



No. 349

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 55 OF 2010

JOHN MASESE MOGOI..... 1st APPELLANT
NELSON ASIANGO MOGOI2nd APPELLANT

-VERSUS-

HELLEN NYABOKE ONDIEKI1st
RESPONDENT

CHAMPION AYORA KIBOTO.....2nd RESPONDENT

JUDGMENT

(Being an appeal from the Ruling of Hon. G. H Oduor SRM Kisii in Misc. App. No. 141 of 2008 dated on the 4th March, 2010).

This appeal is incompetent. The appeal as indicated in the record of appeal is against ***“The ruling of Hon. G. H. Oduor SRM Kisii in Misc. Application (sic) No. 141 of 2008 dated on 4th March, 2010”***.

Previously appeals to this court were provided for under section 79G of the **Civil Procedure Act** and Order XLI of the **Civil Procedure Rules**. This was when the previous **Civil Procedure Act** and rules made thereunder held sway. However that **Civil Procedure Act** and in particular the rules made thereunder have since been replaced by the current **Civil Procedure Rules** vide legal notice number 151

which came into force on 10th September, 2010. In the current **Civil Procedure Rules** the appeals are dealt with under orders 42 and 43. Under section 79G of the **Civil Procedure Act** which was not touched by the extensive amendments aforesaid, an appeal from a subordinate court to this court must be from a decree or order of that subordinate court. Similarly Order 42 provide that the appeal must be from a decree or order of the subordinate court. Such certified decree or order pursuant to rule 2 should be filed with the memorandum of appeal failing which the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order. Under order 42 rule 13 when considering directions to give in the appeal, some of the documents that must be in the record of appeal is the judgment, order or decree appealed from. Finally under order 43, an appeal lies of right from the orders made on application for review such as the application which was before the learned magistrate and whose refusal is the subject of this appeal.

Taking into account all the foregoing provisions of the law, it is clear that an appeal can only lie against the decree or order. Such decree or order must be in the record of appeal either at the time of filing the memorandum of appeal or subsequently. In the record of this appeal the certified order from which the appeal arises is not in the record. The absence of such vital document renders the appeal a nullity or incompetent. I am aware that the issue was not raised in the written submissions of the parties. However, this is a matter of law and goes to the jurisdiction. I can address it *suo moto*. That being my view of the matter, I find the appeal incompetent and is accordingly struck out with costs to the respondents.

Judgment dated, signed and delivered at Kisii this 31st day of January, 2011.

ASIKE-MAKHANDIA

JUDGE