



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 181 OF 2019

KENYA PETROLEUM REFINERIES LIMITED....APPELLANT

VERSUS

1. NGAYAU MUTIA

2. CHAI MUTIA.....RESPONDENTS

RULING

The background Facts

1. This determination respects and relates to the respondents' Notice of Preliminary Objection dated 28th October 2019 brought as grounded upon the provisions of Order 51 Rule 14 of the Civil Procedure Rules and seeking the dismissal and/or striking out of the memorandum of appeal and record of appeal herein. The gist of the respondents' objection is that this appeal ought to be struck out since it was not filed within the mandatory period required by law.

2. The appeal challenges the judgement of the trial court delivered on 5th April 2019 in CMCC No. 4768 of 2003. For an easier understanding of the sequence of events giving rise to the instant objection, I list the relevant dates and the corresponding occurrences in chronological order below.

- 5th April 2019- The judgement giving rise to this appeal was delivered.
- 9th September 2019- The appellant filed a memorandum of appeal.
- 16th September 2019- The appellant filed the record of appeal.
- 3rd October 2019- The appellant filed an application for extension of time within which to file an appeal.
- 28th October 2019- The respondents filed the instant preliminary objection.
- 19th November 2019- The appellant withdrew its application for extension of time since it had obtained a certificate of delay from the lower court. The court had directed the appellant to file its certificate of delay by way of a supplementary record of appeal.
- 22nd November 2019- the appellant filed its supplementary record of appeal.

3. On 26th February 2020, the advocates for the respective parties attended court and made their oral submissions on the preliminary objection. Mr. Kamami appeared for the appellant while Mr. Tindika argued for the respondents.

The Parties' Submissions

4. Mr. Tindika submitted, in support of the objection, that the appeal was not filed within thirty days of the date of delivery of judgement, contrary to the provisions of Section 79G of the Civil Procedure Act (hereinafter 'CPA'). According to him, it would not require 5 months to prepare a decree and file a memorandum of appeal. He lamented that it is only after the respondents filed the preliminary objection that the appellant moved to file a supplementary record of appeal with the certificate of delay. In any event, the certificate of delay is of no help to the appellant as it makes no reference to the decree. He relied on *Kyuma v Kyema [1988] KLR 185* which, according to him, bears similar and identical facts to the present case. Mr. Tindika further referred the Court to the decision in *Lawrence Nguthiru Riccardohw v Genge Ndirangu [2015] eKLR* which followed the decision in *Kyuma v Kyema (supra)*. He asked the court to strike out and/or dismiss the appeal on the strength of the facts, Section 79 G of the CPA and the authorities he relied on.

5. Counsel for the appellant, Mr. Kamami submitted that the judgement giving rise to the present appeal was delivered on 15th April 2019

without notice to the appellant, as shown by the proceeding of the day that the appellant was not present when judgement was delivered. He opposed the respondents' reliance on *Kyamo v Kyema* on the ground that it was decided before promulgation of the current constitution, in an era of strict application of procedure. According to his interpretation of Section 2 of the CPA, a judgement suffices as a decree for the purposes of an appeal. Mr. Kamami relied on *Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & Another [2018]* and *Ng'itarious Mwangi v Washington Odhiambo Wanyang' [2017]* on when to strike out and the effect of failure to avail a decree. He requested the Court to dismiss the preliminary objection and allow the appeal to proceed.

Issues, analysis and determination

6. Having considered the preliminary objection and the submissions by the parties, it is evident that the issues to be determined are:

- a. Whether, given the facts and the law, this appeal should be dismissed for having been filed out of time?
- b. Whether a judgement can suffice as a decree for the purposes of an appeal?

Whether the present appeal was filed within

the timelines set by the law?

7. The right of appeal from a subordinate court to the High Court is conferred by Section 65 of the CPA which provides:

(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;

8. On the other hand, the time for filing appeals is governed by section 79G of the same Act to be '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. There is a rider and a proviso 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'.

9. What sections 65 and 79G say is that the appellant no doubt has a right of appeal, but, in order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order or account for delay by a certificate of delay or get leave to appeal out of time upon satisfying the court that it had a good cause for not acting within time. Judgement in this matter was delivered on 5th April 2019 and the appellant ideally should have filed its appeal on or before 5th May 2019. The appellant did not do so and has filed a certificate of delay issued by the trial court.

10. Pursuant to Section 79G, the period for filing an appeal may be extended in two ways. Firstly, where the appellant obtains a certificate of delay from the magistrates' court. Under this first avenue, the appellant is basically saying, "I would have filed my appeal in time had it not been for the amount of time the lower court took to prepare the decree or order." The second avenue is where the appellant makes a formal application to the High Court to have the appeal admitted out of time. Here, the appellant needs to satisfy the court that he had good and sufficient cause for not filing the appeal in time.

