REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO 56 OF 2018

ANTONY MUTHAMIA NGURWE …….....….1ST APPELLANT/APPLICANT

EDWIN MBUGUA ……..…..…..2ND APPELLANT/APPLICANT

VERSUS

JANE NKATHA KATHURIMA (Suing on behalf of the late

JOHN KIMATHI KATHURIMA ……..…….....…….RESPONDENT

(**Being an appeal from the judgment and decree of the Hon. L Ambasi CM made on 23/10/2017 in Meru CMCC No. 35 of 2015)**

R U L I N G

1. This is a ruling on the Motion filed on 5/11/2019 under **order 45 Rule 1 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act**. The applicants sought an order for the review and the setting aside of the judgment of this court made on 30/10/2019 and to reinstate the appeal for hearing and determination. They also sought leave to file a supplementary record of appeal incorporating the decree of the trial court.

2. The grounds which the application was based were set out in the body of the application and the supporting and further affidavit of **Manesses Kariuki Karoki** sworn on 5/11/2019 and 21/11/2019, respectively. It was contended that the appeal was struck out on the basis that no decree was incorporated in the record of appeal and that none was extracted in the lower court file. That the lower court file does contain the decree dated and signed on 27/2/2019 and the finding that the lower court filed did not contain the decree is an error apparent on the face of the court record.

3. It was further contended that after the decree in the lower court was extracted and signed, the lower court record was forwarded to the High Court before the applicant could get a copy of the same. That due to the strict timelines set for the filing of the record, there was no enough time to procure the decree and include it in the record of appeal. That in any event, the record of appeal contained a certified copy of the judgment which suffices even in the absence of a decree. Thus, there is sufficient cause to review the judgment.

4. The application was opposed vide the replying affidavit of **Charles Mokua Obiria,** advocate sworn on 20/11/2019. He deponed that that application has no merit as applicants had filed a record of appeal devoid of the decree appealed against. That in view thereof, the court was right in striking out the appeal for being incompetent. He concluded that it did not count if there was decree on record in the lower court or not.

5. Although the parties were directed to file their respective submissions, as at the time of writing this ruling, only the respondent had filed her's. The Court has carefully considered the affidavits on record together with the submissions of the respondent.

6. The issue if determination is ***whether this court should review and set aside its judgment dated 30/10/2019.***

7. **Order 45 Rule 1 of the Civil Procedure Rules** provides for the grounds upon which a decree or an order of the court may be reviewed. These are when there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record; or for any other sufficient reason.

8. Before making a determination on the application, there are two issues this Court will like to comment on. First, although the decision of this Court which is sought to be reviewed was intituled 'judgment', strictly speaking, it was a ruling. This is so because the decision did not make any determination of the dispute between the parties. A judgment is a judgment is a final determination of a dispute between litigants, ***See Section 2 of the Civil Procedure Act.***

9. *Strictu sensu*, there is no requirements in both **Sections 79, 79 A and 79 B of the Civil Procedure Act and Order 42 of the Civil Procedure Rules** for the filing of a Record of Appeal in an appeal to the High Court. The filing of such records has been out of practice and convenience. It will be a requirement however, if the Court directs as such when giving directions under ***Order 42 Rule 3 of the Civil Procedure Rules.***

10. For the foregoing reason, once the Court makes directions under that rule that a record be prepared and served, it is only then, in my view that a party is required to file and serve a record of appeal.

11. This position is completely different as compared to the Courts above, viz, the Court of Appeal and the Supreme Court. In those Courts, their Rules expressly provided for the filing of the Record of Appeal when appealing to those Courts. In this regard, I am of the view that the practice and procedure in those courts regarding the filing and service of Records of Appeal may not strictly apply before this court.

12. Having said so. The applicants in the present case should not have filed an application for review. If were to follow the practice and procedure in the Court of Appeal and the Supreme Court of this Country, once an appeal is struck out, all what an appellant has to do is to make a fresh application for leave to lodge a fresh appeal out of time. But as I have already stated, the practice and procedure of those Courts is not contemplated in appeals to this Court.

13. If we were to apply then the procedure in those two Courts above, we shall be defeating the letter and spirit of both ***Section 1A of the Civil Procedure* Act** as to the overriding objective of the Act as well as ***Article 159 of the Constitution*** as there will be delay and increase in costs.

14. In this regard, my view is that once this Court finds that a certified copy of the decree has not been included in the record of appeal that has been directed under ***Order 42 Rule 3 of the Civil Procedure Rules***, the best procedure to follow is to refuse to continue either to hear the matter or write the decision and direct the appellant to comply with ***Order 42 Rule 2 of the Civil Procedure Rules.***

15. I am aware of decisions emanating from this Court that failure to include a decree in a record of appeal to this Court is fatal and leads to the striking out of the appeal. However, for the foregoing reasons I think I am not bound by them as they are only persuasive.

16. Coming back to the application at hand, it was alleged that this Court struck out the appeal on the basis that there was no certified decree in the lower Court record that was before the Court. The applicant contended that indeed there was a certified copy of the decree in the lower court record. That the same had been extracted and certified as early as February, 2018 before the lower Court record was forwarded to this Court for the admission of the appeal.

17. I have perused the lower Court record and I have found that the decree of the lower Court had been extracted and issued on 27/2/2018. However, it was yet to be certified by that Court. All that was required was for the applicants to ask that file to be taken to the lower Court for certification, a process of not more than an hour.

18. I believe that had this Court carefully perused the lower Court record, it would have seen that decree and it would not have struck out the appeal as it did. In any event, under ***Order 42 of the Civil Procedure Rules***, this Court should not have considered the appeal for admission under ***Section 78 of the Civil Procedure Act*** if the decree was not before it. The record will show that the lower Court record was forwarded to this Court with the said decree on 29/5/2019 and the appeal admitted to hearing the following day. Clearly the finding that there was no decree in the lower Court record was an error on the face of the record.

19. In the case of James **Kinja M'Thaimuta (Suing as the legal representative of the estate of David Murangiri deceased) v Cyrus Mwenda (2019) eKLR,** that Court held: -

> **"I note that the appellant did not attach the decree of the trial Court. That may have been a fatal mistake or oversight but for reason that it is but a mere technicality.** In South Nyanza Sugar Co. Ltd v Daniel Obara Nyandoro (2010) eKLR, **it was held:-**
>
> **"**In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the Respondent by reference to the same. In addition, it will be against the spirit of overriding objectives off the Civil Procedure Act as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree."

20. Further, in **Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 Others [2011] eKLR,** the Court of Appeal held:-

> **"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice….In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act. Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010 changed the position. The formed provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents. The court in that regard exercise judicial discretion".**

21. For the foregoing reason. I am of the view that the application is meritorious. I allow the application on the following terms**: -**

a) the judgment made on 30/10/2019 is hereby reviewed whereby the order of striking out of the appeal is set aside and the appeal reinstated for hearing on merit.

b) the applicants are granted leave to file a supplementary record of appeal within 14 days to incorporate a certified copy of the decree.

c) the applicants shall pay the respondent costs assessed at Kshs. 20,000 paya ble within 30 days in default the appeal shall stand dismissed.

SIGNED

A.MABEYA

JUDGE

DATED and DELIVERED at Meru this 20th day of February, 2020

F.GIKONYO

JUDGE