**No. 2779**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE APPEAL NO. 346 OF 2005**

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

**-VERSUS-**

**WILLIAM OURU ABALA.....RESPONDENT**

**JUDGMENT**

***(Being an Appeal from the Judgment and Decree of Mr. W.N. KABERIA Esq. the Senior Resident Magistrate***

***in KILGORIS SRMCC NO. 40 OF 2003 dated 3rd November, 2005)***

This appeal is bound to fail on two grounds; the decree and record of appeal. Apparently, this appeal arises from the Judgment and decree of the Senior Resident Magistrate's court at Kilgoris, **W.N. Kaberia esq**, presiding. The decree in the record of appeal indicates that the Judgment was delivered on the 3rd of November, 2005. However a perusal of the said Judgment reveals that it was not so dated. It is merely in these terms ***"… Judgment dated and delivered at Kilgoris Law Courts in the presence of Nyangosi Oyuko holding brief for Okongo (SRM). Court: By consent 30 days stay of execution…"*** From the foregoing, it is clear that the judgment was not dated as required. I do not therefore see where the date ***"3rd day of November, 2005"*** indicated in the memorandum of appealcame from.

When the hearing of the case was concluded on 5th July, 2005, the learned magistrate indicated that the judgment would be delivered on 28th July, 2005. Thereafter, there is nothing on record to suggest that the judgment was not delivered as scheduled. Is it therefore possible that the judgment was delivered on its

due date. I cannot rule out that possibility. If that be the case then, the decree issued indicating that the judgment was delivered on 3rd November, 2005 is clearly wrong and erroneous.

Subsequent proceedings after the judgment indicate that the judgment was actually delivered on 2nd November, 2005. On 15th December, 2005 the learned magistrate for instance recorded thus: ***"… By consent the court decree dated 2nd day of November, 2005 is hereby stayed on condition that decretal sum is deposited by the defendant/appellant in the joint interest earning account in the names of the parties advocates within 30 days from today".*** This order clearly shows that the judgment was delivered on 2nd November, 2005. This means that no proceedings were taken on 3rd November, 2005. In those circumstances is there a decree from which this appeal is premised? I do not think so. In the case of **Syprose Ageke Owour V Afromeat Company Ltd, civil application No. Nai 1 of 1997(UR)** faced with a similar situation the court of appeal observed ***"…In our view, the only substantial point raised against the appeal is that the decree incorporated therein is said to arise from a judgment dated the 18th June, 1986. It is agreed on all sides that the only judgment from which a decree could be extracted was dated the 21st June, 1996 and so the decree in the record of appeal is no decree at all. 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 bought against a decree or an order...".*** The same situation obtains here.

Again in the case of **Peter Mburu Echaria V Priscilla Njeri Echaria**, Civil appeal No. 140 of 1995, the court of appeal on a similar issue rendered itself thus:- ***…" This is an appeal against the order of Shields J supposed to be made on 22.10.1993. The order in question was however made on 21st October, 1993 according to the record of appeal (Page 39). The extracted order is dated 27.10.1993. Under order 20 rule 7(1) the order must bear the date of the day on which judgment or order was delivered which in this case was 21st October, 1993. On page 116 of the record is the notice of appeal which is against the order given on 27.10.1993. No order was made on that date. The notice of appeal is therefore defective. The appeal itself being against the order of 22.10.1993 which does not exist is incompetent. It is hereby struck out with no order as to cost…".***

From the foregoing authorities it is self evident that the decree and order of court, the subject of an appeal must bear the date of the day when the judgment or ruling giving rise to such decree or order was delivered. If the decree or order is found wanting in any of the above aspects, then it is fatally defective and any appeal mounted or premised on the same is incompetent and liable to be struck out. As already stated this is the situation we are confronted with in this appeal.

Ofcourse those authorities were merely reinforcing the mandatory provisions of order 21 rule 7 of the **Civil Procedure Rules** to the effect that ***"…The decree shall agree with the judgment … shall bear the date of the day on which the judgment was delivered…".*** As correctly submitted by **Mr. Ogweno**, learned counsel for the respondent, the wording above cannot pass for ambiguity. It would lead to an absurdity if the appellate court was to allow this appeal since it would not be clear which decree it shall be setting aside. Would it be the decree of 3rd November, 2005 which is non-existent or of 2nd November which has not been filed (certified or not in accordance with the mandatory provisions of order 42 rule 2) and section 65 of the **Civil Procedure Act.**

The record of appeal also appears to be incomplete. The evidence of the defence is lacking. When the respondent closed his case on 5th July, 2005, the record shows that a consent order was recorded in terms ***"…by consent evidence of DW1 & DW2 in civil suit number 48/2003 to apply…"*** My understanding of the above consent is that the evidence tendered by DW1 & DW2 in the above case was to be adopted as

the appellant's evidence in the case leading to this appeal. Thus it would have been expected that such evidence would be transposed into this proceedings so as to form part and parcel of the record in this appeal. This has not been done with the consequence that this court as a first appellate court is placed at a disadvantage. It is trite law that this court can only interfere with a trial court's findings of fact if it can be demonstrated that the trial court either misapprehended material evidence, or did not appreciate the relevance of the evidence adduced or considered extraneous evidence such that in the end came to a wrong factual conclusion. This court is hampered in that regard as it has no opportunity of appraising the evidence of the appellant to enable it come to the conclusion that the trial court was wrong in its findings.

The respondent raised all these issues in his written submissions which I believe were served upon the appellant. I would have therefore expected some response. No such response was however forthcoming from the appellant. Indeed it appears, the appellant gave the twin issues a wide berth. There can only be one reason for the appellant's inaction, they were serious issues of law to which it had no response.

Again this is a case perhaps in which the ***"Oxygen"*** Principle would have come to the aid of the appellant. However, the appellant never invoked it before me. I cannot invoke it ***suo moto.*** For to do so, I would be aiding the indolent. Further I find it hard to invoke the doctrine where in a situation like this, the appellant had a remedy which it did not take. It would have sought to file a supplementary record of appeal in which it would have included the proper decree and the evidence of DW1 & DW2.

For all the foregoing reasons, I find the appeal incompetent. It is hereby struck out with costs to the respondent.

Judgment **dated, signed** and **delivered** at Kisii this 4th day of May, 2011.

**ASIKE-MAKHANDIA**

**JUDGE**