



**REPUBLIC OF KENYA**

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

**Civil Appeal 18 of 2002**

**DAVID MUTUKU SILU.....APPELLANT**

**VERSUS**

**KYANA THUKA.....RESPONDENT**

**R U L I N G**

1. When this appeal came up for hearing on 8<sup>th</sup> July 2010 the issue arose whether or not the record of appeal filed by the Appellant was complete without a certified copy of the decree appealed against as appeared to be required by **Order XLI, rule 1A** of the **Civil Procedure Rules** (the **Rules**) then in place. That rule provided -

**“1A. 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.”**

2. **“Decree”** is defined in **section 2** of the **Civil Procedure Act, Cap 21** (the **Act**) as follows-

**“decree”** means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within **section 34** or **section 91**, but does not include-

**(a) any adjudication from which an appeal lies as an appeal from an order; or**

**(b) any order of dismissal for default;**

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

3. So, in an appeal, as long as a copy of the judgment is part of the record of appeal the same will be deemed to be a decree, and the same is appealable notwithstanding that a formal decree in pursuance of such judgment may not have been drawn up and issued, or may in fact not be capable of being drawn up.

4. It will also be noted that before the Court gives directions for hearing an appeal the entire record of the lower court will be before it and will no doubt contain the original judgment or ruling.

5. In these circumstances, the requirement of Order XLI, rule 1A of the Rules is a mere technicality which should not be allowed to get in the way of the main object of the Act and the Rules as set out in sections 1A and 1B of the Act. I therefore hold that it is not necessary for the record of appeal to contain a certified copy of decree or order appealed against, as long as the judgment or ruling forms part of the record of appeal. It is so ordered.

6. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF SEPTEMBER 2012**

**H. P. G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

**JUDGE**