REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 15 OF 2013

(FORMERLY EMBU APPEAL NO. 106 OF 2011)

NANCY WAMUNYU GICHOBI..... APPELLANT

V E R S U S

JANE WAWIRA GICHOBI..... RESPONDENT

JUDGMENT

This appeal arises from the decision of the Resident Magistrate Kerugoya in Civil Case No. 64 of 2007 which was delivered on 2/8/11. In a plaint amended on 12/3/2007 the Plaintiff Jane Wawira Gichobi was seeking payment of Kshs 41,000/- with interests at court rates and costs. The trial Magistrate entered Judgment in the sum of Kshs 20,000/- with no orders as to costs and ordered that interest be at court rates.

The Plaintiff was claiming that during the proceedings in Succession Cause No. 138 of 2000 she spent Kshs 40,000/- on behalf of the appellant (Nancy Wamuyu) computed as kshs 25,000/- as legal fees and Kshs 15,000/- as transport and subsistence. After the case was finalized the appellant refused to reimburse the said amount and she spent a further Kshs 1,000/- in sending a demand notice of intention to sue the appellant.

In the defence filed by the appellant on 10/5/10, she denied the claim by the respondent and reiterated that she (respondent) was the greatest beneficiary in Succession Cause No. 138/2000 and further that there was never an agreement in regard to Kshs 40,000/- alleged by the respondent.

This is the defence in the original file. The defence on the record of appeal Page 34 was not the appellants defence as it was a defence filed by the appellant in a related suit, Civil Suit No. 80/2011. The defence of the appellant does not form part of the record of appeal.

At the hearing, the respondent claimed that she spent Kshs.80,000/= on the succession proceedings and her two sisters were to refund her. Their other sister Mary Wanjiru paid her but the appellant did not. She confirmed having spent Kshs.20,000/= as legal fees and the rest on transport and subsistence. However, she had only duplicate receipts since she lost the original and did not have any receipt for Kshs.15,000/=. The appellant testified that she was not involved in the succession proceedings, she neither attended court nor went before an advocate. That the respondent never showed her any receipts or demanded from her.

Judgment was delivered on 02/08/2011 whereby the Court held that the respondent proved her case on balance of probabilities and that the appellant admitted that the respondent spent money in the succession cause because the petitioner had sold some property. Furthermore, she did not dispute some money must have been paid to the advocate and therefore judgment was entered for the respondent against the appellant in the sum of Kshs.20,000/=.

The appellant was dissatisfied with the Judgment and filed a Memoradum of Appeal on 2/9/2011 based on the following grounds:

1. The Learned trial Magistrate erred both in law and fact by giving Judgment as against the weight of evidence.

2. The Learned trial Magistrate erred in law and fact failing to find that the Appellant and Respondent had no any contractual agreement on payment of legal fees.

3. The Learned trial Magistrate erred in law and fact by failing to find that the Appellant was not a party to the protest that led to the accruing of legal fees.

4. The Learned trial Magistrate erred in law and fact by ordering the Appellant to pay the entire Advocate's fee yet the Appellant had not instructed the Advocate as per provision of the Succession Act Cap 160.

5. The Learned trial Magistrate erred in law and fact by failing to note that the receipts used as evidence were framed up as admitted by the Respondent in evidence.

6. The Learned trial Magistrate erred in law and fact by totally disregarding the Appellant's defence.

The parties took directions that the appeal proceeds by way of written Submissions. For the appellant, submissions were filed by Munene Muriuki & Co. Advocates while for the Respondent Magee Wa Magee & Co. Advocates filed submissions.

The appellant in the submissions addressed the grounds of Appeal. From the submissions by counsel for the respondent, two main issues were raised. I will deal with the issues first.

The first issue is:

The appeal was filed out of time.

The counsel for the Respondent submits that Judgment was

entered on 2/8/11. The date the Judgment was entered is excluded in computation of time. The month of August has 31 days and there were 29 days in August 2011. The appeal should have been filed on 1/9/2011 which was the 30th day after the date the Judgment was entered. The appeal was filed on 2/9/11 which was after the time for lodging the appeal had lapsed.

Section 79G of the Civil Procedure Rules provides:

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.

There was no application to file appeal out of time and no explanation was offered for the delay.

Order 50 Rule 8 of the Civil Procedure Rules provides:

In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.

