REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 55 OF 2011

1. **M G**
2. **F M**

(CHILDREN APPEALING THROUGH F W M).....…….APPELLANT

VERSUS

J K G…….....……RESPONDENT

(Being an appeal against judgment and decree in Karatina Senior Resident Magistrates' Court Children's Case No 2 of 2009 (Hon. L.W. Mbugua) on 27th April, 2011)

JUDGMENT

This appeal arises from a judgment in the magistrates' court in which the plaintiff's suit was dismissed with costs. In that suit the appellant had sought an order against the respondent for the latter to assume parental responsibility of two children whom he is alleged to have sired. The appellant also sought for an order against the respondent for payment of Kshs 110,000/= per month towards the maintenance and upkeep of those children; she also sought for the costs of the suit.

The suit was dismissed principally because the paternity of the children was not established to the satisfaction of the trial court. The appellant was dissatisfied with the decision of the court and hence this appeal.

For reasons that will become apparent in due course, it may not be necessary to delve in to the grounds and the merits of the appeal because this court has to consider, as a preliminary point, whether an appeal, in which it can exercise its appellate jurisdiction, exists in the first place. It must be remembered that whenever this court is considering an appeal from a decision of the subordinate court, it only does so in exercise of its appellate jurisdiction and I suppose the court cannot assume such jurisdiction and determine an appeal on its merits if such an appeal does not exist in the first place. It follows that as long as there is a lingering question of whether an appeal exists or not and thus whether the appellate jurisdiction of this court has been properly invoked, that question must be determined *in limine*.

I have been compelled to take this course because I have noted from the record of appeal that the decree appealed against was neither applied for nor extracted and thus it is not part of the record. The only question to consider at this stage therefore is whether, in the absence of a certified copy of the decree, there is a proper appeal before this court. The question is not far-fetched and as the following provisions in the Civil Procedure Act and Rules will show, it is a pertinent and a relevant question to consider in any appeal coming before this court against a decision made in the subordinate court.

To begin with **Section 79G** of **the Civil Procedure Act** states:-

> 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 apparent here 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 appealed against could not, for one reason or another, be secured within the period which an appeal ought to be filed. 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 condition precedent to the institution of any or any valid appeal in the High Court against a decision of the subordinate court.

As if to reiterate the importance of these documents in filing of appeals to the High Court, **Order 42 rule 2 of the Civil Procedure Rules** is clear that:

> ***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 would therefore be reasonable to conclude that in view of section **79 G** of the Act as read with **Order 42 rule 2** of the Civil Procedure Rules, an appeal lodged in the High Court against a decision of the subordinate court would be incomplete without the order or the decree appealed against.

This point is taken up by **Order 42 Rule 13(4)** of the **Rules** which is categorical that the record of appeal will not be complete without the decree or order appealed against; it 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:***
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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).***

According to this rule, more particularly **part f (ii)** thereof, although the 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 be included in the record. A strict application of this rule would mean that this appeal ought not to have been admitted for hearing in the first place and directions for its hearing ought not to have been taken.

The interpretation or application of these statutory and procedural provisions from the foregoing perspective has been approved as the correct interpretation in several court decisions but the one I found quite explicit on this question is the Court of Appeal decision 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** that:-

> ***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).***

This means that whenever one intends to file an appeal under **section 79G** of the **Civil Procedure 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 from 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 it be found that his appeal can only 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**.

There is no evidence in the appeal herein that the appellant ever applied for the decree; as it was in the case of **Kyuma versus Kyema (supra)** so it is in this appeal, the appellant only obtained copies of the proceedings, the judgment and the exhibits. Without a copy of the decree amongst them these documents

are inconsequential.

Lest we forget, it must be noted that the requirement of a certified copy of the decree or order appealed against is not merely a procedural requirement that can be overlooked and dismissed as a peripheral procedural technicality; it is a requirement that is rooted in a statutory provision of the Civil Procedure Act and which, as noted, goes to the appellate jurisdiction of this court. It has been held elsewhere that jurisdiction is everything and without it the court has to down its tools.

In view of the provisions of the law that I have attempted to set out and taking into account that this court is bound by the decision of the Court of Appeal in the **Kyuma versus Kyema (supra)** I am persuaded the appellant's appeal incompetent and fatally so; I hereby strike it out with costs.

Signed, dated and delivered in open court this 14th day of December, 2015

Ngaah Jairus

JUDGE