REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 75 OF 2011

EQUITY BANK LIMITED…….1ST APPELLANT

JOSEPH MURIUKI T/A AJOWARD

ENTERPRISES…….…….…....2ND APPELLANT

JIBS ENTERPRISES……..…….….3RD APPELLANT

VERSUS

PERPETUA MUTHONI NDUMA…….....……...RESPONDENT

(Being an appeal from the judgment and decree in the Chief Magistrates' Court Civil Case No. 613 of 2009 (Hon. J.Kiarie, Senior Principal Magistrate) delivered on 24th May, 2011)

JUDGMENT

The respondent obtained judgment against the appellants in the magistrates' court for a declaration that the appellant's seizure of the respondent's motor vehicle registration number KAS 943N (Toyota Hiace Matatu) was illegal and unlawful; he also got a permanent injunction restraining the appellants or their agents from selling, disposing or in any other way wasting the motor-vehicle aforesaid. The court also awarded the respondent damages for what I suppose was loss of user at the rate of Kshs 80,000/= from the 12th October, 2009 till such a time that the motor vehicle would be released to the respondent. She also got the costs of the suit and interest thereof.

The appellants appealed against the decision of the lower court and filed a memorandum of appeal on 24th June, 2011; they raised several grounds of appeal which, under normal circumstances, I would be inclined to set them forth in this judgment but for reasons that will become clearer in due course, it is unnecessary to take that path.

The record of appeal in this appeal was initially certified to be in order and directions were taken on the manner of its disposal. When I retreated to write the judgment, I noted that the certified copy of the decree appealed against had been omitted from the record and therefore rather than strike out the appeal I opted to give further directions on 2nd October, 2015, the essence of which was to give the appellants opportunity to file a supplementary record of appeal to include the decree; it would be appropriate if I reproduce here verbatim the directions I issued:-

> ***On 9th March, 2015, counsel for the respective parties appeared before me for directions on the hearing of the appeal; they were both in agreement that the record of appeal is in order and***

directions should be given in that regard certifying the record as complete.

Based upon counsel's presentations, I certified the record as complete and also directed that the appeal shall be disposed of by way of written submissions before a single judge. Parties filed and exchanged their respective submissions as directed.

When I retreated to write the judgment during the High Court August vacation, I noted that the decree being appealed against had neither been included in the record of appeal nor had it been extracted.

Without the decree there is no appeal before the court for determination. I therefore direct the appellants to file a supplementary record of appeal to include a certified copy of the decree appealed against. The supplementary record shall be filed and served within thirty days of the date of this order failure of which the appeal shall stand struck out. My orders of 9th March, 2015 are varied accordingly.

The appellants did not file the supplementary record and hence the decree; as a matter of fact, they never took any step on the appeal until the respondent's firm of advocates fixed the appeal for mention before on 7th March, 2016. On that date Mr King'ori who held brief for Mr Ngigi for the appellants informed the court that there was a certified copy of the decree at page 47 of the record and therefore the supplementary record for which they had been granted leave to file was unnecessary.

Mr Kiminda for the respondent denied having seen such a decree either in the record which he was served with or in the court record. He urged the Court to issue what he referred to as "the final order" in this matter.

Contrary to the appellant's counsel's suggestion, pages 47 of the two records of appeal filed by the appellant are not certified copies of the decree; if any of these records had the decree as claimed then there would have been no need for the directions I issued on 2nd October, 2015.

Simply put, and without belabouring the point, the appellants did not comply with the directions or the order of 2nd October, 2015 and file the supplementary record to include a certified copy of the decree they appealed against. The question that appears to have been nagging the respondent's counsel is what was the effect of the appellant's non-compliance?

The order was self-executing to the extent that when the appellants defaulted in complying with it, their appeal automatically stood struck out and therefor there would be no need for any other order, whether "final order" as referred to by the respondent's counsel, or by whatever name called. Failure to comply automatically triggered the disposal of the appeal in the manner directed in the order.

However, perhaps for the benefit of the appellants, I need say something why I hold, as I have always held in several other cases where this issue has arisen, that without a certified copy of the decree appealed from, there is no appeal properly so called before court.

Under **section 79G** an appeal from the subordinate court to the High Court is incompetent if the order or decree appealed against is not filed together with the appeal; that section provides 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 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 a mandatory exercise without which no legitimate appeal can be said to have been lodged in the High Court against a decision of the subordinate court.

To appreciate the importance of the decree or the order appealed against in an appeal to the High Court, one needs to look at **Order 42 rule 2 of the Civil Procedure Rules** which, for all intents and purpose, is consistent with **section 79G** on the necessity the decree appealed from in any appeal; it 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. It is for this reason that I opened for the appellants a window of thirty days to enable them file the decree the moment I realised it was not part of their record of appeal.

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

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 must form part of the record.

The interpretation or application of these statutory and procedural provisions from the foregoing perspective was approved by the Court of Appeal in the case of **Kyuma versus Kyema (1988) KLR 185.** In 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).***

The meaning of this is that whenever one intends to file an appeal under **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**.

My perusal of the original record from the lower court reveals that there are at least two letters from the appellants' counsel asking for certified copies of typed proceedings, judgment and decree; one is dated 7th February, 2012 and the other one is dated 3rd May, 2012. Both letters were specific and categorical that these documents were required for purpose of filing an appeal. Yet, despite the fact that counsel appreciated their importance, they still omitted the decree from their record when they ultimately filed it on 1st April, 2014, almost a year later. For some unexplained reason, they still failed to file it when they were reminded to include it in their record.

The forgoing reasons informed my order of 2nd October, 2015; for avoidance of doubt, and if any other order was necessary after this order was issued, I hereby order that the appellant's appeal was deemed struck out upon the expiry of thirty days from 2nd October, 2015. Orders accordingly.

Dated, signed and delivered in open court this 29th day of July, 2016

Ngaah Jairus

JUDGE