



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Kneller, Hancox & Platt, JJ A)**

**CIVIL APPEAL NO 95 OF 1985**

**BETWEEN**

**MICHAEL A O MASHERE ..... APPELLANT**

**AND**

**PROTAS MAKOKHA WALUSALA ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Kakamega ( Gicheru, J) dated  
November 25, 1983**

**In**

**Civil Appeal No 67 of 1983)**

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**RULING OF THE COURT**

Mr Michael A O Mashere is by now, as Mr Azangalala, for the respondent to the main appeal was at pains to emphasize, a well known figure in these courts, and experienced in them, both professionally and personally.

He seeks to appeal against the order of Gicheru, J, dated November 25, 1983, summarily rejecting his appeal to the High Court against the decision of the learned acting resident magistrate of Kakamega of August 16, 1983. In that decision the magistrate dismissed Mr Mashere's claim for, inter alia , damages for an alleged libel contained in a letter said to have been written by the respondent on April 11, 1982, to Mr Mashere and copied to three persons, as the letter which is contained in the record of appeal, indeed, shows. Publication does not appear to have been in issue, but th main grounds for the magistrate's decision were that he was not satisfied it was proved up to the requisite standards that that letter had been written by the respondent.

Mr Azangalala has raised two preliminary objections to the appeal – first he says that no formally extracted decree or order, as required by rule 85(1) (h) of the Court of Appeals Rules, has been included in the record. Secondly, he says that various parts of the record, which he particularised in his

submissions, are not necessary for the determination of the appeal, that they amount to extrinsic matter and to adducing additional evidence other than on a proper application under rule 29 (1) (b). The circumstances in which additional evidence can be adduced are set out in the rulings of this court in Mzee Wanjie & 93 Others v A K Saikwa & Others Civil Appeal 72 of 1982.

As regards the first objection, as a result of which were invited to strike out the appeal, it is perfectly true that an order under section 79 B of the Civil Procedure Act is, in one sense, a formal order, made without any argument or submissions to the court. It is nevertheless, a decision of the court which is supposed to be made after a careful perusal of the record, and after weighing all those matters which a judge of the High Court should take into account when exercising his discretion to deny a subject his ordinary right of appeal. As this court said in Peter Nzioki & Another v Aron Kitusa, Civil Appeal 54 of 1982, it is a power which should be sparingly exercised.

Therefore in our view it amounts to decision judicially made which, however brief, should be reflected in a formal order or decree. As the decision in, in form and in substance, a final decision of the High Court, then it should, as Mr Azangalala said, be reflected in a decree rather than an order. This in effect, provides the basis for the jurisdiction of this court. As regards the second point, we agree a great deal if the record would appear to be surplusage, and if it is intended to show malice or ill-will against Mr Mashere on the part of the various individuals involved in the succession of cases concerning him, would be of limited, if any, value, because the material is subsequent, rather than prior, to the magistrate's decision in the instant case. On the other hand there are documents, subsequent to page 51, all of which Mr Azangalala said should be excluded, which clearly are relevant to this appeal, notably this court's decision of July 30, 1985, extending time in favour of Mr Mashere and in supporting documents thereto.

In the circumstances we do not propose to strike out these documents, or order that they be excluded, at this stage of the proposed appeal.

Accordingly we consider that the first preliminary objection is well taken, but we do not intend to strike out the appeal, as of now. We will give Mr Mashere leave to file a supplementary record containing a certified copy of the formally extracted decree within ten days from today. It is to be served on the respondent's advocates seven days after such filing. In default the appeal shall be struck out.

Costs of the application to strike out to be the respondent's in any event. Orders accordingly.

Dated at Kisumu this 21st day of June, 1986.

**AA Kneller**

**Judge of Appeal**

**ARW Hancox**

**Judge of Appeal**

**HG Platt**

**Judge of Appeal**

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

**DEPUTY REGISTRAR**