REPUBLIC OF KENYA
IN THE HUIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. E164 OF 2024

PLATINUM CREDIT LIMITED……..….APPELLANT
-VERSUS-
STEPHEN MUTHOKA MALIA…….RESPONDENT

JUDGMENT

1. This appeal arises from the ruling and order given on 13 June 2024 in Small Claims Case No. E330 of 2024 (Hon. Gatambia, Resident Magistrate).
2. In a statement of claim dated 12 April 2024, the respondent made a liquidated claim for the sum of Kshs. 402,594/= against the appellant. The appellant neither entered appearance nor filed a defence against the claim and, therefore, on 30 April 2024 judgment was entered in default of defence.
3. By a motion dated 2 May 2024, the applicant applied to set aside the judgment; to be precise, the order sought, material to this appeal was in the following terms:

> ***"3.That this Honorable court be pleased to set aside the interlocutory judgment entered herein in favour of the Claimant against the Respondent/ Applicant, in default of filing a Response, together with all consequential proceedings thereon, pursuant to the said interlocutory judgment, and the Respondent be granted 7 days to file a Response to the Statement of Claim."***

4. The application was based on the grounds that when judgment was entered against the appellant on 30 April 2024, the appellant's counsel on record had just been instructed to appear for the appellant. However, she could not log onto the virtual platform on the material day because she was allegedly not admitted to the platform by the court. Later, in the course of the day, she learned that judgment had been entered against her client. The learned counsel also disputed service of the claim upon her client because the claimant who served the claim was not a licensed process server.
5. By his ruling dated 13 June 2024, the learned magistrate dismissed the application. The appellant was aggrieved by this decision hence the instant appeal. In the memorandum of appeal dated 13 June 2024, the appellant has raised the following grounds against the magistrate's decision:

> ***"1.That the learned trial magistrate erred in law in finding that the judgment entered in default of a Response was regular when the same was anchored on service upon the Appellant which was improper, as it was undertaken by email by the Respondent himself who is neither a process server nor an officer of the court and hence the judgment entered on 30th April 2024 against the Appellant ought to have been set aside.***

2. That the learned trial magistrate erred in law in finding that the service upon the Appellant was proper yet it was in open contravention of Rule 35 (5) of the Small Claims Court Rules requiring service on a corporation to be undertaken upon it at its registered office, or by delivering a copy of the pleadings upon a principal officer of the corporation, and hence the purported service upon the Appellant by email was improper.

3.That the learned trial magistrate wrongly exercised his discretion in declining to set aside the interlocutory judgment entered on 30th April 2024, and in finding that the reasons advanced by the Appellant's counsel and in particular, the failure to be admitted into court was not a valid reason when the Appellant's counsel presented cogent proof that she had attempted to join the court session and had followed up on her admission with persons who she knew were employees of this court.

4. That in any event, and without prejudice to the above, the learned magistrate wrongly exercised his discretion in visiting the failure of the Appellant's counsel to be present in court, on the Appellant, for not fault of its own, thereby causing a grave injustice.

5. That the learned trial magistrate wrongly exercised his discretion in finding that the Response to the Statement of Claim filed by the Appellant contained mere denials, when the Appellant had explained at paragraph 3 thereof, the circumstances under which the interest rate for the loan advanced to the Respondent rose, which was due to the non-payment of the loan in the manner agreed by the parties, and in addition, that the Appellant had raised a preliminary objection on the territorial jurisdiction of the court to hear the matter, when the contract was entered into in Machakos County, where the Respondent had walked into, and applied for a loan in writing and his account was based thereat, and further, he had indicated his address to be Machakos County/Mwingi, and had indicated the Respondent's address as Nairobi County, hence the court was divested of jurisdiction to hear the matter, thereby falling into error.

6. That the learned trial magistrate erred in law in adopting an unknown procedure in law by going against his own directions of 6th April 2024 where he directed the Respondent to respond to the Appellant's application orally, and thereafter directed parties to file written submissions within 24 hours, with the Appellant

going first, and on the other hand, in his ruling, considered the contents of the Replying Affidavit filed by the Respondent after the Appellant had filed and served its written submissions thereby prejudicing the Appellant who had no further opportunity to file any additional documents/submissions to address the issues raised in the said Reply, thereby violating the Appellant's right to a fair hearing."

