



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII.**  
**CIVIL APPEAL NO. 333 OF 2005**

**(Being an appeal from the judgment of SRM'S Court at Kilgoris in SRMCC NO. 101 OF 2003- Mr. Chepseba, SRM)**

**SOUTH NYANZA SUGAR CO. LTD.....APPELLANT**  
**VERSUS**  
**EZEKIEL NYAKUNDI.....RESPONDENT**

**RULING**

When this appeal came up for hearing on 25<sup>th</sup> May 2010, Mr. Ogwenko for the respondent raised a preliminary objection saying that the decree appealed against is dated 13<sup>th</sup> March, 2009 whereas the judgment was delivered on 2<sup>nd</sup> November, 2009. To that extent, the decree does not comply with the requirements of **order xx rule 6** of the **civil procedure Rules**. He further submitted that the record of appeal does not contain the evidence of DW1 and DW2 before the trial court. He urged the court to strike out the appeal.

Mr. Yogo for the appellant submitted that when the appeal came up for directions on 18<sup>th</sup> May, 2009 in his absence, Mr. Ogwenko told the court that the record of appeal was complete and the appeal could be given a hearing date. He was therefore estopped from lamenting that the record was incomplete or defective. These are issues that ought to have been raised during directions. With regards to the evidence of DW1 and DW2, he referred the court to page 24 of the compiled record of appeal where the trial court stated:

**“The evidence of DW1 and DW2 in civil case 56 of 2004 to apply in 101 of 2003.”**

Counsel added that a supplementary record of appeal could be filed to bring on board the evidence of DW1 and DW2 though the same was already before the court but in a different appeal.

In view of the fact that the appeal has already been admitted to hearing and directions taken, the respondent's advocate having told the court that the record of appeal was complete, it will be contrary to the spirit of the provisions of **Section 1A** of the **Civil Procedure Act** for this court to strike out the appeal. I will grant leave to the appellant's advocate to file a supplementary record of appeal to include a properly dated copy of the decree and the evidence of DW1 and DW2 in the lower court proceedings.

The appellant shall bear the costs of the preliminary objection. The same to be paid before the appeal is given a hearing date.

**DATED, SIGNED AND DELIVERED THIS 28<sup>th</sup> DAY OF July, 2010.**

**D. MUSINGA**  
**JUDGE.**

**28/7/2010**

Before d. Musinga, J

Mobisa- cc

Mr. Obure HB for Mr. Otieno Yogo for the appellant

Mr. Ogwenko for the respondent.

**COURT:** - Ruling delivered in open court on 28<sup>th</sup> July, 2010.

**D. MUSINGA**  
**JUDGE.**