



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 111 OF 2016

BETWEEN

ERNIE CAMPBELL & COMPANY LIMITED.....APPLICANT

AND

THE AUTOMOBILE ASSOCIATION OF KENYA .....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (Koome, J.) dated 8th December 2010*

*in*

*HCCC No. 324 of 2006)*

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JUDGMENT OF THE COURT

At the hearing of this appeal, **Mr. Onyango** the appellant’s learned counsel had to confront an objection raised by his learned counterpart for the respondent, **Mr. Nyaencha**, on the competency of the appeal. It was the latter’s contention in written submissions, repeated at the plenary hearing, that as the record of appeal does not contain a certified decree, a primary document on which the appeal must be anchored, then the appeal is incompetent and must be struck out. Mr. Nyaencha relied on this Court’s decision in REPUBLIC vs. ATTORNEY GENERAL & ANOR Ex PARTE AIRLINES PILOTS ASSOCIATION [2003] KLR 183 to the effect that failure to include the primary documents listed in **Rule 85(1)** of the **Court of Appeal Rules** is fatal to the appeal. The current rule is **87(1)**.

The appellant’s counsel first offered a half-hearted response to that objection by suggesting that the absence of a certified copy of the decree appealed from was “*a technical issue*” that should not defeat the appeal and, later, that he “*had faced Covid-19-related difficulties*” details or particulars of which were not stated, in accessing the Milimani Commercial Courts so as to obtain the said decree. He, however, abandoned those responses in the end and conceded in express terms, as he had to, that “*the authorities say that without the decree the record cannot stand.*”

**Rule 87** of the **Court of Appeal Rules 2010** provides in mandatory terms that for purposes of an appeal from a superior court in its original jurisdiction, such as the present appeal, the record of appeal shall contain the following documents –

“ ....

*h. the certified decree or order*

....”

Those documents are so important to the proper determination of the appeal that **Rule 88** allows the appellant to file without leave, a supplementary record under **Rule 92(3)** within fifteen days of the filing of the record to include any of the primary documents that may have been omitted from the record. Any later filing of such supplementary record will require the leave of the deputy registrar on application.

It is not in dispute that in the present appeal no decree was filed and no attempt was made to introduce one by way of supplementary record of appeal in the manner permitted by the rules. The effect of such omission is doubtless to render the record of appeal incompetent as is conceded.

That being the case, the only order open to us, and which we hereby make, is that the record of appeal be and is hereby struck out with costs to the respondent.

**Dated and delivered at Nairobi this 6th day of November, 2020.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**