



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCA NO. 17 OF 2019

JAMES KOMU.....1ST APPELLANT

ANTONY KIMATHI.....2ND APPELLANT

VERSUS

DAVID MUSA.....1ST RESPONDENT

CELINA KARABAE.....2ND RESPONDENT

PATRICK MUCHAI KIRIMANIA (suing as legal representative of

MARION KARIUKI GICHURU.....3RD RESPONDENT

***(Being an Appeal from a Judgment of the Senior Resident Magistrate Hon. (M. Sudi – SRM) in the
Chief magistrate’s Court at Chuka Civil Case No. 159 of 2017) delivered on 26th March 2019)***

RULING

1. The Appellant has filed this appeal against the Judgment of the Senior Resident Magistrate dated 26th March 2019 in **Chuka Civil Case No.159 of 2017**. The Plaintiff had filed a plaint dated 12th June 2014 claiming special and general damages under the **Fatal Accident Act and Law Reform Act**. The Plaintiff was claiming **Kshs.50,000/-** in Special damages. The trial magistrate entered Judgment for the Plaintiff against the defendants in the total sum of **Kshs. 2, 150,000/-** apportioned in the ratio of 20% against the 1st and 2nd defendant and 80% against the 3rd and 4th defendant. The 1st and 2nd Appellants who were the 1st and 2nd defendants filed this appeal No.17/2019 while 3rd and 4th defendants in the lower court filed Civil Appeal No.18/2019. The two appeals are related and were consolidated vide an order issued on 14th July 2020.

2. The Appellants filed a record of appeal which did not have a decree. The Appellants applied for leave to file supplementary affidavit in order to get the decree from the trial court. The Appellants did not file the supplementary affidavit as the court was informed that the Appellants were unable to pay further court fees. The Appellants were given more time to file supplementary affidavit, that is 30 days from 29th July 2020 or else the court would proceed in the matter as it deems fit. The Appellant was unable to pay further fees and file supplementary affidavit enclosing the decree. The court is now required to give directions on the appeal in the light of failure by the Appellants to annex the decree. The parties did not file submissions but left the matter to the court to give directions.

Section 79G of the Civil Procedure Act shows that a decree is key in an appeal. Section provides:-

“ 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 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.”

3. This is buttressed under **Order 42 rule 2 of the Civil Procedure Rules** which shows that a decree is a key document which has to be included in the record of appeal. The rules gives the Appellant time to file such decree. It provides:-

“ Where no certified copy of 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 the appeal summarily under Section 79B of the Act until a copy is filed.”

4. An appeal is therefore not competent in the absence of a decree of the court whose decision is appealed against. The rules are emphatic that a decree cannot be dispensed with in an appeal. **Order 42 Rule 13 (4) of the Civil Procedure Rules** provides that-

“13. (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.

(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.

(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

(4) 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,”

The **Court of Appeal in Kyuma -v- Kyema (1988) KLR** the Court of Appeal held-

“ 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 30 days from the date of the order.....

This period may be extended provided he obtained from the magistrate’s court a certificate of delay within the meaning of Section 79G of Act 21. The Section allows the 30 days to be extended by such a period as was required to make a copy of the “decree or order of the court...” The question is what documents must the Appellant file within 30 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 and second, copy of the formal order of the court if available.”

5. The *onus* of paying the court fees is on the plaintiff. Any party to a suit may apply for a copy of the Judgment and decree upon payment of the requisite court fees, see **Order 21 Rule 20 Civil Procedure Rules**. Payment of court fees is a condition precedent to the commencement of a cause in action. The filing of a civil suit requires payment of the necessary court fees. It therefore follows that failure to pay the court fees renders the suit non-compliant and therefore incompetent. The court has discretion to extend time to a party who has not paid court fees to give him an opportunity to comply. The Appellants were given time by this court to pay the requisite Court fees. I find that failure to pay the requisite court filing fees which is a pre-requisite of filing for instituting suits renders this appeal incompetent. Although the *onus* of payment of filing fees is on the plaintiff, in this appeal the appellant had the *onus* of extracting the decree and include it in the record of appeal to make the record complete. As the record of appeal stands, it is incomplete without the decree. Payment of court filing fees is a jurisdictional pre-requisite to the commencement of an action. **Section 96 of the Civil Procedure Act** gives discretion to make up for the deficiency of court fees.

It provides:-

“96. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.”

6. The court gave time to the Appellants to pay the fees. The Appellants have owned up and stated that they are unable to pay and has not offered to pay part of the court fees. There is no room for the court to exercise discretion. The Appellant was warned of the dire consequences for failure to pay court fees. No material was laid before me to enable me invoke the discretion under **Section 96 of the Civil Procedure Act**.

The Respondent has the *onus* to pay further Court fees. He will not be able to execute without a decree. The Appellant has been unable to pay. There has to be a determination one way or the other to unlock the stand off. I will give more time to the parties to try and comply. The appeal be mentioned after ninety days for further directions. If the situation does not change then the court will take appropriate action.

Dated, signed and delivered at Chuka this 7th day October 2020.

L.W. GITARI

JUDGE