



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 401 OF 2011**

**PASHA ENTERPRISES LIMITED.....APPELLANT**

**VERSUS**

**BERNARD KINYUA GITHAKA KIBURI.....RESPONDENT**

**RULING**

1. The Respondent herein sued the Appellant in Milimani Commercial CMCC No. 4895 of 2009 seeking recovery of damages arising from an alleged industrial accident. The trial court entered judgment against the Appellant in favour of the Respondent and found the Appellant 90% liable and awarded the Respondent KShs. 450,000/-. The Appellant felt aggrieved by that judgment and filed an appeal and a record of appeal.
2. The Respondent on the other hand has filed a notice of motion dated 13<sup>th</sup> October, 2014 seeking that the record of appeal and this appeal be struck out with costs. The motion is premised on grounds that no decree has been filed within reasonable time or at all; that the record of appeal is incompetent; that the appeal is incompetent and that essential steps have not been taken within reasonable time.
3. In response thereto the Appellant filed grounds of opposition dated 20<sup>th</sup> February, 2015. The grounds are that; the application lacks merit since failure to file a decree would not call for the striking out of the record of appeal. That the proviso to Section 2 of the Civil Procedure Act, 2010 provides that "for 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"; that grounds 2(b) (c) and (d) are vague as the Respondent has not stated the reason why either the record of appeal or the appeal is incompetent or what essential steps have not been taken within a reasonable time and that the application is an afterthought as the Respondent ought to have raised the issues therein before directions were given admitting this appeal for hearing.
4. This application was canvassed by way of written submissions. It was the Respondent's contention that the reasons for the application are points of law thereby there was no need to file an affidavit. It was stated that the memorandum of appeal was filed on 22<sup>nd</sup> August, 2011 without a copy of the decree contrary to the provisions of Order 42 rule 2 and the said rule provides that the court need not consider whether to reject an appeal summarily under Section 79B of the Act until such certified copy has been filed. It was the Respondent's submission that the appellant ought to have filed a copy of the decree within thirty (30) days from the date of filing the appeal but that the Appellant has since 28<sup>th</sup> August, 2011 not filed a copy of the decree. It was the Respondent's argument that the consequence of failure to take such an essential step as stated is striking out of the appeal. The Respondent cited **Nairobi HCCC No. 47 of 2000., Wilfred Odhiambo Musingo v. Habo Agencies Ltd, Ruithibo v. Nyingi (1984) KLR 505, Afric Co-operative Society v. Uganda Railway Corporation (2002) 1EALR 1 and Shabani v.**

**NBC Holding Corporation (2004) 2 EALR 262** wherein pleadings were struck out for failure to comply with the rules. The Respondent cited the Court of Appeal's decisions of **Mombasa Civil Appeal (Application) No. 230 of 2009., Ministry Valji Naran Mulji v. Vantage Road Transporters & 6 others** and **Benedict Mwazighe & Another v. Gasper Walele & 2 Others (2011) eKLR** where it was found that the failure to take essential steps in time will attract striking out of the offending pleading or appeal; that the overriding objectives do not apply to defeat matters of law as opposed to technicalities and that courts will continue to apply settled precedents. The Respondent relied on **South Coast Fitness & Sports Centre Ltd v. Clarkson Notcutt Ltd (2000) 1EA 230** and submitted that an appellant cannot apply for a decree or proceedings and sit back and do nothing for an unreasonable and unexplained long time and that that would render the appeal a candidate for striking out. The Respondent submitted that the record of appeal is incompetent without a certified copy of a decree and ought to be struck out. It was submitted that the situation here is different from an appeal being preferred before a decree has been extracted which is what Section 2 of the Civil Procedure Act is about. It was further submitted that any judgment holding that a record of appeal is competent without a decree must be held to have been decided per incurium and wrongly decided in view of the authorities he cited.

