



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CIVIL APPEAL 39 OF 2005**

**ALEX GICHUA MWATHA.....APPELLANT**

**VERSUS**

**JEREMIAH MURIUKI GATHIMBA..... RESPONDENT**

*(Being an appeal from the Order of B.A. OJOO Resident Magistrate in Civil Case No. 6 of 2005 at Baricho on 26<sup>th</sup> May 2005)*

**J U D G M E N T**

The Appeal is against the Order of the Resident Magistrate Baricho on 26<sup>th</sup> May, 2005 in Civil Case No. 6/2005 in which she struck out the Appellant's suit for lack of *locus standi*. He filed six grounds of appeal. Both counsels filed written submissions by consent. I have considered the said submissions.

Mr. Maina Kagio for the Respondent has raised 2 issues about the competence of this appeal. The two issues are:-

- 1. No leave to appeal was sought hence contravening the provisions of Order 43 Rule 1 of the Civil Procedure Rules.**
- 2. There was no extracted order of the Ruling appealed against.**

These two issues should be dealt with first. Under Order 423 Rule 1 of the Civil Procedure Rules are outlined in the orders from which an Appeal lies as a right. Orders arising from Preliminary objections are not among them. They fall under Order 43 Rule 2 of the Civil Procedure Rules where the leave of the Court must be sought. There is no evidence from the record to show that leave to appeal was even sought. And the appeal having been filed without leave has no foundation and must fail.

The record does not contain any extracted order from the Ruling appealed from. Order 42 Rule 2 of the Civil Procedure Rule provides:-

***“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.”***

This provision stresses the importance of the decree/order which should be certified in forming part of the record. The Court of Appeal held in the case of ***CHRISTOPHER AJOWI OBIERO VS PATROBA KIRA OKOTH & OTHERS IN CIVIL APPEAL NO. 340/2000 ON 28/11/2002 UR*** – that:-

***“The failure to incorporate a certified copy of the order in the record of appeal renders the appeal incompetent”.***

I am also guided by the same finding by Hon. Lady Justice W. Karanja in ***ANTHONY KANYI MATHENGE VS EPHREM GITARI & ANOTHER – EMBU HCCA NO. 43/2002.***

For the two reasons above I find that there is no competent appeal before me. I strike it out with costs.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 19<sup>TH</sup> DAY OF JULY 2012.**

**H.I. ONG’UDI**

**JUDGE**

**In the presence of:-**

**Mr. Maina Kagio for Respondent**

**Respondent present**

**Nancy CC**