REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO 112 OF 1993

SIMON KIREGI MARUKU...APPELLANT

-VERSUS-

PHILIP KIREGI MARUKU..RESPONDENT

JUDGMENT

By a memorandum of appeal dated 4 November 1993, the appellant appealed against the decision of the magistrates' court in Succession Cause No. 296 of 1995 in which an elders' award in respect of the distribution of the intestate estate of one Maruku son of Kiregi was adopted.

From a copy of the grant of letters of administration on record, the deceased died in 1982; he was domiciled in Kenya and his last known place of residence was Aguthi location in Nyeri County.

It would appear that sometimes after the deceased's death and, apparently after succession proceedings in respect of his estate had commenced, a dispute over the sharing the estate ensued between the appellant and Jane Waigumo Maruku. Both were related to the deceased in the sense that the latter was the deceased's widow and the appellant's step-mother; that is, the appellant is the deceased's son but whose mother is different from Jane Waigumo Maruku. Maruku was succeeded in these proceedings by her son, the present respondent.

The court referred the dispute to a panel of elders under the chairmanship of District Officer of the then Nyeri Municipality Division. The record shows that the elders deliberated on the dispute on 19 February, 1992 and made its award on the same date. The essence of that ward was to distribute the deceased's estate between the appellant and Jane Waigumo Maruku. The appellant was awarded land parcel No. Aguthi/Muruguru/375 while Jane Waigumo Maruku was given land parcel No. Aguthi/Muruguru/307. They both were to share equally a sum of money from the coffee proceeds and the deceased's credit balances in Kenya Commercial Bank. Also, to be shared equally was Plot No. 10 at Gatitu market.

On the 25 January, 1993, the court adopted the award and in the same breath dismissed the appellant's application to set it aside.

Undeterred, the appellant apparently moved the court again to review its earlier ruling and set aside the award on the ground that the award was filed out of time. This, I gather from the ruling of the court delivered on 7 June 1993. In that ruling the court held that the time for filing of the award had been extended from time to time with the consent of the parties and it was in bad taste that the appellant could have submitted himself for such extension and then turn around against it only because the award turned out to be in favour of his opponent. In dismissing the application, the learned magistrate further questioned why the appellant had not raised the issue of filing the award out of time in his previous application.

It is this ruling that is the subject of this appeal. The grounds of appeal are stated as follows:

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1. The learned magistrate erred in law and in fact in dismissing the appellant's application to review the ruling made on 25 th January 1995.

2. The learned magistrate erred in law and in fact in holding that the time for filing of the award was ever extended.

3. The learned magistrate failed to appreciate that the parties have no access to award before it is read to them and the question of raising the objection that it was filed out of time does not arise.

4. The learned magistrate erred in law and in fact in holding that "it is totally unjust to use the law only when things are not in their favour and close your eyes when you have gained" as a party is entitled to make full use of the law when he feels that the

law has been breached."

At the hearing of the appeal, the appellant, through his counsel, initially embraced the award as adopted by the court; as soon as I recorded what in effect was a consent withdrawing the appeal, counsel beat a hasty retreat and insisted that only part of the award was acceptable to his client; he rejected that part of the award according to which Plot No. 10 at Gatitu centre was to be shared equally between him and his step-mother.

The learned counsel for the appellant argued that the award was a nullity and ought to have been set aside. According to him, it was wrong for the matter to be referred to the elders for arbitration before an administrator of the deceased's estate had been appointed. According to the learned counsel, the learned magistrate abdicated his responsibility when he referred the matter to arbitration.

The respondent who appeared in person briefly submitted in response that the award must be sustained. He urged that the lower court had made two rulings on this award and which ought to be sustained.

The first thing that caught my attention when I retreated to write this judgment is that that the order arising from the imugned ruling was not extracted and there is no evidence that it was ever applied for. It follows that in the absence of a certified copy of the order, there is, strictly speaking, no appeal.

According to **section 79G of the Civil Procedure Rules, 2010** an appeal from the subordinate court to the High Court is incompetent if the order or decree appealed from is not filed together with the appeal. In my previous decisions on this question, I have been of the humble view that according to section 79G and Order 42 rules 1(2) and 13(4) of the Civil Procedure Rules the omission of a certified copy of the decree or the order appealed from is fatal in any appeal. ***Section 69G** states as follows:*

> ***79G. 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.***

This provision of the law is more or less self-explanatory that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed from a decision by the subordinate court; without the decree or order appealed from there is, in effect, no appeal. This why section 79G gives 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 prescribed time.

Order 42 rule 2 of the Civil Procedure Rules reiterates the importance of the order or decree appealed from and states 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.***

Thus where the appellant is set to lodge his memorandum of appeal but the order or the decree appealed from has not been prepared and delivered, the memorandum of appeal may be filed but the filing of the order or the decree must follow at the earliest opportunity possible or within such a time that the court may direct.

Again **Order 42 Rule 13(4)** of the **Rules** is also clear that the record of appeal will not be complete without the decree or order appealed against; it provides:

> ***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***
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> ***(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).

Under this rule and more particularly **part f (ii)** thereof, although a judge has discretion to dispense with certain documents, he cannot dispense with an order or decree appealed from; they are primary and therefore mandatory documents that constitute the record.

I have said enough to demonstrate that technically, there is no appeal or any proper appeal before court.

