REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.51 OF 2013

NDEGWA KAMAU T/A SIDEVIEW GARAGE……..…APPELLANT

VERSUS

FREDRICK ISIKA KALUMBO…….…….RESPONDENT

(Being an appeal from the judgment and decree in Nanyuki Chief Magistrate's Court Civil Case No. 28 of 2007 (Hon. J.N. Nyaga) delivered on 19th June, 2013)

JUDGMENT

The appellant was the defendant in a suit in which the respondent sued him for delivery of his vehicle which he had entrusted the appellant with for repairs; he also sought for the sum of Kshs 110,000/= being the sum allegedly paid to the appellant to cater for the repair costs and Kshs 94,850/= being the cost of parts of the vehicle which he claimed the appellant vandalised. He also asked for the costs of the suit and interest thereof.

The appellant not only denied the respondent's claim but he also lodged a counterclaim against him for the sum of Kshs 63,800/= being the charges for services rendered and storage of the respondent's motor vehicle.

Upon the conclusion of the trial, the magistrates' court held that the respondent did not prove the claim of Kshs 110, 000/= but entered judgment against the appellant for the sum of Kshs 38,000/= which the court held had been proved as the costs of parts vandalised from the respondent's vehicle while it was in the custody of the appellant. The appellant's counterclaim was dismissed. The court also awarded the respondent a half of the costs of the suit and interest thereof.

The appellant was dissatisfied with the decision and therefore appealed against it on 16th July, 2011 when he filed his memorandum of appeal in which he raised several grounds impugning the decision of the lower court; it would have been apt to set out those grounds at this stage but for reasons that will become clearer in due course, this may not be necessary.

The record shows that on 16th December, 2013, parties agreed to have the appeal disposed of by way of written submissions; directions were given accordingly and they were allocated time within which to file and exchange their respective written submissions. When this matter came before me for the first time on 17th July, 2015, Mr Abwuor for the appellant reminded the court that parties had complied with the directions given by the court and all they were seeking from the court was a date for the judgment.

When I retreated to write the judgment I perused, as I have to, the record of appeal and noted that the appeal was admitted on 24th September, 2013, apparently without the original record from the

magistrates' court. I have also perused the entire record of appeal from cover to cover and noted that although the appellant filed all or many of the documents that comprised the original record, he omitted a certified copy of the decree appealed from; it is this particular omission that concerns me and on which I intend to dwell for the rest of this judgment.

My starting point is **section 79G** of the **Civil Procedure Act**; it 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.***

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. It therefore follows that the preparation and delivery of the decree or order for the purpose prescribed in **section 79G** of the Act is not a pastime which one may choose to overlook but rather it is a mandatory ritual without which no legitimate appeal can be said to have been lodged in the High Court against a decision of the subordinate court.

The importance of the decree or the order appealed against in an appeal to the High Court is also mirrored in **Order 42 rule 2 of the Civil Procedure Rules; this rule provides 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.***

This rule envisages a situation where the appellant is set to lodge his memorandum of appeal but the order or the decree appealed against has not, in the words of **section 79G** of the Act, been "prepared and delivered"; in that case, 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. The logical conclusion that one can make from these provisions is that without the order or the decree appealed against, the appeal is incomplete.

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***
> 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).***

According to this rule, and in particular part (f) (ii) thereof, this court has the discretion to dispense with certain documents which may have been omitted from the record but certainly it cannot overlook an order or decree appealed from; these are what one may describe as primary and, therefore, mandatory documents that must form part of the record of appeal.

This perspective of the law was approved by the Court of Appeal in the case of **Kyuma versus Kyema (1988) KLR 185; i**n this case the applicant was caught out by time such that he could not file his appeal against orders issued by the magistrate's court without extension of time. He had applied for a "certified copy of the proceedings and judgment/orders". He ultimately got the certified copies of the proceedings and judgment and was also issued with a certificate of delay that certified the period required to prepare the proceedings and the judgment; apparently, it is the delay in preparation and delivery of these documents that occasioned the delay in filing of the applicant's appeal.

When the appellant filed his appeal, the learned judge (Shields J, as he then was) held that the certificate of delay which was filed with the appeal was not the one contemplated under **section 79G** of the **Act 21**. He struck out the appeal and when the appellant appealed to the Court of Appeal, the latter upheld the High Court's judgment and said at page 187:

> ***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". As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal, not only the order of the court, but also a certificate of delay. (Underlining mine).***

My understanding of this passage is that according to **section 79G** of the Act, it is incumbent upon the intended appellant to apply for an order or a decree which he will file together with the memorandum of appeal; apart the memorandum of appeal and the decree the applicant must obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree should his appeal be filed outside the 30 day time limit. The court explained this better in its judgment. It said at page 189:

> ***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. Rule 1A of Order 41 permits this latter document to be filed as soon "as possible and in any event within such a time as the court may order". Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant "a copy of the order" of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were "the proceedings and judgment".***

Rule 1A of **Order 41** which the court referred to in its judgment is now **rule 2** of **Order 42** of the **Civil Procedure Rules, 2010**.

Coming back to this appeal, there is no evidence that the appellants ever applied for the decree appealed against, let alone filing it as part of the record of appeal. Without belabouring the point, this failure is fatal

to the appeal; sheer failure to comply with the foregoing mandatory statutory and procedural provisions renders this appeal incompetent and of no consequence; it is hereby struck out with costs.

Signed, dated and delivered in open court this 22nd day of April, 2016

Ngaah Jairus

JUDGE