



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Appeal 13A of 2004

HAMZAALI JIWAJI.....APPELLANT

VERSUS

SAID MAHDY.....RESPONDENT

R U L I N G

At the hearing of the appeal the advocate for the appellant, on enquiry by the court, conceded that the decree appealed from was omitted from the record of appeal. He further conceded that order XLI Rule 8B (4), of the Civil Procedure Rules makes it mandatory to file the decree before allowing the appeal to go for hearing.

The advocate for the respondent, going by the concessions aforesaid, urged me to find that the said omission are so grave more so in the light of the fact that on 8th March 2007 the appellant had moved the court and did file a further supplementary affidavit which also omitted the decree.

Consequently, it was his case that the appeal should be struck out.

Order XLI Rule 8 B (4) provides:

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:-

- (a) the memorandum of appeal;**
- (b) the pleadings;**
- (c) the notes of the trial magistrate made at the hearing: notes made at the hearing;**
- (d) the transcript of any official shorthand or palantypist notes made at the hearing;**
- (e) where the appeal is from a decision of a subordinate court given in the exercise of its appellate jurisdiction,**
the documents corresponding to those specified in paragraphs (a) to
- (f) inclusive so far as they relate to the appeal to such subordinate court:**

Provided that:-

- (i) a translation into English shall be provided of any document not in that language.**
- (ii) The judge may dispense with the production of any document or part of a document which is not relevant other than those specified in paragraphs (a) (b) and (f).**

In my considered view the omission is fatal. The problem is compounded by the fact that the appellant had also sought and obtained leave to file supplementary record of appeal which also omitted the decree appealed from. The appellant has had two chances to put his house in order and squandered both. In the result, I hold that the appellant no longer deserves my discretion. Accordingly, I am left with no alternative other than to strike out the appeal, which I hereby do, with costs to the respondent.

DATED and DELIVERED at Malindi this 24th

Day of May 2007.

N.R.O.OMBIJA

J U D G E

Mr.Shujaa } for respondent.

Mr.Mouko } for appellant

For Jiwaji _____