Even if the purported appeal was properly before court, there does not appear to be any merit in it when one considers whether the learned magistrate could have properly reviewed the impugned order.

Order 44 of the Civil Procedure Rules, under which an application for review was made prescribed the grounds for such an application; in the Civil Procedure Rules, 2010 the rule has now been renumbered as Order 45 but both the wording and the substance have been maintained; it states as follows:

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his 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, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

Thus, an application for review may only be made upon-

a) A discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the material time; or if,

b) there is a mistake or error apparent on the face of the record; or

c) for any other sufficient reason.

Any of the three grounds is sufficient for grant of an order for review sought by an applicant who considers himself aggrieved by a decree or order; however, the application must be made without undue delay irrespective of which of the three grounds it is based upon.

There is no evidence that the appellant demonstrated that any of these grounds existed as to persuade the court to review its earlier decision. The ground that the award was filed out of time cannot, by any stretch of imagination, be said to have been a new and important matter of evidence, which was not within the applicant's knowledge or could not be produced by him at the material time and that he only discovered it after exercise of due diligence; it is an issue that the appellant could and ought to have raised in his initial application to set aside the award. At any rate, it was not a matter of evidence; rather it was an issue of law.

Assuming that the court ought to have taken it into account when it deliberated on the applicant's initial application, it is trite that failure to take any provision of the law into account or misinterpretation of such a provision or provisions in a court's decision is not an error apparent on the face of record.

If the appellant felt aggrieved by the order of the learned magistrate adopting the award because, in his view, the order was based on a misapprehension of the law, the correct course for him was to appeal against the order rather than file an application for review. In **Abasi Balinda versus Fredrick Kangwamu & Another (1963) E.A 558** the court was asked to review its order on costs on the ground that it had taken an erroneous view of the evidence and of the law relating to the question of whether a returning officer was a necessary party to an election petition. The court (Bennet, J.) appreciated that **section 83** of the Uganda Civil Procedure Ordinance (equivalent to **section 80** of our **Civil Procedure Act**) conferred upon the court jurisdiction to review its own decisions in certain circumstances and **order 42** (which is equivalent to **order 45** of our **Civil Procedure Rules**) prescribed the conditions subject to which and the manner in which the jurisdiction should be exercised. In coming to its conclusion, the court cited with approval a passage from **Commentaries on the Code of Civil Procedure by Chitaley & Rao (4th Edition), Vol. 3 page 3227,** where the learned authors explained the distinction between a review and an appeal and had this to say;

"a point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or law is no ground for review though it may be a good ground for an appeal"

This was also explained by the Court of Appeal in **National Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)**; at page 253 of the judgment, the Court said: -

"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. <u>It will not be a sufficient ground for review that another judge could have taken a different view of the matter.Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.</u>

<u>Misconstruing a statute or other provision of the law cannot be a ground for review</u>." (emphasis added).

In light of these decisions it is clear that the ground upon which the appellant sought to have the court review its earlier decision was neither a new and important matter of evidence which the appellant had subsequently discovered nor an error apparent on the face of record. The learned magistrate was thus justified in rejecting his application.

In this appeal the learned counsel questioned the legality of the elders' award and in his view, it was a nullity. First, I need to remind counsel that the question before this court is not whether the award was valid or not but whether the learned magistrate ought to have reviewed his earlier order and set it aside. However, even if a assume, for a moment, that there is some merit in counsel's submission, I reiterate that once the award was adopted as the judgment of the court, the only forum in which its legality could be questioned was the appellate court.

One other thing I have noticed about the appellant's appeal which is relevant to its fate is that on 7 December 2015 the respondent applied to have the record of appeal reconstructed since the original court filed could not be traced. The appellant opposed the motion and filed grounds of objection dated 14 December 2015 in that regard. Amongst grounds for his opposition to the respondent's application was that "*the orders sought are incapable of being granted as there is no appeal pending, as this appeal abated on or about 14th January 2004, the Respondent having died on or about 15th July 2003 as per her death certificate annexed to the application."* To drive the point home, he continued, "*the appeal having abated by virtue of Order 24 Rule 4(3) and (9) of the Civil Procedure Rules, there is no appeal pending for which reconstruction can be made."*

Whether the appellant was right or not, it must have been obvious to him that in the absence any order overturning the decision of the learned magistrate or any appeal against it, that decision to date remains the final and the only adjudication on the longstanding dispute between the parties. That decision is, as noted, the elders award made on 19 February1992 and which was adopted by the court on 18 January 1993; as far as I understand it and, for avoidance of doubt, it distributed the deceased's estate as follows:

1. Simon Kirugi Maruku to be registered the absolute proprietor of Title No. Aguthi/Muruguru/375.

2. Jane Waigumo Maruku to be registered as the absolute proprietor of Title No. Aguthi/Muruguru/367.

3. Plot No. 10 at Gatitu to be shared equally between Simon Kirugi Maruku and Jane Waigumo Maruku.

4. Coffee proceeds and money at Kenya Commercial Bank to be shared equally between Simon Kirugi Maruku and Jane Waigumo Maruku.

For reasons I have given the appellant's appeal is struck out; parties shall bear their respective costs.

Dated, signed and delivered in open court this 31st day of May, 2019

Ngaah Jairus

<u>JUDGE</u>