5. The Appellant on the other hand cited the provisions of Section 2 of the Civil Procedure Act and submitted that the fact that a formal decree was not included in the record of appeal does not make the appeal incompetent. That the judgment is in the record of appeal and is appealable without a formal decree. It was argued that the absence of the decree will not stand in the way of just determination of the issues raised in the appeal and that the Respondent has not demonstrated how the failure to include the decree in the record of appeal will prejudice him. In this regard the Appellant relied on the provisions of Section 1A (1) of the Civil Procedure Act and the decision in **David Mutuku Silu v. Kyana Thuka (2012) eKLR** where Makhandia J held as follows:-

***"... in an appeal, as long as a copy of judgment is part of the record of appeal, the same will be deemed to be a decree, and the same is appealable notwithstanding that a formal decree in pursuance of such judgment may not have been drawn up and issued or may in fact not be capable of being drawn up."***

6. It was submitted that the Respondent's statement that the record of appeal is and the appeal are incompetent and that essential steps have not been taken within reasonable time is vague as they are neither explained nor supported by any affidavit. The Respondent submitted that this application is an afterthought since it was filed on 28<sup>th</sup> November, 2014 i.e. about one month after the appeal was admitted by consent of the parties on 17<sup>th</sup> October, 2014. The Appellant argued that if the Respondent intended to raise the issues now raised in this application, such ought to have been done before the appeal was admitted. The Appellant on this point quoted **South Nyanza Sugar Co. Ltd v. Daniel Obara Nyandoro (2010) eKLR** where D. Musinga J while dealing with an application such as the instant one held as follows:-

***"In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the Respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the Civil Procedure Act as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree."***

7. The Appellant further cited **John Ouko Yogi v. Spinknit Ltd (2004) eKLR** where Kimaru J was of a similar view to that of Musinga J in **South Nyanza Sugar Co. Ltd.**

8. I have given the depositions herein due consideration. It is not disputed that the record of appeal herein was filed out of time and without the leave of court and that a decree was not included in the record of appeal. The issues arising out the application herein therefore are the effect of filing a record of appeal out of time without the leave of court and secondly the effect of failure to annex a copy of the decree to the record of appeal.

9. Section 79G of the Civil Procedure Act, Cap 21 states 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 to the appellant 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.*** (Emphasis own)

10. From the above provision, it is clear that the record of appeal was filed contrary to the provisions of Section 79G of the Civil Procedure Act. Secondly, the decree appealed against is not part of the record of appeal. 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. From the said provision, a decree or order appealed from is a pertinent part of an appeal filed in the High Court against a decision from the subordinate court. Without it there is, in effect, no appeal. It is no wonder Section 79G is couched in mandatory terms. A further illustration that a decree or order is an important element of a record of appeal is Order 42 Rule 13(4) of the Civil Procedure Rules which provides 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).*** (Emphasis Own)

11. It therefore follows that a cannot dispense with an order or decree appealed from; they are primary and therefore mandatory documents that must form part of the record. In view of the aforesaid disposition the record of appeal is incompetent. The question that follows is whether such incompetence is reason enough to have it struck out. I wish to respectfully move away from the reasoning therein, considering the circumstances of this case and bearing in mind the overriding objective in civil litigation and the provision of Article 159 (2) (d) of the current Constitution. While the Respondent crucifies the record of appeal herein, I note that they were present in court at the time directions were taken. They however failed to disclose to the court the discrepancy at that point yet by that time this application had been filed. Further a similar application had been filed and withdrawn. To me the Respondent's counsel conduct to say the list is sharp practice which is contrary to the duty of advocates to court to assist in attaining justice

expeditiously. I reiterate the pronouncement in **South Nyanza Sugar Co. Ltd** case (supra). There has been a shift in the theory of striking out an appeal filed out of time. In **Nairobi Civil Application No. 173 of 2010., Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others**, the Court of Appeal had this to say where a notice of appeal was served on the respondent out of time and without leave of the court:-

*“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”*

12. And in **Civil Appeal (Application) No. 130/2008., Joseph Kiangoi v. Waruru Wachira & 2 others**, held as follows:-

*“The cure would come about because in the circumstances justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view, there cannot be a better case for the invocation of the overriding objective principle than this case. Courts should, in our view, lean more towards sustaining appeals rather than striking them out as far as is practicable and fair... the substantive aspect of sustain the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record...”*

13. In view of the foregoing, I find no merit in this application and find that this application is in itself an abuse of this court's process bearing in mind that a similar application had been filed earlier.

Dated, Signed and Delivered in open court this 29<sup>th</sup> day of May, 2015.

J. K. SERGON

**JUDGE**

In the presence of:

Mrs. Njuguna for the Appellant

Miss. Otieno h/b for Kaburu for the Respondent