



**John v Kibwana (Civil Appeal 84 of 1995) [1996] KECA 212 (KLR) (19 January 1996) (Order)**

*Margaret M. John v David J. Kibwana [1996] eKLR*

Neutral citation: [1996] KECA 212 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 84 OF 1995  
AM COCKAR, CJ, RO KWACH & AB SHAH, JJA  
JANUARY 19, 1996**

**BETWEEN**

**MARGARET M JOHN ..... APPELLANT**

**AND**

**DAVID J KIBWANA ..... RESPONDENT**

*(Appeal from a ruling of the High Court of Kenya at Mombasa (Mr Justice ICC Wambilyangah) dated 21st September 1994 in P&A Cause No 258 of 1993)*

**ORDER**

1. Mr Kimani for the appellant after having made submissions for over a day has now applied to have his appeal marked withdrawn on certain terms after he realised that his appeal was incompetent because he had not obtained leave to appeal. His appeal had been filed against the dismissal by the High Court on 21<sup>st</sup> September, 1994, of his summons for revocation or annulment of grant filed under section 76 and rule 46 of the Law of Succession Act (cap 160 hereafter referred to as “the Act”).
2. It will be observed that section 50 of the Act has specifically provided for a right of appeal from any order or decree made by a resident magistrate to the High Court whose decision is final. There is no such specific grant of a right of appeal from a decision of a High Court to the Court of Appeal. However, section 47 of the Act which has given jurisdiction to the High Court to adjudicate on any matter under the Act reads as follows:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided ”
3. It is clear that the grant made to the respondent by the High Court was through proceedings initiated by way of a petition as provided in the rules of the Act. A final adjudication which had culminated in



- the making of the grant to the respondent was the decree of the court. The application to annul the grant was a part of the same proceedings but its dismissal was not a decree but an order.
4. The right of appeal to the Court of Appeal from any decree or order of the High Court granted under section 66 of the Civil Procedure Act (cap 21 - hereafter referred to as CP Act) has in respect of orders as against decrees been limited in certain ways by section 75 of the Civil Procedure Act. Section 75(1) (h) (order 42 of Civil Procedure Rules) has provided for appeal by way of right and also where needed, with leave of court from any order made under Civil Procedure Rules.
  5. In the Court of Appeal decision in *Commission of Income Tax v Ramesh K Mennon* (1982-88) - 1 KAR p 695 Hancox JA (as he then was) held the use of the word “decree” in the relevant section of the Income Tax Act to mean that the wording of section 87(3) of the Income Tax Act which provided that an order of the High Court on appeal shall “have effect .. as decree” was conclusive and such an order was therefore appealable to the Court of Appeal as of right under section 66 of the Civil Procedure Act. We respectfully agree with that view entirely and in the same token accept that finding as an authority that the use of the word decree in section 47 of the Act has made the decision of the High Court appealable by way of right.
  6. The position here, however, is that the appeal is from an order and not a decree. But in our view the use of the two words “decrees” and “orders” in section 47 of the Act is significant. Had a word such as “decision” or “adjudication” been used in place of these two distinct words then clearly the High Court’s decision or adjudication would have been non-appealable altogether. The effect to the use of the word “decree”, as Hancox JA (as he then was) very correctly pointed out in the Income Tax decision (*supra*), was that the decision of the High Court was appealable as of right under section 66 of the Civil Procedure Act. But provision of appeals by way of right in respect of orders in section 66 has been made subject to “where otherwise expressly provided in the Act” (Civil Procedure Act). As we stated earlier section 75 of the Act has clearly defined the orders where an appeal lies by way of right. The order of dismissal made by the High Court in this matter does not fall under any of these. The term “order” having been specifically used together with the term “decree” is conclusive that an appeal from this order of dismissal lies not by way of right but with leave of court only. Mr Kimani as we stated earlier, did realise during his submission that his appeal was incompetent and he applied for the appeal to be withdrawn. An incompetent appeal cannot be withdrawn. It must be struck out.
  7. Mr Kimani has asked for an extension of time to be granted to file a fresh appeal under the Court of Appeal Rules. That can be dealt with by a single judge only.
  8. Mr Kimani wanted no order to be made with regard to costs. After having gone through the record and the way Mrs Ali had submitted before the High Court on the question of jurisdiction regarding the appeal we are satisfied that she is entitled to costs. This appeal is now struck out with costs awarded to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY, 1996.**

**A.M COCKAR CJ**

.....

**JUDGE OF APPEAL**

**R.O KWACH**

.....

**JUDGE OF APPEAL**



**A.B SHAH**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

