



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, GICHERU JJ A & CHESONI Ag JA)

CIVIL APPLICATION NO NAI 161 OF 1989

TITUS MUIRURI DOGE APPLICANT

VERSUS

KENYA CANNERS LIMITED.....RESPONDENT

(Application to strike out Civil Appeal No 12 of 1989 in an intended appeal from a judgment of the High Court of Kenya at Nairobi (Shah CA) dated 28th October, 1988 in HCCC No 1832 of 1980).

RULING

The applicant, Titus Muiruri Doge has moved this court to strike out Civil Appeal No 12 of 1989 filed by the respondent Kenya Cannery Ltd. He wants the appeal to be struck out because in his view it is incompetent and the court has no jurisdiction to entertain it as the respondent did and had not extracted the decree or order appealed from at the time of lodging the appeal and there was no certificate copy of the decree or order included in the Record of Appeal filed and served on the applicant's advocates. The applicant's alternative prayer is that the Record of Appeal which the respondent filed be struck out and the appeal be dismissed because it was not compiled in accordance and does not comply with rule 85 of the Court of Appeal Rules.

The application is supported by an affidavit sworn by Lee Gacuiga Muthoga. There was no replying affidavit. In his affidavit Mr Muthoga has deposed that the Notice of Appeal was served on his firm of advocates on the 15th November, 1988, and six days later his firm filed and served on the respondent's advocates a notice of an address for service. The respondent's advocates wrote to the applicant's advocates on the 25th January, 1989 requesting the later to draw up a decree. However, from the Record of Appeal served on the applicant's advocates on 30th January, 1989 it appeared that the appeal was filed on the 23rd January, 1989. The Record of Appeal did not contain a copy of applicant's advocates' Notice of Address for service, a certified copy of the decree or order and a certificate of delay. The judgment to be appealed from was delivered by Commissioner B Shah – on 28th January, 1988 and in the absence of a certificate of delay certifying the period to be excluded from the period within which the appeal was to be instituted, the appeal was not filed within sixty days of the date the Notice of Appeal was lodged.

On 1st November, 1989 the respondent's advocates filed a supplementary Record of Appeal which comprised a decree and a certificate of delay. Referring to section 66 of the Civil Procedure Act which provides that an appeal lies from the decree or part of the decrees and from the orders of the High Court to the Court of Appeal, Mr Muthoga submitted that an appeal filed before the appellant has a decree or an order appealed from is premature. He stressed that since the appeal was from a decree that had not been extracted when the appeal was filed this court had no jurisdiction and the defect could not be cured through filing a supplementary record. The defect is not procedural but jurisdictional. Mr Muthoga

supported his arguments with the cases of *Paul Chege v Amir Suleman* Civil Appeal No 12 of 1987, *Murai & Others v Wainana* (No 2) [1978] KLR 31 and *Alexander Morrison v Mohamedraza Suleman Versi & Anor* (1953) 20 EACA 26.

Mr Le Pelley for the respondent submitted that the action of filing the appeal before the decree or order was drawn up and the failure to include a decree or order in the Record of Appeal was a technicality that was curable by filing a supplementary record. He argued that the matter did not go to the jurisdiction of the court. He referred to section 2 of the Civil Procedure Act and said that the section gave jurisdiction to this Court.

That section defines decree and the proviso that Mr Le Pelley relied states that

“for the purposes of appeal, ‘decree’ includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”

Mr Le Pelley contented that a judgment once given is appealable from notwithstanding the fact that the decree may not have been drawn up and this Court has jurisdiction to hear such appeal. He argued that section 66 of the Civil Procedure Act which gives this court jurisdiction must be interpreted in accordance with the interpretation section i.e section 2. He distinguished the position obtaining to a decree from that of an order in that there was no proviso to the definition of ‘order’ as in the case of ‘decree’ so, where an appeal is from an order the formal order must first be drawn up before the appeal to this Court is filed which is not the case with an appeal from a decree. For authority to his proposition Mr Le Pelley referred to *Paul Chege v Amir Suleman* *ibid*. He said that *Murai & Others v Wainana* was heard on its own merit and *Alexander Morrison v Mohamedraza Suleman Versi & Anor* and *Old EA Trading Co Ltd v Jetha* 23 EACA 164 were based on the Tanganyika Act.

There is no dispute that what is sought to be appealed from in this case is a decree and that that decree was not drawn up at the time the Record of Appeal was filed. No copy of the decree was, therefore included in the record, although this has subsequently been done by way of supplementary record. We agree *Alexander Morrison v Versi & Anor* was a Tanganyika case but it was decided under the Rules of the East African Court of Appeal and not under the Civil Procedure Act of Tanganyika. In that case no decree had been drawn up when the Memorandum of Appeal was presented for filing and a preliminary objection taken by counsel for the respondent that in those circumstances the appeal was premature was upheld and the court said that it had no jurisdiction to entertain an appeal where a decree embodying the terms of the judgment had not been drawn up. In the *The Old EA Trading Ltd v Jetha* where the applicant’s advocates had failed to extract the order before lodging the appeal, but they did so subsequently and filed it by way of supplementary record, it was held that as no order had been extracted at the time of lodging the appeal, there was nothing to appeal from. The appeal was incompetent and there was no jurisdiction to hear it.

Murai & Others v Wainana (No 2) was a Kenyan case. The appellants filed the judgment in the High Court with the Record of Appeal but they did not extract the decree and file it with the record. The respondent applied for the appeal to be struck out. Mr Le Pelley who appeared for the appellants in that case based his argument on the interpretation of the term “decree” in section 2 of the Civil Procedure Act. The arguments he advanced in that case were more or less the same as what he has submitted in the application before us. This Court held that the failure to file a decree with the record was not a mere technicality. The appeal was struck out. In *Paul Chege v Amir Suleman* where the record did not contain the formal order of the Court it was argued that such formal order was not in existence at the time the Record of Appeal was filed. The appeal was, upon application by the respondent, struck out and the court held that the failure to extract the order before the launching of the appeal was not a procedural but a jurisdictional point and in the circumstances the appeal was incompetent.

The authorities cited have established that an appeal filed before the decree or order appealed from is extracted is premature and hence incompetent and this Court has no jurisdiction to entertain it. The defect is not curable by way of filing a supplementary record. Accordingly we hold that the appeal filed in this

case is premature and incompetent and is ordered to be struck out with costs.

Dated and Delivered at Nairobi this 9th Day of May, 1990

J.O. NYARANGI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

Z.R CHESONI

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Ag JUDGE OF APPEAL