



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Appeal 12 of 2004

FRANCO ESPOSITOPLAINTIFF

VERSUS

CENTRO DIRICARGA

PROGETTO SAN MARCO DEFENDANTS

R U L I N G

By a Notice of Motion, pursuant to Section 3A of the Civil Procedure Act, the applicant seeks orders:

1. That the entire record of appeal, including the memorandum of appeal, presented to the court by the appellant be struck out on the grounds that:

- (i) The record of appeal is incompetent and fatally defective.
- (ii) The appeal has been fixed for direction twice but the same could not be given owing to the above fact.
- (iii) The appeal is burdensome and is subjecting the respondent to unnecessary expenses.
- (iv) The appellant is not interested in correcting error apparent on the face of his record of appeal.

2. Costs of this application be provided for.

The application is based on the grounds that the appeal arises out of a court order, while what was extracted is a decree.

The application is predicated upon the annexed affidavit of **Raffaella Virno Lamberti** sworn on 13th December 2001.

For the applicant it was argued that, the application to strike out the record of appeal was filed because, the appeal is against an order of the court. Yet what the appellant extracted was a decree as opposed to an order.

That twice the court has hinted to the appellant to correct the record and twice the appellant has failed to do so. In the circumstances, it was apparent that the appeal cannot proceed to hearing by reason of the defect in the record of appeal. That the appeal has been pending since 2004 and by reason of the delay

the same is becoming burdensome to the applicant. That the respondent is convinced that the defect in the record of appeal cannot be corrected even by filing a supplementary record of appeal. In the circumstances, the only way forward is to apply to strike out the appeal.

The appellant/respondent filed grounds of objection dated 26th February 2005 on 20th February 2006 in opposition to the application. By way of submission, it was urged on behalf of the respondent that under Section 2 of the Civil Procedure Act, a decree is described thus:

“the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include-

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal or default:

(c) provided that, for the purposes of appeal, “decree” includes judgment, and a judgement shall be appealable notwithstanding the fact that a formal decree in pursuance of which judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. – a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

That the plaint was struck out and the result of the striking out is a decree in terms of Section 2 of the Civil Procedure Act.

That under Order XX Rule 7(5), in a subordinate court, the decree is drawn out by the court as opposed to the parties.

I have agonized over the issue at hand. A “suit” is any civil proceeding commenced in any manner prescribed by the rules made by the Rules Committee to regulate the procedure of court. Under the Civil Procedure Ordinance, Section 81, an application otherwise commenced in the High Court is only a “suit” if a local or special law so provides. I am alive to the law that there is a difference between a decree and an order. Simply put, on the one hand, a decree arises out of a suit. On the other hand, an order may arise out of a proceeding which is not a suit **See (MANSION HOUSE LTD V. JOHN STANSBURY WILKINSON: [1954] Vol. 21 EACA 98)**

In the present case the plaint was struck out by the court pursuant to an application under Order VI Rule 13(b) and (d). An appeal arising therefrom is an appeal against an order (see order XLII, Rule 1(1) (c)). To my mind what was supposed to be extracted by the appellant was an order striking out the plaint. Instead what was extracted is a decree. In the circumstances, it was incumbent upon the respondent to take a step to rectify the anomaly. The respondent has failed to do so.

As matters stand now, there is a decree on record appealed from instead of an order. Accordingly, the only order that commends itself to me is to strike out the record of appeal, which I hereby do. I award costs of this application to the applicant.

Dated and delivered at Malindi this 21st day of May 2008.

N. R. O. Ombija

JUDGE