



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CIVIL APPEAL NO. 69 OF 2005**

**EZEKIEL MBITI WAWERU..... APPELLANT**

**VERSUS**

**JOSEPH NYAGA WAWERU.....RESPONDENT**

**R U L I N G**

The Appeal herein is against a Ruling of the Honorable Okato Senior Resident Magistrate Kerugoya dated 3.11.05. I have considered the written submissions by both counsel herein. I have also carefully perused the record of the trial court and the relevant law. I will be very precise in this ruling. There is no competent Appeal before me for the following reasons.

Firstly, as rightly submitted by counsel for the Respondent, the order or decrees Appealed from was not at any time extracted and annexed to the memorandum of Appeal or filed before the Appeal was heard, as required by law. I would have struck out the Appeal on that ground only.

Secondly, the Application giving rise to the ruling appealed against does not attract an Appeal as a matter of right under Order XLII of the Civil Procedure Rules. It was necessary for the appellant to seek the leave of the trial magistrate in the first instance before filing this Appeal.

Thirdly, even if the court was to assume that the appeal was properly filed, the said Application was not contested although the same was properly served and the Appellant was even in court when it was heard. Any deponment that is not rebutted or controverted by way of a replying affidavit is deemed to have been admitted.

**(See Civil Application No. 78 of 1990 Touring Cars K (Ltd) & Another Vs Ashok Kumar (un-rep)**

The learned trial magistrate was therefore in order in allowing the application.

Finally, the award of the Tribunal had already been entered as a judgment of the court. The same had not been quashed or Appealed against. It was therefore a regular judgment of the court which was enforced by the court. The learned trial magistrate could not decline to allow the application on grounds that the award had been arrived at without jurisdiction. That was not a matter before him. Indeed he had no capacity to make such an order.

For these reasons, I find and hold that the Appeal herein lacks merit. I therefore dismiss the same with orders that the Appellant bears the costs of the appeal.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 23<sup>rd</sup> day of November 2010

**In presence of:- Mr. Kahara for both counsel.**