



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO.100 OF 2013

J M M.....APPELLANT

VERSUS

A N M.....RESPONDENT

JUDGMENT

(Being an appeal from the judgment in Murang'a Senior principal Magistrate's Court Civil Case No. 16 of 2009 (Hon. E.J. Osoro) delivered on 1st July, 2011)

The respondent filed a civil suit against the appellant in the magistrate's court seeking for, *inter alia*, an injunction stopping the appellant from conducting a statutory marriage mainly on the ground that his earlier customary marriage with her had not been dissolved. The appellant, on his part, opposed the suit and in his defence, he lodged a counter-claim seeking for the dissolution of the marriage between him and the respondent.

In her judgment, the learned magistrate upheld the respondent's claim but dismissed the appellant's counter-claim and held that the grounds for divorce had not been proved.

The appellant was dissatisfied with this judgment; he appealed against it and in a memorandum of appeal dated 19th October, 2011 he faulted the learned magistrate's decision on, amongst other grounds, that the judgment was against the weight of the evidence; that it was erroneous for the learned magistrate to hold that the appellant's witness was couched; and that the learned magistrate erred in holding that the acts of adultery and cruelty were not proved.

The appeal was admitted on 29th September, 2012 in the High Court at Nyeri before it was transferred to the High Court at Muranga for hearing and determination. Before the transfer, the parties counsel also took directions to the effect that the appeal be determined on the basis of written submissions and when they ultimately appeared before me on 18th March, 2014, they confirmed that the submissions had been filed and exchanged. On 4th June, 2014, they adopted those submissions as filed. I have read and considered the submissions, the record of appeal and the original record from the subordinate court.

Without going into the merits of the appeal, it would appear at outset that the appeal was improperly admitted; if the memorandum of appeal is dated 19th October, 2011 yet the judgment appealed against was delivered on 1st July, 2011, it is apparent that the appeal was filed out of time.

I have had the opportunity to peruse the record of appeal and the court record and I have not found anything that suggests that leave to file the appeal out of time was granted. It is therefore apparent that the purported appeal herein was filed contrary to **section 79G of the Civil Procedure Act, Cap 21** which states:-

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.

The appellant's appeal was filed way outside the thirty day period and as noted there is no evidence on record that the appellant had persuaded the court that before he filed this appeal, he had a good and a sufficient cause for not filing it in time.

Secondly and equally important, the decree appealed against is not part of the record of appeal; I have perused the lower court file and the appeal record and what I gather is that the decree was not even applied for.

Under **section 79G** an appeal from the subordinate court to the High Court is incompetent if the order or decree appealed against is not filed together with the appeal. I dealt with this question relatively extensively in my judgement in **Civil Appeal No. 127 of 2013, Joseph Kamau Ndung'u & Another versus Peter Kaunga Kamau**. I said of section 79G in that appeal:-

"I have carefully read the record of appeal and noted that the although appellants tried as much as possible to file the requisite documents in compliance with Order 42 Rule 13(4) of the Civil Procedure Rules, they 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 this omission 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."

To emphasise the importance of the decree or the order appealed against in an appeal to the High Court, I also made reference to **Order 42 rule 2 of the Civil Procedure Rules** which 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.

I was of the view in that appeal that 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. I therefore concluded that without the order or the decree appealed against, the appeal is incomplete.

Again **Order 42 Rule 13(4)** of the **Rules** is also clear 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).

Under this rule and more particularly **part f (ii)** thereof, although a 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.

The interpretation or application of these statutory and procedural provisions from the foregoing perspective was approved by the Court of Appeal 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).

The meaning of this is that whenever one intends to file an appeal under section 79G of the 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.**

As noted earlier in this judgment, there is no evidence in the appeal herein that the appellants ever applied for the decree. In the face of non-compliance with the mandatory statutory and procedural provisions, the appellant’s appeal is incompetent and of no consequence; it is hereby struck out with costs.

Signed, dated and delivered in open court this 6th day of October 2014

Ngaah Jairus

JUDGE