REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 10 OF 2012

JOMO KENYATTA FOUNDATION……...……..APPELLANT

VERSUS

JA (a minor suing through his next

friend and father JA)…….....…RESPONDENT

(Being an appeal from the judgment in Nyeri Chief Magistrates' Court Civil Suit No. 221 of 2010 (Hon. M. Nyakundi) dated 26th January, 2012)

JUDGMENT

The appellant was sued by the respondent in the subordinate court in a claim for both general and special damages arising from a road traffic accident that is said to have occurred on 16th June, 2009; in the plaint filed in court on 18th May, 2010 the respondent claimed that he was lawfully walking along Nyeri-Kiganjo road when the appellant's driver, agent, servant or employee drove its vehicle registered as **KAV 002 E** so "violently" that he knocked down the respondent thereby occasioning him serious bodily injuries. It was the respondent's case that the accident arose out of the appellant's driver's, servant's, employee's or agent's negligence and the appellant was vicariously liable.

The appellant denied the appellant's claim. At the conclusion of the trial the learned magistrate found for the respondent and awarded the sum of Kshs. 400,000/= in general damages and Kshs. 3000/= as special damages.

Being aggrieved by this decision the appellant has now appealed against it in this court on three grounds which are:-

1. That the learned trial magistrate erred in law in awarding judgment of Kshs. 400,000/= in general damages for injuries that do not deserve such a high award.
2. That the learned trial magistrate erred in law and fact in failing to consider sufficiently or at all the appellant's evidence and submissions as to the facts and the law placed before him.
3. The learned trial magistrate erred in law and fact in awarding the plaintiff a sum manifestly excessive in the circumstances.

This would have been an opportune point to navigate through the evidence at the trial and consider whether upon its fresh analysis and evaluation the learned magistrate arrived at the correct decision. It will, however, be an academic exercise to take that direction considering one fundamental legal issue raised by the respondent whose determination will settle this appeal.

In his written submissions in opposing this appeal, the learned counsel for the respondent has urged that the appeal as filed is bad in law because the record of appeal does not contain the decree appealed against; indeed there is nothing in the record to suggest that the decree was either applied for or extracted. The appellant did not address this particular issue in the submissions filed in its behalf but with or without its answer the questions still begs, whether in the absence of the decree appealed against there is an appeal or any valid appeal before court for determination.

I have chosen to determine this question *in limine* because whether there is or there is no appeal for the court's determination goes to the root of this court's appellate jurisdiction; simply stated that jurisdiction can only be properly invoked if there is valid appeal without which the invocation of that jurisdiction would be in vain. Ideally, this point ought to have been addressed at least at the directions stage, but apparently none of the parties raised it until the submissions were filed.

Whenever this question has arisen I have always looked to **section 79G** of the **Civil Procedure Act** and **Order 42 Rule 13(4) Rule 13(4)** of the **Civil Procedure Rules** for an appropriate answer. I have addressed it in several cases including **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** and I can do no better that reproduce here what I have thought is the correct position of law in those cases.

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 almost all the requisite documents were filed except 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.

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; as it was in the case of **Kyuma versus Kyema (supra)** so it is in this appeal, the appellant only obtained copies of the proceedings, the judgment and the exhibits. Without a copy of the decree amongst them these documents are inconsequential.

Considering the law I have 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