Judgment having been delivered on 02/08/2011 computation starts on the following day Wednesday 03/08/2011 and the 30th day falls on Thursday 01/09/2011.

The memorandum of appeal was filed on 02/09/2011 which was the following day and as per the proceedings, the decree was available on 04/08/2011. No explanation has been forwarded by the appellant and he has also not applied for extension of time to appeal.

Where the law stipulates the time for doing something a party must comply. Failure to comply does not shut out a party as the party has the option to offer an explanation for the delay or to seek leave to file the appeal out of time. The appellant has not taken either of the options as he has not offered an explanation as to why the appeal was filed outside time nor has he applied for leave to file appeal out of time. An appeal filed out of time is incompetent and is not properly before the court. I find the appeal before court is incompetent and bad in law as it was filed out of time.

The second issue is that, ***the Decree appealed against is not included in the record of appeal.***

It is submitted that ***Order 21 Rule 7 of the Civil Procedure Rules*** provides that a decree shall contain the number of the suit, the names and description of parties and particulars of the claim and shall specify the relief granted or other determination of the suit. That failure to attach the decree appealled from is fatal. The Respondent relied on ***Municipal Council of Kitale –v- Fedha (12983) eKLR*** where the Court of Appeal held:

"the failure to include the decree appealed from in the record of appeal rendered the appeal incompetent. The omission could not be cured by including the decree in a supplementary record. A supplementary record cannot comprise documents which ought to be included in the original record of appeal (KIBORO –VERSUS- POSTS & TELECOM CORPORATION (1974)EA 155)".

In ***Paul Karenyi Leshuel –versus- Ephantus Kariithi Mwangi & Another (2015) eKLR*** , the court explained the essence of a decree thus,

"the Court of Appeal …. In Civil Appeal No. 7 of 1998, MUNICIPAL COUNCIL OF KITALE –VERSUS- FEDHA (1983) eKLR held that failure to include the decree appealed from in the record of appeal rendered the appeal incompetent ….. One may ask why so much importance is attached to this document: the answer appears to me that an appellate court can only uphold or overturn what has been demonstrated to exist …… much as this requirement is contained in the rules, it is not, in my humble

> ***view, a requirement that can merely be dismissed as a procedural technicality that maybe swept under the carpet; the question whether or not there is indeed an appeal which calls for the appellate court to exercise its jurisdiction in that respect goes to the root of the appeal itself for without an appeal, properly so called, any attempt to invoke and exercise that jurisdiction would be in vain."***

The record of Appeal has indeed not included the decree appealed against. It is an omission which goes to the substance of the appeal and the real issue in dispute and cannot therefore be wished away as a procedural requirement and therefore a technicality. The Court of Appeal has firmly stated that the issue of failure to attach the decree is a jurisdictional point. In the case of:-

Chege v Suleiman [1988] eKLR

The Court of Appeal held;

> **But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.**

I find that failure to include decree is fatal. The appeal is incompetent.

On the grounds, the appellant admitted during cross examination that she could not dispute that the respondent paid some money to the Advocate. The trial Magistrate found that the respondent produced receipts. Though the appellant submits tht they were duplicates, they were produced as exhibits without any objection. In the appellants submissions she is stating that what she could have paid was Kshs 26,000/-. The learned trial Magistrate entered judgment on what was proved on a balance of probabilities.

The case number 138/2000 was a Succession matter and though the appellant did not participate in the proceedings, she benefited as she was given 1/4/ (quarter) of an acre. It is expected that expenses were incurred in the litigation. The respondents submits that there was an oral agreement that her sisters would reimburse the expenses. There was no dispute that the other sister Mary Wanjiru paid her share of the expenses. The appellant has not proved that she paid anything even the Kshs 26,660/- which she submits is the amount she should have paid. The respondents claim was enforceable against her. The trial Magistrate found that Kshs 20,000/- was proved with receipts. The balance of the claim was rejected.

I find that considering the evidence tendered before the trial Magistrate, the respondent's claim was proved on a balance of probabilities. The appeal on the evidence is without merits.

For these reasons I find that the appeal is without merits and is also incompetent for being filed out of time and failure to comply with the mandatory requirement to attach the decree appealed against. I order that the appeal be dismissed.

Costs to the respondent.

Dated at Kerugoya this 14th Day of December 2018.

L. W. GITARI

JUDGE