



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION APPEAL NO.95 OF 2015

(CHILDREN CASE 83 OF 2013)

JAJ.....APPELLANT

VERSUS

RAS.....RESPONDENT

RULING

RESPONDENT'S CASE

On 26th July 2018, the appellant and Respondent through respective Counsel they were to highlight written submissions. Instead the parties through Counsel canvassed the application dated 18th July 2018. The Respondent sought the following orders;

- i. That the Appellant contrary to Civil Procedure Act filed incomplete record of appeal and thus invalid.**
- ii. If relied upon, the incomplete record of Appeal will cause miscarriage of justice and irreparable harm to the Respondent and issue.**
- iii. That the appeal challenging the Ruling delivered on 11th September 2015 in favor of the respondent be struck out in its entirety and all interim orders pending the appeal be vacated.**

The application is based on the following grounds;

On 22nd January 2013 the Respondent filed an application in the Children's Court at Nairobi against the Appellant in **Children's Case No. 83 of 2013**. The Trial Court issued ruling on 11th September 2015, on the matter in favor of the Respondent. The Appellant filed **Notice of Motion** on 17th September 2015 and sought stay pending an Appeal which this Court granted on 21st September 2015. The Appellant filed the **Memorandum of Appeal** dated 15th September 2015, filed on 16th September 2015.

The record of appeal was filed on 5th December 2017 and served the Respondent on 6th December 2017. The matter was scheduled for highlighting of submissions before this Court on 26th July 2018.

The Appellant served the submissions on 4th July 2018 yet the Appellant had been ordered by the Court to serve the same on 28th July 2018. Upon perusal of the record of appeal it is evident that pertinent documents and annexures including the certificate of appeal, plaint together with all the accompanying documents and annexures to the respondent's Affidavit dated 20th June 2013 are missing from the Record of Appeal. That it is in the interest of justice and equity that the appeal is struck out.

In her affidavit in support she reiterated the grounds as stated in her summons adding that upon being served with the Appellant's submissions' on 4th July 2018. And it is evident that the pertinent documents relied upon in the trial court were deliberately missing from the record of appeal.

That under **Order 42 rule 13(4) of the Civil Procedure Rules** outlines the documents which must be included in the record of appeal being before the appeal can be set for hearing as follows;

“memorandum of appeal, pleadings, notes of trial magistrate, transcript of shorthand notes in the hearing, all affidavits, maps and documents put in evidence before the magistrate, judgment, order or decree appealed from and where appropriate the order if any giving leave to appeal.”

That the appellant's record of appeal does not contain the following documents outlined in **Order 42 Rule 13(4) of the Civil Procedure Rules**.

The certificate of delay, Complaint and accompanying documents annexures attached to the respondent's affidavit dated 20th June 2013. That the missing documents render the appeal irregular and if the court relies on an incomplete record of appeal it would occasion a miscarriage of justice. That it is in the interest of the minor that the appeal dated 15th September 2015, be struck out in its entirety and all interim orders pending appeal be vacated.

APPELLANT'S CASE

The Appellant opposed the said application and filed Replying affidavit dated 22nd January 2018. She avers that the Applicant was in contempt of the stay orders granted on 21st September 2015 and thus his hands were tainted and he should not be heard until he purges the contempt. That being aware of the orders in place the Respondent wrote to the registrar of Births and Deaths Certificates on 21st March 2016, demanding the birth certificate to be changed to reflect his name as the father. That the application is misconceived, premature and brought in bad faith and should be dismissed as the threshold for the remedy sought has not been met. That on 30th October 2017, the file was placed before the Deputy registrar for directions and the Court directed that her advocates should file the proceedings and the order and mention the matter on 30th November 2017 for directions. That on 23rd November 2017, her advocates on record were served with the current application with a hearing date for 26th November 2017, but the same was not heard as it was a public holiday. That on 30th November 2017 the matter was not listed.

