

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 23 OF 2002

(From Busia SRM CC No. 169 of 2001 before B. Maloba SRM)

PHILIP ETYANG OUNOI APPELLANT

VS

LEONARD WANDERA RESPONDENT

R U L I N G

The Respondent sued the Appellant for defamation before the Senior Resident Magistrate's court, Busia. Judgment was entered in his favour in the sum of Ksh.40,000/= being general damages for defamation. Being dissatisfied the appellant challenged the aforesaid decision in this appeal and put forward four grounds in his memorandum of appeal.

The appeal came up for hearing and the appellant condensed his four grounds of appeal to two grounds. The Respondent put up a spirited fight against the appeal. The Respondent raised a preliminary point at the closing stages of his submissions. Mr. Ashioya who appeared for the Respondent claimed that the appeal was fatally defective because the decree appealed against was not extracted and attached to record of appeal. I think this is a very crucial point which must be disposed of first before considering the substance of the appeal. The Respondent's learned advocate is of the view that the failure to include the decree on the record of appeal rendered the whole appeal fatally defective and incompetent.

Mr. Omondi who appeared for the appellant conceded that he did not include in his record the decree, however he was of the view that the Respondent should have raised the issue at the stage of taking directions. He sought to shield himself behind the provisions of Order XLI rule 8 B (2) of the Civil Procedure rules which states that party should take up objections on jurisdiction of the appellate before directions are taken. With great respect to the appellant's learned advocate the matter at hand relate to the competency of the appeal and not the jurisdiction of the court. Consequently the Respondent has jurisdiction to raise the objection. In fact Order XLI rule 8 B (4) of the Civil Procedure rules enjoins this court to be satisfied that all the documents specified in sub rule (4) of rule 8 (B) are on record before having the appeal heard. The sub rule clearly states that the record of appeal should contain the Judgment, Order or decree appealed from. The court's discretion to dispense with the production of any of the documents specified is restricted to all other documents save for the memorandum of appeal, the pleadings, Judgment, Order or decree. In short without the production of the above documents the appeal is rendered incompetent. A decree has been described as the formal expression of an adjudication. It is clear that there has been no legal representation of the memorandum of appeal at all in the absence of the decree.

The upshot therefore is that the preliminary objection raised by the Respondent must succeed. It is upheld. Consequently this appeal is ordered struck out with costs to the Respondent.

DATED AND DELIVERED THIS 9th DAY OF July 2004

J.K. SERGON

JUDGE