6. Based on these grounds, the appellant prays that the appeal be allowed and the order dismissing the appellant's motion dated 2 May 2024 be set aside and be substituted with the order allowing the application. The appellant has also asked for the costs of the application.
7. I note that although the appellant has appealed against the ruling and order given on 13 June 2024, that order was neither applied for nor extracted; certainly, it is not part of the record of appeal.
8. Absence of a decree or order appealed from in an appeal to this Honourable Court from the subordinate court is a question that the court has been confronted with from time to time. My answer has always been that an appeal without a decree or order appealed from is fatally defective. I hold the view that without these documents, the court's appellate jurisdiction is not properly invoked.

9. At the risk of repeating myself, I held in **Lawrence Nguthiru Riccardahw v George Ndirangu (2015)KEHC 771 (KLR)** that whenever this Honourable Court is called upon to consider an appeal from a decision of a subordinate court, it only does so in exercise of its appellate jurisdiction and that it cannot assume such jurisdiction and determine the appeal on merit if such an appeal does not exist in the first place. A question of jurisdiction is determined *in limine.*
10. It has been held in **Owners of the Motor Vessel "Lillian SS" versus Caltex Oil (Kenya) Ltd 1989 KLR 1** at pages 14 and 15 that the question of jurisdiction may be raised by the court on its on motion or by any party to the proceedings and, whenever it is raised, the question must be determined at the earliest opportunity possible.
11. As noted earlier, the order appealed against was neither applied for nor extracted and, therefore, it is not part of the record. The only question to consider at this stage is whether, in the absence of a certified copy of the order, there is a proper appeal before this court. The question is not far-fetched and as the following provisions in the Civil Procedure Act and Rules show, it is a pertinent and a relevant question to consider in any appeal coming before this court against a decision made in the subordinate court.
12. To begin with **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.

13. It is apparent here 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 appealed against could not, for one reason or another, be secured within the period which an appeal ought to be filed. It, therefore, follows that the preparation and delivery of the decree or order for the purpose prescribed in **section 79G** of the Act is a mandatory condition precedent to the institution of any or any valid appeal in the High Court against a decision of the subordinate court.

14. 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.***

15. 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 such a 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, therefore, be reasonable to conclude that in view of section **79 G** of the Act as read with **Order 42 rule 2** of the Civil Procedure Rules, an appeal lodged in the High Court against a decision of the subordinate court is incomplete without the order or the decree appealed against.

16. This point is taken up 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 as follows:-

> ***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).

17. 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 be included in 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.

18. 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 quite apt on this question is the Court of Appeal 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.

19. 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** that:-

> ***"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, <u>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."</u> (Underlining mine).

20. 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 from 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 it be found that his appeal can only 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. <u>Rule 1A of Order 41 permits this latter document to be filed as soon "as possible and in any event</u>

> ***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”.***

21. **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**.

22. There is no evidence in this appeal that the appellant ever applied for the order; 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 and the ruling. Without a copy of the order amongst them, these documents and the record in which they are filed are of no consequence.

23. Lest we forget, it must be noted that the requirement of a certified copy of the decree or order appealed against is not merely a procedural requirement that can be overlooked and dismissed as a peripheral procedural technicality; it is a requirement that is rooted in a statutory provision of the Civil Procedure Act and which, as noted, goes to the appellate jurisdiction of this court. It has been held **Owners of the Motor**

Vessel "Lillian SS" versus Caltex Oil (Kenya) Ltd 1989 KLR 1 at page 14 that jurisdiction is everything and without it the court has no power to make one more step. Without it there would be no basis for continuation of the proceedings in which event the court has to down its tools in respect of the matter the moment it holds that it is deficient of jurisdiction.

24. Against the foregoing legal background, I am persuaded the appellant's appeal is incompetent and fatally so; I hereby strike it out with costs to the respondent. It is so ordered.

Signed, dated and delivered on 13 March 2026

Ngaah Jairus
JUDGE