Further, that the matter raised are matters to be considered for hearing. She denied fraudulently procuring the minor's Birth Certificate. That when she gave birth in January, 2012 the paternity was not obviously ascertainable as she was in a relationship and married her husband **Andre Desimone** and had since broken up with the defendant in 2011. That the child was presumed to be her husband's child until a **DNA** was conducted in late April 2012. The American passport for the child was obtained on 2nd March 2012 having been applied for in February 2012, both dates well before the **DNA** results were obtained. That her husband assumed parental responsibility over the child and hence put his name on all relevant documents belonging to the child. That while acknowledging that her husband is not the biological father; he is the presumed father; *de-facto* father and Andre Desimone was not only present during the pregnancy, but also at birth and since then to-date.

That the allegation of fraud is farfetched, untrue and made in bad light to taint her image as the true facts are highlighted above. She avers that she does not refute that the child has a right to adopt the Respondent's name. That that right should be considered against the best interests of the child. That the right to adopt the father's name should be decided upon by the child when mature enough to do so. That **D** is their family name and that she changed her name to **JJD** to reflect in her Identity Card and Passport adding that forcing the child to adopt another name will alienate her from her family. That her husband has explained to the child that she has 2 fathers and has sought professional advice on the matter. That the passport the Applicant refers to has since expired. She urged the court to set the appeal down for hearing for the best interest of the minor.

DETERMINATION

The Respondent seeks that the record of appeal be struck out as the same as filed was incomplete and did not include; the certificate of appeal, Complaint and accompanying documents annexures attached to the respondent's affidavit dated 20th June 2013. **Order 42 rule 2 of the Civil Procedure Rules** provides 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.”

It is therefore clear that in filing an appeal, it is important to include the decree or the order appealed against in an appeal to the High Court.

Further, **Order 42 Rule 13(4) of the Civil Procedure Rules** provides that;

“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 memorandum of appeal;**
- **The pleadings**
- **The notes of the trial magistrate made during the hearing;**
- **The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;**
- **All affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
- **The judgment, the order or decree appealed from and, where appropriate, the order (if any) giving leave to appeal”**

The Court of Appeal in the case of **KYUMA versus KYEMA (1988) KLR 185**; It was held 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”.

.....

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.”

COURT RECORD

A perusal of the Court File confirms that the memorandum of appeal was filed on 16th September 2015 by Kalwa & Company Advocates. The decision appealed against was delivered on 11th September 2015. The record of appeal dated 4th December 2017, was filed on 5th December 2017. The Appellant subsequently filed an application on 17th September 2015 and sought stay of the said orders pending the hearing and determination of the appeal which were granted on 21st September 2015.

The firm of Judy Thongori & Co filed Notice of Change of Advocates on 20th April 2017. The file was inactive until reactivation on 30th October 2017. This Court gave directions on 14th June 2018. There is a supplementary record of appeal dated 13th June 2018 and filed on 14th June 2018.

This Court considered the following provisions of Civil Procedure Rules 2010;

Section 79 G of Civil Procedure Act;

“Every appeal from subordinate Court to the High Court shall be filed within 30 days from the date of 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 sufficient cause for not filing appeal in time”.

In the instant case, the memorandum of appeal was filed by the advocates on record then within the statutory period of 30 days from the date of Ruling from the Trial Court.

Order 42 (1) of Civil Procedure Rules 2010 provides;

“Every Appeal to the High Court shall be in form of a memorandum of appeal signed in the same manner as a pleading”.

From the record in the instant case; there is valid and legal appeal based on memorandum of appeal filed on 16th September 2015.

Order 42 (2) of Civil Procedure Rules 2010 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 time as the Court may order, and the Court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed”.

In the instant case, the certified copy of the decree and /or order was not filed with the memorandum of appeal. It was filed vide Further Supplementary Record of Appeal on 25th July 2018 after filing record of appeal on 5th December 2017.

Order 42 Rule 13(4) Civil Procedure Rules 2010, further provides;

Provided that;

i)

ii) the Judge may dispense with production of any document of part of document which is not relevant, other than those specified in (a) (b) & (f) [above]

The totality of the above outlined provisions applied to the pleadings in the instant case; this Court finds that although the memorandum of appeal was filed within the stipulated period, the fact of filing the certified copy of decree and/or order does not in law render the appeal

incompetent as the above *proviso* does not make it mandatory that all outlined documents shall be filed with the appeal except for memorandum of appeal, pleadings and certified copy of decree and/or order. It is also not fatal if the certified copy of decree or order prior filed with the memorandum of appeal as long as it is filed as soon as possible or within the period allowed by the Court. On the issue of the mandatory filing of Court documents.

Counsel cited the following cases;

- **BWANA MOHAMMED BWANA vs SILVACO BUKO BONAYA & 2 OTHERS [2014] eKLR; and**
- **NDEGWA KAMAU T/A SIDEVIEW GARAGE vs FREDRICK ISIKA KALUMBO [2016] eKLR.**

The 1st case is distinguished from the instant case, as the election laws applied and not **CPR 2010**. The 2nd case relates to filing appeal after the statutory 30 days period and hence the appeal ought to be filed with the certificate of delay to confirm when the decree and/or order was issued and certified to justify filing appeal beyond 30 days. In the instant case the memorandum of appeal was filed within the statutory 30 days.

On the issue of compliance of filing the appeal within the requisite period; that is 30 days from the date of the issuance of decree and/or order by the Trial Court; the appeal in this case was filed within 30 days.

Secondly, the matter at hand was handled on behalf of the Appellant by different Counsel as confirmed by the record and it would be unfair and unjust to lock out the Appellant on right of appeal at the instance of Counsel ineptitude for delay in filing the decree and/or order being appealed against.

Thirdly, the Court erred as the matter was not listed for directions in terms of **Rule 11 & 12 of Order 42 Civil Procedure Rules 2010**; that upon the memorandum of appeal being filed within 30 days, the appeal be placed before the judge to consider/confirm compliance of **Section 79B Civil Procedure Act** and thereafter, if appeal is not dismissed, the registrar to notify and serve Respondent(s) within 7 days. Since this process was overlooked, it is difficult to hold the Appellant liable as the consideration and/or compliance with **Section 79B CPA** was not conducted at the appropriate stage.

Fourthly, the Court record confirms, after filing of appeal in September 2015, the file remained inactive until 2017 when new Counsel on record took over the matter. Hence the application for dismissal of appeal for want of prosecution was dismissed as both the Court and parties contributed to the delay of disposal of the appeal.

Fifthly, it is conceded and agreed that the Appellant failed to file certificate of delay as to the time the Copy of decree/ order was obtained from the Trial Court. The Appellant is granted leave to regularize the same promptly.

However, the issues outlined above do not merit dismissal of the appeal despite delay as the memorandum of appeal was filed within 30 days; Ruling of The Trial Court was on 11th September 2015 and memorandum of appeal was filed on 16th September 2015; in terms of **Order 42 (1) CPR 2010**, there is a valid and legal appeal on record. In terms of **Order 42 Rule (2) CPR 2010**, it is not mandatory that an appeal filed within the statutory period is struck out by virtue of incomplete record and/or delay of filing certified copy of decree and/or order; the Court may exercise judicial discretion and allow the party to file the same after the statutory period. No prejudice will be accensioned to any party as the parties have requisite time to familiarize with the matter and file and serve relevant documents.

DISPOSITION

- 1. The application filed on 18th July 2018 is dismissed and costs in the cause.**
- 2. The Appellant shall comply and avail certificate of delay for the certified decree and/or order within 30 days of this order**
- 3. There is a valid appeal on record for hearing and determination before any Court within Family Division.**

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21st JANUARY, 2019.

M. W. MUIGAI

JUDGE-FAMILY DIVISION

IN THE PRESENCE OF:

MS.THONGORI/MS LYNN NGANGA FOR APPELLANT

MS KAMAU HOLDING BRIEF MS.SHEILA SHEIK FOR RESPONDENT