



**IN THE COURT OF APPEAL**

**AT MALINDI**

**CIVIL APPEAL 12 OF 83**

**MUTUKU AND ASSOCIATES.....APPELLANT**

**AND**

**FELIX R M KITONGA & BROS LTD.....RESPONDENT**

**(From the ruling of the High Court of Kenya at Mombasa (Schofield, J) dated 16th December, 1982)**

**Civil Suit No 65 & 513 of 1978 (Consolidated) \_\_\_\_\_**

**RULING OF THE COURT**

HANCOX, J A It has been held, repeatedly, by this court that failure to include the formally drawn up decree or order embodying the decision of the court appealed from, is a matter going to jurisdiction and must result in the appeal being struck out – see in particular JASWANTRAI AGGARWAL & ORS v LEKHRAJ AGGARWAL, Civil Appeal 3 of 1981. In this case, the hearing notice for today has been served. On the last occasion when this appeal was called on, 25th July 1983, Mr Kitonga who then appeared for the Appellant on behalf of Messrs Mulwa, said, in terms, that the notice to strike out the Appeal had in fact been received by his office. We are therefore satisfied that Messrs J K Mulwa & Co were aware of this application to strike out.

We are informed by the clerk of the court, that when a notice of hearing is issued, it is not the registry's practice to specify, in addition, that the application to strike out will be heard because, the appellant being already aware thereof, must know that the notice of hearing embraces not only the appeal, but the application to strike out which of its nature, will precede the hearing of the appeal on the day of the hearing. It is therefore selfevident that the notice covers both matters.

Accordingly, we allow the respondent's application to strike-out the appeal, with costs to the respondent of the application.

Dated at Mombasa this 30th day of January, 1984.

A A KNELLER

JUDGE OF APPEAL

A R W HANCOX

JUDGE OF APPEAL

J O NYARANGI

AG JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR