REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 97 OF 2013

MARY KAUNGA WANYAGA ……..…….APPELLANT

VERSUS

MILLICENT WANJIRU NDUNGU…….....……RESPONDENT

(Being an appeal from the judgment and decree of the Murang'a Senior Principal Magistrates Court (Hon. A.K. Kaniaru dated 23rd November, 2011 in Civil Suit No. 256 of 2010)

JUDGMENT

This is a judgment on appeal against the judgment of the Senior Principal Magistrate's Court at Murang'a dated 23rd November, 2011. In that judgment the respondent was awarded the sum of Kshs. 120,000/= as general damages and special damages of Kshs. 2,000/=. The respondent was also awarded costs of the suit and interest thereof at court rates.

The judgment in the subordinate court arose out of a claim in damages as a result of a road traffic accident involving the defendant's motor vehicle registration number **KAY 571F** and the respondent; the accident is said to have occurred on 16th December, 2009 within Murang'a town.

Parties agreed that judgment on liability be entered against the appellant at 80% and therefore no evidence was called to establish how the accident occurred. They also agreed that the documents which they relied upon be admitted in evidence without necessarily calling their makers and that the suit be disposed of by way of written submissions. The suit in the subordinate court proceeded accordingly.

Being dissatisfied with the subordinate's court judgment, the appellant appealed in the High Court at Nyeri where his appeal was admitted on 26th September 2012 before it was subsequently transferred to Murang'a vide the order made on 29th January, 2013 by my brother, Justice Wakiaga sitting at Nyeri.

When the parties appeared before me on 14th October, 2013 they agreed that the appeal be disposed of by way of written submissions; directions were given by this court to that effect and parties proceeded to file and exchange written submissions as directed.

I have carefully read the record of appeal and noted that the although appellant tried as much as possible to file the requisite documents in compliance with **Order 42 Rule 13(4)** of the **Civil Procedure Rules,** she omitted 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** this omission 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 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.

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 only 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.

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; however, the omission of the decree from the record is something that was only noticed at the time of writing this judgment and this court would not pretend to turn a blind eye on this omission even at such a late stage.

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 appeal but the one which 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 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).

This means that whenever one intends to file an appeal under 79G 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 187:

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 was in the case of **Kyuma versus Kyema (supra)** she only applied for and she was dutifully supplied with the proceedings and the judgment. That was not sufficient.

Considering the law I have attempted to 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 appellant's appeal; it so struck out with costs.

Signed, dated and delivered in open court this 16th day of May, 2014

Ngaah Jairus

JUDGE