



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Wicks CJ, Law & Miller JJA)

CIVIL APPEAL NO. 27 OF 1981

BETWEEN

KADUDA.....APPELLANT

AND

DOUGLAS.....RESPONDENT

JUDGMENT

When the hearing of this appeal began Mr Jiwaji for the first respondent took the preliminary objection that the notice of appeal was not served in accordance with rule 76 (1) of the rules of this Court, and that the record of appeal was not served in accordance with rule 87(1). The facts are that the notice of appeal, which should have been served within seven days of the date of filing (March 19, 1981) was not served until April 1, 1981, five days out of time; and the record of appeal, which was filed on May 13, 1981, which should have been served within seven days thereafter had not been served by the July 24, 1981, when Mr Jiwaji filed his notice of motion. The responsibility for effecting service is in each case placed upon the appellant by the relevant Rule. Mr Chalalu for the appellant has taken no steps before today to apply for extensions of time and so regularise these procedural defects. He has applied informally today, and his reason for not complying with the Rules is that the failure was due to an oversight, as he thought the Registry would effect service.

In our view Mr Chalalu has failed to satisfy us that sufficient reason has been shown for extending time under rule 4. Rule 76(1) and rule 87(1) make it clear that it is for the appellant to serve the record.

It is however a fact that Mr Chalalu has not had two clear days' notice as required by rule 49(1), but this was not Mr Jiwaji's fault as he was not served with the record until yesterday.

A more serious defect is that the record of appeal does not contain a copy of the decree or formal order, as required by rule 85(1)(h) of the Rules of this Court. Indeed, we are informed that no such decree or formal order has ever been extracted. This being so, the record is incapable of amendment by inclusion of the missing essential document out of time. The consequence is that this appeal is incompetent and must be struck out with costs, and we so order. If it is any consolation to the appellant, it would seem that in any event the appeal had little chance of success. Reliance is placed throughout the memorandum of appeal on the importance of applying African customary law, in accordance with Section 3(2) of the Judicature Act (Cap 8). But that application is subject to the customary law not being inconsistent with any written law. This appeal concerns the custody of infants. By Section 17 of the Guardianship of Infants Act (Cap 144), the welfare of the infant is the "first and paramount consideration". This written law supersedes the relevant African customary law, as was pointed out by Mosdell J in *Wambwa v Okumu*

[1970] EA 578, and the judgment of Kneller J the subject of this appeal was, we are satisfied, based on the correct principles applicable to the case as presented to him.

Dated and Delivered at Mombasa this 28th day of July 1981.

S.J.WICKS

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CHIEF JUSTICE

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR