



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPLICATION NO. NAI 358 OF 2003**

**SAMUEL MBURU KIRATU ..... APPLICANT**

**AND**

**DANIEL NGANGA KIRATU..... RESPONDENT**

**RULING OF THE COURT**

By his notice on motion dated and lodged in this Court on 4th December, 2003, Samuel Mburu Kiratu, the applicant herein, is asking the Court to strike out Civil Appeal No. 300 of 2003 which Daniel Nganga Kiratu, the respondent herein, filed in the Court on 5th November, 2003. Two substantial grounds are offered by the applicant as the basis for the application to strike out the appeal. The first ground is that the appeal does not contain a valid copy of the decree appealed against, contrary to the requirement of Rule 85 (1) (h) of the rules of the Court. The second ground, as we understand it, is that because the respondent did not send a copy of his letter to the Deputy Registrar applying for proceedings and judgment of the superior court the certificate of delay to be found at page five of the record of appeal is not a valid certificate in terms of the proviso to rule 81 and also in terms of rule 81 (2) of the rules.

On the first issue relating to the validity of the decree, Mr Karanja for the applicant pointed out to us that the decree at page six of the appeal record cannot be a valid one as it does not set out in its body the prayers which were asked for in the superior court. Order 20 Rule 6 (1) of the Civil Procedure Rules sets out what a valid decree is to contain. That Order provides:

“The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.”

The decree in the record of appeal contains the number of the suit and the names of the parties, but it does not state the particulars of the claim which was made in the superior court. This Court has held time and time again that in terms of rule 85 (2A) of its rules, a decree is a primary document and cannot be cured by way of amendment or by way of filing a supplementary record of appeal. Rule 85 (2A) sets out the documents which can be brought on the record by way of a supplementary record. A decree is not one of the documents enumerated in rule 85 (2A). The decree at page six of the record of appeal does not clearly satisfy the provisions of Order 20 Rule 6 (1). The respondent to this motion must have realised that point and that explains why in the replying affidavit in the motion he attaches a “draft decree” which is totally different from the one in the record of appeal and which, if it had been in the record of appeal, would have totally complied with the requirements of Order 20 Rules 6 (1) of the Civil Procedure Rules. The decree in the record of appeal is clearly defective and since there is no way of correcting the defect, the appeal is, ipso facto, incurably defective.

On that ground alone, the motion to strike out is bound to succeed. In view of what we have stated above,

we do not feel called upon to determine the second issue dealing with whether or not the appeal was lodged out of time. The notice of motion filed by the applicant is allowed on the ground that there is no valid decree in the record of appeal. Civil Appeal No. 300 of 2003 lodged in this Court on 5th November, 2003, is accordingly struck out with the costs thereof to the applicant. We also award the costs of the motion to the applicant. Those shall be our orders.

**Dated and delivered at Nakuru this 24th day of September, 2004.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**AG. JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**