



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 62 OF 2019**

**JUMBO FOAM MATTRESSES**

**INDUSTRIES LIMITED.....APPELLANT**

**VERSUS**

**FIRST COMMUNITY BANK LIMITED.....RESPONDENT**

***[Being an appeal from the judgment and decree of Hon. W. K. Onkunya (SRM) delivered on the 5<sup>th</sup> day of April 2019 in the original KISUMU CMCC No. 36 of 2017]***

**RULING**

This Ruling is on the Preliminary Objection dated 18<sup>th</sup> November 2020. The said Objection was raised by the Respondent, who called upon the Court to have “struck out and dismissed with costs”, the Appeal herein.

1. The Objection was in the following terms;

***“1. THAT the Appellant’s Appeal contravenes Rule 42 of the Civil Procedure Rules, 2010, in that no Judgement and decree appealed from has been extracted or annexed in the Appeal.***

***2. THAT the Appellant’s Appeal is defective in form and substance and to-date there is no proper appeal filed before the Court.***

***3. THAT the Plaintiff’s Appeal is fatally and incurably defective, bad in law and otherwise an abuse of the court’s process and should therefore be struck out and dismissed with costs.”***

2. Pursuant to **Order 42 Rule 13 (4)** of the **Civil Procedure Rules**, which provides for “*Directions before Hearing*”, it is stated that before, the Judge can allow the appeal to proceed for hearing, he shall be satisfied that, inter alia;

***“(f) the judgement, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal,”***

are on the court record.

3. In this case, a perusal of the record of appeal reveals that a certified copy of the judgment is on the court record.

4. However, there is no extracted Decree on the record.

5. The Respondent told the court that the Judgment on the record was defective because it was neither signed, sealed, dated nor certified by the learned trial magistrate.

6. By dint of the provisions of **Order 21 Rule 3** of the **Civil Procedure Rules**, a Judgment pronounced by the Judge who wrote it, shall be dated and signed by him at the time of pronouncing it.

7. I have perused the original court file from the trial court, and the Judgment was definitely dated and signed.

8. Secondly, the copy of the Judgment which is part of the Supplementary Record of Appeal is duly certified.

9. As far as the Appellant was concerned, there was no legal requirement that the appeal be prepared in a certain manner.
10. It is the understanding of the Appellant that it was only with respect to appeals to either the Court of Appeal or the Supreme Court that records of appeal had to be prepared in a certain manner.
11. The Appellant submitted that for purposes of an appeal to the High Court, all that was required was the record of the lower court and a memorandum of appeal. However, the Appellant failed to specify the basis for that contention.
12. It is noteworthy that the provisions of **Section 1 (2)** of the **Civil Procedure Act** make it clear that;

*“This Act applies to proceedings in the High Court and, subject to the Magistrate’s Courts Act, to proceedings in subordinate courts.”*

13. Pursuant to **Section 2** of the Act, reference to the “Act” includes the Rules.
14. And **Section 2** further reiterates that in this statute, the word “court” means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.
15. In the circumstances, as **Order 42** is within the statute, it is applicable to the High Court.
16. **Order 42 Rule 2** stipulates thus;

*“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 time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.”*

17. The obligation to file a certified copy of the decree vests upon the Appellant. And the responsibility of the Judge is to satisfy himself that the documents set out in **Order 42 Rule 13** of the **Civil Procedure Rules** are on the court record.
18. Nonetheless, the Appellant drew attention to the provisions of **Section 2** of the **Civil Procedure Code**, whose proviso reads as follows;

*“Provided that, for the purposes of appeal, ‘decree’ includes judgement and a judgement shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgement may not have been drawn up or may not be capable of being drawn up.”*

19. In my understanding of the proviso, an aggrieved person who wishes to lodge an appeal, may commence the process before a formal decree had been drawn up or even if a formal decree was incapable of being drawn up.
20. However, before the High Court can allow the appeal to go to hearing, it is required to satisfy itself that the decree, amongst other documents was on the court records.
21. It is noted that whereas the Appellant appears to suggest that a Judgment is synonymous with a Decree, for the purposes of an appeal, the Appellant’s Memorandum of Appeal and also the Supplementary Record of Appeal expressly state that the appeal was against the

*“Judgement and Decree.”*

22. There would have been no need for the Appellant to make reference to both the Judgment and the Decree if they were synonymous.
23. And a party who was appealing to the High Court cannot abdicate the responsibility of making available the documents listed in **Order 42 Rule 13** of the **Civil Procedure Rules**. Once the Appellant has provided the said documents, the Judge has the task of ascertaining that the requisite documents are on the record.
24. I have perused the record and found that the decree is not within it.
25. The question is whether or not I should now proceed to strike out or to dismiss the appeal.
26. The Appellant made the following submission about the provisions of **Order 42 Rule 13 (4)**;

*“The language in the said provision is that before allowing the appeal to proceed to hearing the court shall be satisfied that the documents are on record. The consequence of the documents not being part of the record is not that the appeal will be dismissed.*

*The consequence is that the court will not allow the appeal to proceed without the listed documents.”*

27. I am in agreement with the Appellant in that respect, and I therefore direct that the Appellant shall file and serve the Decree within the

next fourteen (14) days from the date of this Ruling.

**28.** Although the Court has neither dismissed nor struck out the appeal, I have directed the Appellant to take the necessary step prior to the court giving directions for the hearing of the appeal. As the said directions have been prompted by the Preliminary Objection raised by the Respondent, I award the costs of the said Preliminary Objection, to the Respondent.

**DATED, SIGNED and DELIVERED at KISUMU**

This **20<sup>th</sup>** day of **May** 2021

**FRED A. OCHIENG**

**JUDGE**