IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Apaloo JJA & Kwach Ag JA)

CIVIL APPEAL NO 16 OF 1988

Between

GREGORY KIEMA KYUMA .....APPELLANT

AND

MARIETTA SYOKAU KIEMA.....RESPONDENT

(Appeal from a Ruling of the High Court at Nairobi, Shields J)

JUDGMENT

November 17, 1988, **Apaloo JA** delivered the following Judgment.

The important question raised for determination in this appeal, is whether the memorandum of appeal filed by the appellant on the 29th April 1987, set on foot a competent appeal from the Magistrate's judgement of the 5th December 1986 to the High Court.

To determine this purely legal question, it is necessary to relate the relevant facts. On the 6th June 1986, the respondent who is the lawful wife of the appellant, brought a complaint against her husband for legal custody of such children of the marriage as were less than 16 years of age and an order for their maintenance. These orders were sought in the Magistrate's Court. The appellant resisted the complaint and both parties led evidence before the Court. On the 5th December 1986, the Magistrate delivered judgement and declared "that the parties are no longer bound to cohabit". He also made the custody order sought by the respondent and the order for maintenance.

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. That means, on or by the 5th January 1987. This period may be extended provided he obtained from the Magistrate's Court a certificate of delay within the meaning of section 79 G 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 on a date 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. Instead of applying for the copy of the order, the appellant, acting through his advocate by a letter dated 5th January 1986, applied for "a certified copy of the proceedings and judgement/orders". Although the appellant's advocate's letter of application bore the date "5th January 1986", that date must by a typographical error. The letter was apparently written one month after the delivery of judgement which was on the 5th December 1986. So the correct date of that letter was 5th

January 1987.

Had the appellant applied only for the formal order of the Court, he would have received it on the 27th January 1987 – that being the date on which it was signed. But the certified copy of the proceedings and judgment for which he applied, were not ready till the 2nd April 1987. So he was given a certificate of delay which certifies that the time required for preparing "the proceedings and judgment was 5th January 1987 to 2nd April 1987". He filed his appeal on the 29th April 1987 that is within 27 days from the date of receiving the proceedings. If this was a valid certificate of delay and the one contemplated by section 79G of Act 21, then he filed his appeal within time. The learned judge held that was not the certificate of delay contemplated by section 79G. The learned Judge was right, it has very serious consequence for the appellant.

Mr. Ogutu the appellant's then advocate, must have realized at sometime prior to the 24th April 1987, that that was not the right certificate. So on that day, that is, the 24th April 1987, he applied to the High Court for extension of time of file the appeal. This would not have been necessary if the certificate of delay was the valid one. This matter came before Shields J. The learned Judge had a discretion conferred by the proviso to section 79 G to admit the appeal out of time for good and sufficient cause. The Court exercised its discretion in the appellant's favour on terms, namely, that extension of time was to be granted to the appellant up to the 14th May 1987 on condition that the sum of 25,000/- was paid into Court on or before the 12th May 1987. It is common ground that no part of that sum was lodged into Court then or since.

So on the 14th May 1987, Counsel for the respondent returned to the Court and informed the Judge that the condition for the extension of time namely, the payment of the 25,000/- into Court was not fulfilled. So he invited the Judge to strike out the appeal. The learned Judge agreed and noted as follows:-

> "I strike out the appeal".

He awarded costs to the respondent. There can be no doubt whatsoever that the appeal the Judge had in mind was the one lodged by the appellant on the 29th April 1987 and which bore the High Court number 104 of 1987. And it seems clear that the reason for striking it out, was the appellant's failure to fulfil the condition of paying 25,000/- on or before the 12th May 1987.

At sometime which is not too clear on the evidence, the appellant changed his advocate. He briefed Mr. Mureithi. In execution of the Magistrate's orders, the appellant's properties were attached and in order to stop the attachment pending the determination of what the appellant believed to be the appeal to the High Court, the appellant, by Counsel, applied to the Court for an injunction. Mr. Mureithi took the view that as the appeal was filed on the 29th April 1987, that is 27 days from the date of the certificate of delay, it was filed within time. He thought Mr. Ogutu's application to the Court to obtain extension of time, which resulted in a somewhat onerous conditional grant, was superfluous and therefore had no legal consequence. As he put it in ground 3 of the memorandum of appeal:-

> "The learned Judge failed to appreciate that the proceedings before him in Misc. Case No. 186 of 1987 were superfluous and quite unnecessary as High Court Appeal No. 104 of 1987 had been filed within time as per the certificated of delay dated 2nd April 1987 issued by the Senior Resident Magistrate at Sheria House, Nairobi."

