

IN THE COURT OF APPEAL

AT KISUMU

CORAM: KWACH, TUNOI & OWUOR JJ.A

CIVIL APPLICATION NO. NAI. 221 OF 1998 (KSM.21/98)

BETWEEN

ZEDEKIAH OGADA.....APPLICANT

AND

ALBERT OGUTU.....RESPONDENT

(Application to strike out the Notice of Appeal and the entire Record of Appeal in an intended appeal from the Judgment and decree of the High Court of Kenya in Kisumu (Justice I.C.C. Wambilyangah) dated the 14th January, 1998

in

H.C.C.C. NO. 33 OF 1996)

RULING OF THE COURT

This is an application under rule 80 of the Court of Appeal Rules to strike out Civil Appeal No. 189 of 1998 on several grounds.

The decision against which Zedekia Ogada, the appellant in the appeal, has appealed was given by Wambilyangah J, on 14.1.98. By that decision the learned judge dismissed an application by the appellant for stay of execution. That application could only have been made under relevant provisions of Order 21 of the Civil Procedure Rules.

The appellant did not file a Notice of Appeal within 14 days as required by rule 74(2) of the Rules of this court. Instead he lodged a Record of Appeal on 13.3.98 containing all sorts of documents including one at page 29 purporting to be a notice of appeal. We have looked at that document and we are satisfied it is not a Notice of Appeal within the meaning rule 74 of the Rules of this court. Nor does the record contain a certified copy of the decree appealed against. Last but not least the order appealed against is not appealable without leave of the superior court.

For all these reasons the appeal is incompetent and is struck out with costs to the respondent assessed at Shs.5,000/=. The respondent will also hear the costs of the motion assessed at Shs.1,000/=. The costs awarded to the respondent to be paid within sixty (60) days and in default execution to issue.

Dated and delivered at Kisumu this 25th day of November, 1998.

R. O. KWACH

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.