



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CIVIL APPEAL 43 OF 2002**

**ANTHONY KANYI MATHENGE.....APPELLANT**

**VERSUS**

**EPHREM GITARI NJUGUNA.....1<sup>ST</sup> RESPONDENT**  
**PURITY WANJIRA MURIITHI.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

This Appeal was filed by Rugaita and Co. Advocates on behalf of Anthony Kanyi Mathenge. It is against the decision of the Senior Resident Magistrate Kerugoya in Principal Magistrate's Civil Case No. 314 of 2001. Both counsel decided to file written submissions and the matter was fixed for Judgment. I have considered the said submissions Mr. Ndona counsel for the respondents raised the issue of the appeal being incompetent because it contravenes the mandatory provisions of Order XLI Rule 8 B F of the Civil Procedure Rules, Section 65 (1) and Section 75 (1) of the Civil Procedure Act.

He therefore urged the court to dismiss the appeal with costs to the Respondents. M/s Wairimu countered this submission by stating that the Court of Appeal had held that dismissing an application on the mere basis that a copy of the decree has not been attached is a drastic action. She did not however attach the case cited and that submission therefore amounts to nil as the court cannot make reference to the said authority.

My view is that that submission must be dealt with first before the court can decide on whether the appeal substantively had merit or not. Mr. Ndana did not come out very clearly in his submission. In any event, the original Judgment or decree would always be in the original file and would never therefore form part of the record of Appeal. Indeed Section 65 (1) and 75 (1) as cited were totally irrelevant and misplaced.

The correct provision is actually Order XLI Rule 1 A which provides as hereunder.

**“ Where no certified copy of the decree or order  
appealed against is filed with the memorandum of  
appeal, the appellant shall file soon as possible and in  
any event within such time as the court may order,  
whether to reject the Appeal summarily under  
Section 79 B of the Act until such certified copy  
is filed”**

In Civil Appeal No. 47 of 1998 **JOSEPH NDERITU GITHINJI -V- WANJIRU GITHINJI** the Court of Appeal held while comparing the position in Appeals before the Court of Appeal under Rule 85 (1) of the Court of Appeal Rules and appeals to this court

**“ ..... Even by the Rules regarding appeals to the  
High Court, a decree or order was, of necessity,  
to be drawn-up, at any rate before the Appeal  
could have been heard....”**

The Court of Appeal was therefore emphasizing that not only is it mandatory for an appeal to be accompanied by the decree or order appealed against, but such a decree must be certified as provided for by Order 41 Rule 1 A.

Unlike in the Court of Appeal, an Appeal may be filed before the High Court without a decree or order, but the appeal need not be dealt with until the decree or order is drawn up and filed. In absence therefore of not just a decree or order but a certified one, an appeal becomes incompetent and calls for striking out.

This is because as held in the above cited case, and also in the locus classica case of **GULAMHUSSEIN MULLA JIVANJI & another -Vs- EBRAHIM MULLA JIVANJI and another (CA 29 /930**, the Court of Appeal held that;

**“ An Appeal to the High Court from a subordinate  
court can only be against a ‘decree’ or order.”**

and that is where Mr. Ndona’s Section 65(1)

should have come in.

In the **Jivanji Case (Supra)**. The Court of Appeal for Eastern Africa further went on to state that it is the duty of the party who is appealing against the decree or order to have it drawn -up;

extracted and certified. It is not enough for the appellant to refer the court to the decree or order which is in the original subordinate court file. My stand on this issue, and I have struck out several such appeals is that an appeal that is not accompanied by a certified copy of the '**decree**' or '**order**' appealed against is incompetent and the same should be struck out.

Accordingly, my firm view is that there is no competent appeal before me in this matter. The same is therefore struck out with costs to the Respondents.

**W. KARANJA**  
**JUDGE**

Delivered, signed and dated at Embu this 11th day of May 2009

**In presence of:-Mr. Magee for Wairimu for Appellant and Mr. Kariithi for Mr. Ndena for the Respondent**