I think that if Appeal No. 104 was filed within the true meaning of section 79 G of Act 21, then Mr. Mureithi's view of the matter would be right. The appellant could safely ignore the conditional extension of time to appeal as superfluous. 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 section contemplates that the appeal is against a decree or order, the appellant is obliged to file 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 1 A of Order 41 permits this latter document to be filed "as soon as possible and in any event within

such time as the Court may order". Therefore a certificate of delay within the true intendment of section 79 G 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".

The upshot of this, was that the appellant did not file a memorandum of appeal from the order appealed from within thirty days and had no valid certificate of delay within the true contemplation of section 79G. So he cannot appeal as of right, not having complied with the strict requirement of section 79G. He could only set on foot a competent appeal by the grace of the Court if the Court in exercise of its discretion, under the provison granted him extension of time. I think therefore the extension sought by Mr. Ogutu was not superfluous. It was absolutely necessary if the appeal was to be prosecuted within the time limited by section 79 G. And it cannot be gainsaid that in exercising his discretion, the Judge is entitled to do so on terms. It is common ground that the condition imposed by the Judge was not fulfilled. In those circumstances, the learned Judge was entitled to strike out the appeal.

In holding that there was no pending appeal before him on which to base jurisdiction to grant interim injunction, the Judge said of the certificate of delay:

> "This certificate however relates to the time for "the preparation of certified copies of proceedings and judgment" and not "for the preparation and delivery to the applicant of a copy of the decree or order". From this, the Judge concluded that; "The certificate accordingly does not exclude the period 5th January 1987 to 2nd April, 1987 from the period of 30 days allowed for filing of an appeal. The appeal accordingly was late or out of time."

I think, with respect, that holding was right. In the events which have happened, the only permissible method by which the appeal could be prosecuted, was by extension of time allowed by the Court and this was granted on a condition which the appellant failed to meet. In the circumstances, the learned Judge was entitled to hold that the appeal was incompetent and was right in striking it out. If there was no pending appeal, there could be no jurisdiction to grant interim injunction. So the learned Judge's holding on that score cannot be faulted.

Although I was at first inclined to think differently, on reflection, having considered the true requirement of section 79G of the Civil Procedure Act and scrutinized the relevant original documents, including the terms of the certificate of delay sought from the Magistrate's Court and the one granted by that Court, I have come to the conclusion that the ruling appealed from was right and ought not to be disturbed.

I cannot help feeling some sympathy for the appellant who was driven from the judgement seat without a hearing on the merits. But my sympathy is no substitute for the law. As is well-known, an appeal is a creature of statute and any person desirous of exercising that right must bring himself squarely within the four corners of the substantive and procedural legislation. My conclusion therefore is, that this appeal fails and should be dismissed with costs.

Gachuhi JA. I have had the advantage of reading the judgements prepared by Apaloo JA and Kwach Ag JA.

I would and that in matrimonial cases, there is no decree drawn but orders. The appeal was to be filed against the order drawn and signed on 27th January 1987.

The certificate envisaged by Section 79G of the Civil Procedure Act (Cap 21) was to cover the period 11th December 1986, the date of the maintenance order and 27th January 1987 when the said order was signed.

If such certificate was applied for and obtained, then the appellant was to file his appeal on or before 26th February 1987. The certificate relied upon by the appellant is not provided for in the Act or in the Rules.

In my view, Mr. Ogutu rightly applied for leave to file the appeal out of time on 6th April 1987 which was rightly granted on condition. The Judge exercised his discretion judicially. This appeal does not comply with the provision of the law and it should be dismissed with costs. As Apaloo JA and Kwach Ag JA also agrees, the order of the Court will therefore be that this appeal is dismissed with costs.

Kwach Ag JA. This appeal raises a point of general importance. It concerns the procedure for filing appeals from the orders and decrees of the subordinate Courts to the High Court.

