



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CIVIL APPEAL 6 OF 2006

KOECH NERIUS CHEPTOO.....PLAINTIFF

VERSUS

ELIUD TORMOI.....DEFENDANT

R U L I N G

By a Notice of Motion pursuant to the provisions of Order XLI Rule 1A of the Civil Procedure Rules, the applicant seeks orders:

1. That the appellant's appeal be struck out for being incompetent.
2. That the costs of this suit and of this application and the appeal be provided for.

The application is based on the grounds:

- (a) That the order appealed against is not certified.
- (b) The appeal amounts to an abuse of the due process of the law.

The application is supported by the annexed affidavit of P.N. Kiarie advocate sworn on 27th March 2009.

The application was served on the firm of Birech, Ruto & Co Advocates, as per the affidavit of service of Peter Kiarie Ndarwa sworn on the 16th day of June 2009, who failed to turn up for the hearing. Equally the said firm failed to file grounds of opposition or replying affidavit within the time prescribed by the law.

On application, I ordered the hearing to proceed ex-parte.

On behalf of the applicant, it was argued that upon perusal of the file, it is evident that the order against which the appeal has been lodged has not been certified as a true copy of the original. That the failure to incorporate a certified copy of the order renders the entire appeal incompetent hence this application.

I have perused the record of appeal and find as a fact that the order appealed from which appears at page 27 of the record is not certified. This violates the express provisions of Order XLI Rule 1 (a) of the Civil Procedure Rules.

By reason of the foregoing matters the appeal is for striking out.

Accordingly, the appeal herein is struck out with costs of the appeal and the application to the applicant.

Dated and delivered at Kitale this 29th day of JUNE 2009.

N.R.O. OMBIJA

JUDGE

Mr Ingosi for Kiarie for respondent