11. In the instant case, the appellant obtained a certificate of delay and opted to abandon its application for extension of time to file its appeal. Section 79G of the CPA allows the thirty days to be extended by such period as was required to make a copy of the "decree or order of the court." The appellant via its supplementary record of appeal produced a certificate of delay dated 14th November 2019. The certificate reads:

"This is to certify that the defendant applied for certified proceedings vide letter dated 11th April, 2019 which was received in our registry on 15th April, 2019.

The proceedings were certified on 16th August, 2019. The period when proceedings were applied for and the date when they were supplied was necessary for preparation and certification".

12. The judgement giving rise to the present appeal having been delivered on 5th April 2019 and the appellant made a request for the judgement and proceedings on 11th April 2019. This means that by the time it requested for the judgement and proceedings, six out of its thirty days to appeal had lapsed, and as such from its 30 days to appeal, the appellant remained with 24 days. Those are the days I find ought to be accounted for by the certificate of delay.

13. The proceedings and judgement were certified on 16th August 2019 hence the period between the date of application and certification of the proceedings must be excluded from the period of delay. Accordingly, therefore, when the appellant filed its memorandum of appeal on 24th September 2019, he was at the nick of time and had not run out of the time permitted. In coming to this conclusion, I have appreciated that an appeal is instituted when a memorandum of appeal is lodged. Based on the applicable law as set out above and the foregoing calculations, the inescapable conclusion is that the appellant filed its appeal on time.

Whether a judgement can suffice as a decree

for the purposes of an appeal?

14. The appellant via its supplementary record of appeal opted to put on record the judgement giving rise to the present appeal instead of a decree or order. Counsel for the respondents faulted the appellant for this. He submitted that Section 79 G of the CPA strictly refers to a decree or order and not a judgement and thus a record of appeal without a decree or order is fatally defective and ought to be dismissed.

15. It is indeed true that Section 79G of the CPA strictly refers to a decree or order. But what is a decree? I seek to rely on the definition provided by Section 2 of the Act. The law says:

“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”.

16. According to section 2 therefore, a decree includes a judgement and a judgement is appealable notwithstanding the fact that a formal decree has not been extracted. My view is that a record of appeal is not fatally defective simply because it lacks a decree or order. My understanding of section 2 above is that a judgement on its own without a decree or order also suffices for the purposes of an appeal.

17. The question that keep coming up in similar situation is that a document routinely compiled and filed as a record of appeal needs to meet certain threshold in terms of contents. Parties keep arguing that such a record may be defective for failure to include one of the documents set out under order 42 Rule 13(4). I read that provision not to impose any duty on any of the parties to compile a record with the listed documents. Rather, it is the court that is mandated to ensure that the record of the trial is with it before the appeal is allowed to proceed to hearing. This court had a chance to consider same point in **CMA – CGM Kenya Limited v Diamond Gate General Trading Llc & 4 others[2019] eKLR** and delivered itself in the following words:-

“On the second limb alleging shoddy compilation of the record that equally has no legal foundation because no law provides how a Record of Appeal before this court must be compiled. What we now routinely call a record of appeal before the high court is a rule of convenience developed out of practice and largely copying from the Court of Appeal Rules but with no legal underpinning. I say no legal underpinning because Order 42 rule 13(4) merely obligates the court, and not the appellant, to ensure that the enumerated documents are in the court file. That must be seen to demand that the record at trial be availed and thus contrasts with Rule 87, Court of Appeal Rules, which obligates the appellant to prepare and serve the record and defines what must be contained therein.

To this court those objections are in the nature of technicalities which should never sway a court of law from persisting and endeavouring to hear a party’s appeal on the merits. They lack merit and substance and are therefore disregarded as untenable”.

18. I still hold the view that failure to avail a decree or order in a record of appeal compiled by the appellant and indeed failure to file such a record when the trial court’s record has been availed with the said documents, cannot be the basis to defeat an appeal before this court.

Conclusion and final orders

19. The foregoing analysis has revealed that the instant appeal was filed on time and that a judgement can suffice as a decree for the purposes of an appeal. The inescapable conclusion is therefore that the preliminary objection dated 28th October 2019 fails and as such is hereby dismissed. Since the appellant has carried the day, it will have the costs of the objection.

20. This appeal will proceed to hearing on the merits. The appellant is hereby directed to take all necessary steps within the next 45 days to ensure this matter is fixed for hearing.

Dated, signed and delivered at Mombasa this 29th day of May, 2020.

P.J.O. OTIENO

JUDGE