REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 53 OF 2011

FREDRICK MWANGI NJUGUNA,……APPELLANT

VERSUS

EAST AFRICAN GROWERS LTD...……...……..RESPONDENT

(Being an appeal from the judgment and decree the Nyeri Chief Magistrates' Court Civil Suit No. 135 of 2009 (Hon. M. Nyakundi) dated 21st April, 2011)

JUDGMENT

The appellant sued the respondent in the subordinate court principally for special damages as a result of a road traffic accident that is alleged to have occurred on 24th March, 2006; according to the appellant's claim the accident involved his vehicle Registration No. KWC 929 (Mitsubishi Canter) and the respondent's vehicle registration number KAT 087 N (Mercedes Benz Lorry). The appellant's vehicle was as a result of the accident the appellant's vehicle was damaged and thus his suit against the respondent was essentially a material damage claim.

The respondent denied the appellant's claim and in a rather short judgment, the learned magistrate dismissed the appellant's suit because he could not prove the ownership of what he claimed to be his motor vehicle registration. It is against this judgment that the appellant. Ordinarily, it would have been ideal at this point to set forth the grounds upon which the appellant has faulted the learned magistrate's judgment and being the first appeal, it would also have been incumbent upon this court, exercising its appellate jurisdiction, to interrogate the evidence at the trial before coming to its own conclusions. It is unnecessary, however, to take this direction because as will be noted in due course the determination of this appeal, in my humble view, largely turns on a point of law.

The record shows that parties took directions on the hearing of the appeal before my predecessor in this matter Hon. Mr Justice Wakiaga on 11th July, 2014; they agreed to have the appeal disposed of by way of written submissions and on 17th February, 2015 counsel for the respondent informed the court that parties had complied with the court's directions and all he wanted was a date for judgment.

I have had occasion to consider the parties submissions; I have also considered the record of appeal and noted that there is one issue which parties seemed to have overlooked but which this court must consider in the determination of this appeal. Inspite of the parties' apparent silence, whether by design or by simply an involuntary omission, the question whether there is an appeal for consideration before the court can delve into its merits is a pertinent question that this court cannot turn its back to. It is a pertinent question because, without an appeal, properly so called, there is nothing for the court to determine and since it goes to this court's appellate jurisdiction, it can only be determined in limine or at the preliminary stage. Ideally, it should have been a point taken at the directions stage but there is nothing that stops this

court from addressing it in its penultimate decision. The answer to this question revolves around **section 79G** of the **Civil Procedure Act** and **Order 42 Rule 13(4) Rule 13(4)** of the **Civil Procedure Rules**.

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 looking at the appellant's record he tried as much as possible to file the requisite documents in compliance with that rule but, unfortunately, he 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** the omission of the decree appealed against from the record renders the appeal fatally defective. I have so held in several appeals where this question has arisen the most recent of which are **Murang'a High Court Civil Appeal No. 127 of 2013**, **Joseph Kamau Ndung'u & Another versus Peter Njuguna** and **Murang'a High Court Civil Appeal No. 91 of 2013 Milligan Heritage Ltd & Another**

At the risk of repeating myself I will adopt my reasoning in the judgment I have rendered in those cases in this judgment.

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 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.

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 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 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 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**.

There is no evidence in the appeal herein that the appellant ever applied for the decree; all I can see from the original record is a an undated handwritten letter addressed to the Deputy Registrar by counsel for the appellant asking for the copies of the proceedings and exhibits to enable counsel prepare for the record of appeal. Just as it was in the case of **Kyuma versus Kyema (supra)** the appellant only applied for and was dutifully supplied with the proceedings, including the judgment and copies of the exhibits. Without the decree, these documents were 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 appellants' appeal; it so struck out with costs.

Signed, dated and delivered in open court this 8th day of May, 2015

Ngaah Jairus

JUDGE