The parties to this appeal are husband and wife. The original proceedings started in the Resident Magistrate's Court, Sheria House, Nairobi, where Marietta Syokau Kiema (the respondent) filed a maintenance cause against Gregory Kiema Kyuma, the respondent, seeking orders of noncohabitation, custody of the children of the marriage and maintenance for herself. Judgment was given in favour of the respondent on 5th December, 1986 but the final orders for maintenance were not made until 11th December, 1986. The appellant felt aggrieved by this decision and decided to appeal to the High Court. His memorandum of appeal was filed in the Court registry on 29th April, 1987.

The right of appeal from a subordinate Court to the High Court is conferred by section 65 of the Civil Procedure Act (Cap 21) which provides:

> "65(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court.
>
> (b) from any original decree or part of a decree of a subordinate Court, other than a magistrate's Court of the third class, on a question of law or fact."

The time for filing appeals is governed by section 79G of the Acts which provides:

> "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 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." (Italics added).

The appeal is to be in the form of a memorandum of appeal signed in the same manner as a pleading (see 0.41 r 1(1)). It is not necessary to file a certified copy of the decree or order appealed against simultaneously with the memorandum of appeal. These can be filed as soon as possible or within such time as the Court may order. (See 0.41 4.1A.)

Before filing his appeal in the High Court, the appellant by his Advocates applied for a certificate of delay which the Senior Resident Magistrate issued and signed on the 2nd April, 1987. The certificate so far as is material was in the following form:

"CERTIFICATE OF DELAY

This is to certify that Ms Ogutu Wariuki and Company Advocates for the respondent applied for certified copies of ***proceedings*** and ***judgment*** on 5thJanuary, 1987 and the same were made available to them on 2nd April, 1987.

The time between that of application and receipt was the time required for preparation of ***proceedings*** and ***judgment***" (Italics mine).

After receiving this certificate and before filing the appeal Mr. Onyango Ogutu who was then acting for the appellant applied to the Judge for an extension of time to file the appeal. Looking at that certificate against the express provisions of section 79G of the Civil Procedure Act it must have occurred to him that

this certificate was of very doubtful validity. So he made the application for extension in order to hedge his bet so to speak. The application came before the Judge on 24th April, 1987, and in exercise of his discretion the learned Judge granted leave to file the appeal out of time but on terms. The appellant was given up to 14th May, 1987 to file his appeal if he paid Shs. 25,000/- into Court by 12th May, 1987.

The appellant most probably acting on advice ignored the order made by the Judge on 14th April, 1987 and did not deposit the amount ordered to be paid into Court. He instead instructed a new Advocate who went ahead and filed a memorandum of appeal on the 29th April, 1987 disregarding completely the order of 14th April, 1987. For some reason the matter came before the Judge again on 22nd May, 1987, when Mr. Morgan, the learned Counsel for the respondent, complained to the judge that an appeal had been filed without money being paid into Court as previously ordered. The Judge straightaway ordered the appeal struck out with costs to the respondent. A second application for extension was made by Mr Mureithi which culminated in the ruling given on 14th August, 1987 dismissing the same with costs and giving rise to this appeal.

It was in his ruling of 14th August, 1987 that the learned Judge held that the certificate of delay did not exclude the period from 5th January, 1987 to 2nd April, 1987 from the period of 30 days allowed under the Act for filing an appeal. And Mr Mureithi thought and submitted before us that the learned Judge was wrong in taking this view. This submission in my judgment is not sustainable on a proper construction of Section 79G of the Act.

A certificate of delay issued in accordance with the terms of that section covers only the period requisite for the preparation and delivery to the appellant of a copy of the decree or order appealed against. It does not and cannot be used to cover a period, as is suggested in the certificate, which may be required to obtain copies of proceedings and judgment. So the certificate of delay filed and relied upon by the appellant was absolutely worthless ad totally incapable of remedying the delay that had occurred. It must follow from this that the appellant's appeal No. 104 of 1987 filed on 29th April, 1987 was hopelessly out of time and consequently incompetent.

I must confess that in the course of arguments I wavered slightly but having had the benefit of subsequent reflection, I am more than convinced that Mr. Mureithi's submission cannot possibly be right and that the learned Judge's decision was correct. The conclusion I have arrived at removes the central plank of the appellant's appeal which inevitably collapses and should be dismissed with costs.

Dated and delivered at Nairobi this 17th day of November, 1988.

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

R.O KWACH

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AG.JUDGE OF APPEAL

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

DEPUTY REGISTRAR