 rule 13 (4) of the [Civil Procedure Rules](#).
- 16) It was submitted that order 42 rule 13 (4) highlights which documents needs to be annexed in the record of appeal and the law imputes a requirement that the decree must be part of the record of appeal. Counsel for the appellants/respondents opposed the argument by submitting that order 42 rule (13) (4) of the [Civil Procedure Rules](#) is not couched on mandatory terms. Therefore, the judgment or the order or the decree will suffice.
- 17) Counsel for the applicant sought to rely on the following authorities in support: [Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others](#) [2016] eKLR; [Tropicana Hotels Limited v SBM Bank \(Kenya\) Limited \(formerly known as Fidelity Commercial Bank Ltd\)](#) [2020] eKLR; and [Lawrence Nguthiru Riccardabw v George Ndirangu](#) [2015] eKLR.
- 18) I disagree with the applicant’s argument. Order 42 rule 13 (4) (f) provides for mandatory inclusion in the record of appeal of “judgment, order or decree appealed from”. Therefore, the use of the word or implies any of the documents is relevant. Further, with due respect, the above order does not provide express power to strike out an appeal for failure to include the requisite documents. It provides for giving directions before hearing as to inclusion of the required documents and the court may delay the hearing of the appeal until the necessary documents are availed.



19) The position in the Court of Appeal is different. Rule 87(1) of the [Court of Appeal Rules, 2010](#) provide:

“contents of record of appeal

For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents—

an index of all the documents in the record with the numbers of the pages at which they appear;

a statement showing the address for service of the appellant and the address for service furnished by the respondent and as regards any respondent who has not furnished an address or service as required by rule 79, his last known address and proof of service on him of the notice of appeal;

the pleadings;

the trial judge’s notes of the hearing;

the transcript of any shorthand notes taken at the trial;

the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;

the judgment or order;

the certified decree or order.”

20) In my respectful view, this is the context of the Court of Appeal decisions in [Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others](#) [2016] eKLR and [Tropicana Hotels Limited v SBM Bank \(Kenya\) Limited \(Formerly Known as Fidelity Commercial Bank Ltd\)](#) [2020] eKLR. In the former, the order impugned in the memorandum of appeal was missing from the record therefore striking out the appeal while the latter certified copies of both the decree and the judgment appealed against was missing vitiating the record of appeal. In [Lawrence Nguthiru Riccardabw v George Ndirangu](#) [2015] EKLR, the High Court rejected an appeal where the order appealed from was not part of the record.” In this case, the court relied on the Court of Appeal case, [Kyuma v Kyema](#) [1988] KLR 185.

21) This application has been brought after the appeal had been admitted as per section 79B of the [Civil Procedure Act](#). It therefore would be unfair and punitive to the Appellants to strike out the appeal.

22) In exercising judicial authority, as per article 159 (2) (d) of the [Constitution](#), justice should be administered with less reverence to procedural technicalities. This position was pronounced in the Court of Appeal case [Emmanuel Ngade Nyoka v Kitbeka Mutisya Ngata](#) [2017] eKLR:

i. “Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of order 42 rule 2 of the Civil Procedure Rules which provides *inter alia*:

1. “Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed.”



- ii. However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The appellant thinks so as according to him the requirement is couched in mandatory terms. The judge did not agree with him reasoning that:
 - 1. “The word “decree” has been defined by the *Civil Procedure Act*, cap 21 to include judgment. In fact, the *Civil Procedure Act* has provided at section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”.
- iii. This is the essence of the proviso to the definition of the term “decree.”
- iv. According to the judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.
- v. We entirely agree with the reasoning of the learned judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in sections 1A and 1B of the *Civil Procedure Act*. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.”

23) I am satisfied that there is no merit in the application for striking out of the record of appeal. Justice shall be served if the appeal is heard on merit. The appellant is hereby granted twenty-one (21) days to file a supplementary record of appeal that will include the certified copy of the decree.

24) Costs in the cause.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Respondent/Applicant

..... for the 1st Appellant/Respondent

..... for the 2nd Appellant/Respondent

