



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCA NO. 2 OF 2017

PRIME ROCK COMPANY.....APPELLANT

~VERSUS~

JOSEPH MWANGI NDEGWA.....RESPONDENT

RULING

This is an appeal against the Chief Magistrate Court's decision in **CMCC No.46 of 2015** in which the Respondent was awarded damages against the Appellant for occupational injuries. In the original plaint the Respondent sought for **kshs.6,200/-** as special damages. Court fees were assessed based on this amount. During the hearing of that case, the Respondent was allowed to amend its prayer of special damages from **Kshs. 6,200/-** to **Kshs.148,043/-**. This amendment attracted further court fees which have not been paid to date. The consequence is that the decree at the lower court has not been extracted making the instant record of appeal incomplete.

The issue is who between the Appellant and the Respondent should pay the requisite court fees at the lower court to enable the extraction of the decree for purposes of this appeal.

The Court heard oral submissions by counsel of both parties on this issue. It was submitted for the Appellant that the obligation for payment of court fees at lower court was on the Respondent. The Appellant cannot withdraw its appeal because the Respondent has in fact filed a related appeal, **HCA 64/16**. If the Appellant pays the further fees to extract the decree, the Respondent may proceed to execute.

The Respondent responded that the said related appeal has been withdrawn since it is unable to pay the said further court fees at the lower court. It stated that the Appellant may proceed to pay the further court fees which it may recover if its appeal succeeds. The Respondent invited the Court to give the Appellant timelines to comply with extraction of the decree failure of which the appeal should be dismissed for incomplete record of appeal.

Section 79G of the **Civil Procedure Act** shows the centrality of a decree in an appeal as follows:-

“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 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.”

Order 42 rule 2 of the **Civil Procedure Rules** echoes the above centrality of a decree in the record of appeal by allowing time for the Appellant to file such decree as follows:-

“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 a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed.”

Order 42 Rule 13(4) of the **Civil Procedure Rules** stresses that a decree cannot be dispensed with in an appeal as follows:

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

- a. The memorandum of appeal;**

b. The pleadings

c. The notes of the trial magistrate made during the hearing;

d. The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;

e. All affidavits, maps and other documents whatsoever put in evidence before the magistrate;

f. The judgment, the order or decree appealed from, and, where appropriate, the order(if any) giving leave to appeal:

Provided that-

i. a translation into English shall be provided of any document not in that language;

ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

Commenting on Section 79G above, Justice Hon. Ngaah Jairus in *Ndegwa Kamau t/a Sideview Garage ~v~ Fredrick Isika Kalumbo (2016)eKLR* held as follows:-

“It is clear from this provision of the law that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal. It is clearly for this reason that section 79G provides a window for extension of time to file the appeal if the decree or order could not, for one reason or another, be secured within the limitation period.”

The Court of Appeal in *Kyuma ~v~ Kyema (1988) KLR 185* held:-

’The appellant was entitled to appeal to the High Court against these orders if he felt aggrieved by them. Section 65(1) of the Civil Procedure Act confers a right of appeal on him. 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...This period may be extended provided he obtained from the magistrates court a certificate of delay within the meaning of section 79G of Act 21. The section 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 question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available.”

The question to ask is whether a decree is available for extraction by any party under order 21Rule 20 of the Civil Procedure Rules upon payment of the requisite extraction fees. The answer is simple. There is no such decree for failure of payment of court filing fees. The onus of payment of filing fees is on the Plaintiff. This is why even where a suit has been accepted as a pauper brief and exempted from fees, Order 33 Rule 10 of the Civil Procedure Rules allows such fees to be recovered from the amount of money the pauper gets if he wins the case. Court fees become the first charge on such compensation. The Respondent is well aware of this fact and cannot be heard to argue that it is the Appellant herein who should pay those fees to be able to extract the decree. According to the record of appeal at pages 44-45, the Respondent stated the following on 19th August 2016 during the hearing of the case:-

“I wish to make application to amend the special damages to read Kshs.141,843/- as against Kshs.6200 as addition for special damages. The receipts were not in our custody. The final to be Kshs.148, 043/-, we undertake to pay additional charges to court in form of assessment”

Payment of Court filing fees is a jurisdictional prerequisite to the commencement of an action but failure of such immediate payment can be cured under Section 96 of the Civil Procedure Act which provides:-

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance."

In *Mombasa Cement Ltd ~v~ Speaker, National Assembly & Another (2018)eKLR* the Court was faced with similar dilemma of non-payment of requisite court fees and its consequences. Hon. Justice J.M Mativo aptly held:-

“The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent.”

Based on the above cited authorities, the Appellant indeed has the onus to extract the decree to make his record complete. However the Respondent also has the onus of making that decree available for extraction by the Appellant by paying the requisite filing fees at the lower court. This appeal will not hang forever at the will of the Respondent who has already shown disinterest in fulfilling his said obligation. He has withdrawn his appeal on the ground that he cannot raise the further court fees. He cannot now turn around and demand that the respondent in his appeal, the appellant herein be forced to withdraw its appeal for his failure to comply with the law.

It is the respondent herein who is obligated to pay the further court fees, not the appellant. He cannot enjoy the fruits of his judgment without the decree. So, *hasara pia kwake (loss is his too)*. The appellant still has a window, to await this to happen. Obviously the record of appeal is not complete without the decree and the appellant herein would not be able to pursue the appeal. It can only sit and wait or be philanthropic.

Mr. Ombongi's objections not sustainable. This appeal will be mentioned in three months' time on the 9/4/2019 to confirm the position, as once again, it cannot just sit in my docket.

Dated, delivered and signed this 25th day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant-Jerusha

Waweru Macharia for appellant

Ombongi for respondent

Mumbua T Matheka

Judge

25/1/19