



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 168 OF 2011

WILDLIFE TRUCK TOURIST TRAVEL.....1ST APPELLANT

JOHN THANGA RINDIRI.....2ND APPELLANT

VERSUS

RICHARD MACHARIA MURIUKI.....RESP/APPLICANT

RULING

By a motion dated 20th February, 2015 the applicant sought to have the appeal filed herein dismissed for want of prosecution. He also sought for an order that the decretal amount deposited in Family Bank be released to the respondent's counsel and the appellant's counsel be ordered to execute the necessary documents. He asked for costs of the application too.

The motion is brought under **section 3 and 3A** of the **Civil Procedure Act** and **Order 51 Rule (1)** of the **Civil Procedure Rules, 2010**. It is supported by the affidavit of Andrew Kariuki, counsel for the applicant.

Mr Kariuki has deposed that the appeal was admitted and the appellant was so notified by the Deputy Registrar of this Court vide a letter dated 1st October, 2014. Besides the correspondence by the Deputy Registrar, counsel also wrote to his counterpart on 3rd September, 2014 and informed her that her client's appeal had been admitted.

Counsel also complained that the appellant has not served the respondent with a copy of the memorandum of appeal which is a mandatory requirement under **Order 42 rule 12** of the **Civil procedure Rules, 2010**.

The appellants opposed the application and in the replying affidavit sworn and filed by their counsel on record in that regard, they averred that they have always been interested in pursuing their appeal and to demonstrate this endeavour, they filed the memorandum of appeal on 11th November, 2011 and subsequently an application for stay of execution of the decree appealed against. Thereafter they engaged the respondent's counsel in negotiations and ultimately they were able to reach a settlement on the application for stay of execution.

They also wrote to the executive officer requesting for copies of the proceedings, judgment and decree on

15th November, 2013.

The respondents also deposed that although they received a letter from the court dated 28th April, 2014 informing them that the proceedings were ready for collection, they were later to discover that those proceedings had not been proof read, signed and photocopied when they went to collect them; however when they finally got these documents they prepared and filed the record of appeal.

The respondents are of the view that the application before court is premature in view of **Order 42 rule 13** as read with **rule 35(ii)** of the **Civil Procedure Rules**. It is their case that the delay in prosecution of the appeal is not inordinate and they are willing and able to prosecute it.

At the hearing of the application, counsel reiterated all that they have deposed to in their respective affidavits. Their submissions aside, I sought to know from counsel of the appellant whether she had included a certified copy of the decree appealed against in the record of appeal as I could not find one in the record filed in court. Counsel informed me that there was none and that she was, at that point, seeking leave to file a supplementary record apparently to include this particular document.

Inevitably, the omission of the decree from the record has turned out to be the main question I have had to grapple with and it is all because before one considers whether an appeal should be dismissed for want of prosecution, it is only logical and indeed necessary to consider whether such an appeal exists in the first place.

The determination, at the preliminary stage, of the question whether or not an appeal exists is no doubt necessary because the appellate jurisdiction of this court can only be invoked where it has been determined that indeed an appeal, properly so called, exists. It is for this reason that despite the application before me, I have to consider whether, in the absence of the decree appealed against, there is a proper appeal before the court and thus whether the court's appellate jurisdiction has been properly invoked.

As I understand the law on this question a decree or an order appealed against are part and parcel of an appeal and without either of these documents, depending on which of them is in issue in an appeal, there is simply no appeal.

This is a question that has arisen before me on a number of occasions and since, so far, I have not come across any contrary opinion on this point I would do no better than reproduce what I have said before in my earlier decisions, at the risk, of course, of repeating myself.

Whenever this question has arisen I have always looked to **section 79G** of the **Civil Procedure Act** and **Order 42 Rule 13(4)** of the **Civil Procedure Rules** for an appropriate answer. I have addressed it in several cases including **Murang'a High Court Civil Appeal No. 127 of 2013, Joseph Kamau Ndung'u & Another versus Peter Njuguna; Murang'a High Court Civil Appeal No. 91 of 2013 Milligan Heritage Ltd & Another** and recently in **Civil Appeal No. 10 of 2012, Jommo Kenyatta Foundation versus John Aruma** (a minor suing through his next friend and father John Aruma).

Order 42 Rule 13(4) of the **Civil Procedure Rules** sets out the documents that ought to be included in the record of appeal and the appellant's record has all these documents except the certified copy of the decree appealed against.

In view of the mandatory provisions of **section 79G** of the **Civil Procedure Act**, **Order 42 Rule 1(2)** and **Rule 13(4)** of the **Civil Procedure Rules** the omission of the decree appealed against from the record renders the appeal fatally defective.

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 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 a mandatory requirement without which no legitimate appeal can be said to have been lodged 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 be reasonable to conclude that without the order or the decree appealed against, the appeal will be incomplete.

This point is buttressed 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:

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, 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 form part of the record. Though the record shows that the appeal was admitted on 23rd September, 2014, a strict application of this rule would mean that this appeal

ought not to have been admitted in the first place and thus not even directions for its hearing can be 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 most apt is the Court of Appeal's 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 Cap 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).

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 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**.

It has been noted that counsel for the appellant sought for leave to file a supplementary record to file the decree in the context of her response to the applicant's application. Even as she sought for that leave there is no evidence on record that she ever applied for the decree. Though she alleged in her affidavit that she applied for the proceedings, judgment and the decree, the evidence on record suggests the contrary. The letter dated 15th November, 2013 exhibited to that affidavit said in its pertinent part:-

The above matter refers.

Kindly supply us with certified copies of the typed proceedings and judgment issued on 17th October, 2011.

We undertake to pay your charges once you notify us the proceedings are ready for our collection.

Your faithfully

L.G. Kimani & Company Advocates

Signed.

It is clear from this letter that the appellant never applied for the decree; as it was in the case of **Kyuma versus Kyema (supra)** so it is in this appeal, the appellants only obtained copies of the proceedings and the judgment which they applied for. Without a copy of the decree amongst them, these documents are of no consequence.

Considering the law I have set out on this issue and considering that this court is bound by the decision of the Court of Appeal in the **Kyuma versus Kyema** case the only conclusion that I am inclined to come to is to strike out the appellants' appeal; it so struck out with costs.

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

Ngaah Jairus

JUDGE