**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Apaloo, Masime JJA & Gicheru Ag JA)**

**CIVIL APPEAL NO 12 OF 1987**

**BETWEEN**

**CHEGE..... APPELLANT**

**AND**

**SULEIMAN.....RESPONDENT**

*(Appeal against the ruling of the High Court at Nairobi, Kwach CA)*

**RULING**

July 13, 1988, **Apaloo, Masime JJA & Gicheru Ag JA** delivered the following Ruling.

On December 17, 1986, the High Court (Kwach Commissioner) dismissed an application for injunction brought against the respondent after a hearing *inter partes*. The dispute related to the possession of a shop known as Safariland Botique. The appellant was apparently aggrieved and dissatisfied with the ruling and purported to appeal to this Court. On February 5, 1987, he lodged a Record of Appeal in apparent compliance with rules 81 and 85 (1) of the Court of Appeal Rules.

The record contains a five-page ruling of the court. But it did not contain the formal order of the court. That order was extracted on September 30, 1987 and filed as a supplemental record on March 10, 1988. But on December 12, 1987, the successful respondent brought this motion and prayed that the Record of Appeal be struck out and the appeal itself be dismissed with costs.

The main reason given for this application, is that as the formal order was not in existence at the time the record of appeal was filed, there was no jurisdiction to entertain the appeal. It was contended therefore that this appeal is incompetent and should be struck out. It seems on the face of it to be a hard decision to dismiss *in limine* what may well be a deserving appeal on what seems to be a highly technical point. But a succession of cases which counsel for the applicant brought to our attention, decide that failure to extract the decree or order of the court before launching the record of appeal, is a point which goes to the jurisdiction of the Court and since the jurisdiction of this Court is founded on statute, it cannot be properly invoked unless the intending appellant strictly complies with its provisions.

Thus in *Mohamedbai Co Ltd v Ghani* 19 EACA page 38 it was held by the East Africa Court of Appeal that as the intending appellant had not drawn the formal order before purporting to appeal against it, the purported appeal cannot be entertained. A preliminary objection to the entertainment of the appeal was upheld and the appeal was dismissed *in limine*. In *Alibai v Raichura* 20 EACA 24; the headnote reads:

> "An Order is a formal expression of any decision of a Civil Court which is not a decree. An appeal does not lie from such decision where no formal expression of the decision has been filed."

That seems to be the consistent trend of the decisions. Also in *Old East African Trading Company Ltd v Jetha* 23 EACA 964 it was held that:

> "As no order has 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."

In this case, it was not in dispute that the record of appeal was filed in February 1987. No order was extracted by that date. It was extracted, seven months later, namely, in September 1987. So if the holdings in these cases still stand, the appellant can have no valid answer to the preliminary objection. Although a number of amendments have been made to the procedure rules since those decisions, rule 85(1) still provides that a record of appeal shall contain … the judgment or order.

Counsel for the appellant has sought to get round these holdings by submitting that although no formal order was in existence when the record of appeal was filed, it has since been extracted and filed by a supplemental record. Accordingly, counsel submitted that no prejudice resulted to the applicant by this omission.

Mr Khaminwa also referred us to the ruling of Hancox JA in NAI 56/83 *Githere v Kimungu* in which the applicant sought the exercise of the court's discretion to extend time to file both notices of appeal and for instituting the appeal. In his ruling the learned justice of appeal said:-

> "The relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress and that the court should not be so far bound and tied by the rules, which are intended as general rules of procedure as to be compelled to do that which may cause injustice in a particular case."

Counsel said the objection merely raised a procedural point which this Court, in its inherent jurisdiction, can waive.

But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.

Accordingly, sorry though we are, we are, precluded by authority from entertaining this appeal. We hold that it is incompetent and accordingly strike it out with costs. We also discharge and revoke the stay of execution granted by this Court pending the hearing and determination of the appeal.

**Dated and delivered at Nairobi this 13th day of July , 1988**

**F.K. APALOO**

**.....**

**JUDGE OF APPEAL**

**J.R.O. MASIME**

**.....**

**JUDGE OF APPEAL**

**J.E. GICHERU**

**.....**

**AG.JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**