



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 60 OF 2005**

SOUTH NYANZA SUGAR CO. LTD ..... APPELLANT

-VERSUS-

ELIJAH NTABO OMORO..... RESPONDENT

**JUDGMENT**

***(Being an appeal from the Judgment and decision of Hon. Chepseba Esq S.R.M dated the 17<sup>th</sup> March, 2005 in the Original Kilgoris SRMCCC No. 92 of 2003).***

This appeal is bound to fail on procedural aspects. The record is silent as to whether the judgment which is the subject of this appeal was ever dated, signed and delivered. However, from the original record of the trial court, though the judgment is signed it does not show that it was dated and delivered. It is a mandatory requirement that for a judgment of the court to be valid, it must be dated, signed and delivered in open court. See order XX of the **Civil Procedure Rules**. Thus a judgment that is neither dated nor delivered in open court is a nullity. This is what appears to have happened in the circumstances of this case.

Secondly, on 28<sup>th</sup> September, 2010, **Mr. Yogo**, learned counsel for the appellant and **Mr. Ogwen**, learned counsel for the respondent appeared before **Musinga J.** and recorded a consent in terms that “... **1. That appellant be granted leave to file a supplementary record to include a certified decree within 21 days. 2. The appeal be canvassed by way of written submissions to be filed within 14 days from the date of filing the supplementary record of appeal .....**”. In terms of the above consent order the appellant was required to have filed supplementary record of appeal latest by 19<sup>th</sup> October, 2010. The record does not show that any such supplementary record of appeal was ever filed. So that as it is, there is no certified decree in the record of appeal filed. Sections 65 and 79 of the **Civil Procedure Act** and order XLI rule 8(b) of the **Civil Procedure Rules** are explicit. An appeal lies to this court from the decree of the subordinate court. Thus in the absence of the certified decree in the record of appeal, this appeal is a non-starter and ought to be struck out. See what I said on the same issue in **Kisii HCCA No. 103 of 2007, Kenya Tea Development Agency Ltd –vs- Yunia Kemuma Machuka & Anor (UR)**. The Court of Appeal in the case of **Syprose Ageke Owour –vs- Afro Meat Company Limited C.A No. 1 of 1997 (UR)** rendered itself thus on same the issue “...**Order 20 rule 7(1) of the Civil Procedure Rules mandatorily lays it down that a decree shall bear the date on which the judgment was pronounced. The decree in the appeal in question violates that mandatory injunction and is accordingly invalid. It follows that there is no valid appeal for under section 66 of the Civil Procedure Act, an appeal can only be brought against a decree or an order.....**”. I do not think I can put it any better.

It is instructive that all these issues were raised by the respondent in his written submissions which as I have already stated elsewhere in this judgment were exchanged between the parties. I would therefore have expected some response to the same by the appellant. However, the appellant’s submissions are mute on the twin issues. Is it because the appellant had no response at all to the same. I would want to imagine so otherwise if it had, nothing stopped it from responding as appropriate.

The upshot of the foregoing is that the appeal is incompetent and is accordingly struck out with

costs to the respondent.

**Judgment dated, signed and delivered** at Kisii this 17<sup>th</sup> day of January, 2011.

**ASIKE-MAKHANDIA**  
**JUDGE**