



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL (APPLICATION) 203 OF 2008

SOUTH NYANZA SUGARCOMPANY LIMITED.....APPELLANT

AND

SILVAN KETCH.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of

Kenya at Kisii (Kaburu Bauni, J) dated 18

th

May 2007

in

H.C.C.APPEAL NO. 210 OF 2001

RULING OF THECOURT

This is an application under **rules 42, 43 and 80** of the **Court of Appeal Rules** for striking out the appeal. The grounds upon which the order is sought are that:-

- (a) The decree attached to the record of appeal is invalid it having been extracted without approval or notice or settlement contrary to Order XX Rules 6 and 7 of the Civil Procedure Rules.**
- (b) The decree attached and as extracted does not reflect the judgment of the court and is also undated.**
- (c) The attached certificate of delay is inaccurate and invalid and consequently therefore the record of appeal is invariably defective and incompetent as the same was**

filed out of time prescribed of the lodging of appeals.

On 18th May 2007 the late Kaburu Bauni, J delivered judgment by which he allowed the respondent's appeal and ordered as follows:

“The lower court's judgment is hereby set aside and substituted with an order allowing the appellant's case and awarding him Shs. 102,498/- with costs both in the lower court and costs of this appeal.”

The appellant was aggrieved and on 25th May 2007 timeously lodged a notice of appeal.

Subsequently thereafter, on 15th August, 2008 it caused the Deputy Registrar, High Court of Kenya at Kisii, to issue it with a decree and on 11th September 2008 it filed this appeal.

The decree which was issued by the superior court and incorporated in the record of appeal read in the main as follows:-

“The judgment decree in the subordinate Court in Kisii CMC NO. 795 of 1998 dated and delivered on 27th July 1999 be and is hereby set aside and in its place there shall be judgment for the appellant and against the respondent in the sum of Kshs. 102,498/- only.”

It is plain from the reading of the judgment delivered on 18th May, 2007 that the decree that was incorporated in the record of appeal is completely at variance with the judgment of the superior court and not only contains words which were not used by the learned Judge but, also, words deliberately calculated to mislead. For example, the sum awarded was **“Shs. 102,498 with costs both in the lower court and costs of this appeal”** but, the extracted decree shows the decree being for Shs 102,498/- only. If the extracted decree was adopted, it would have shown erroneously, of course, that the respondent was deprived of costs, which is not the position.

The extracted decree was, therefore, improperly approved by the Deputy Registrar as it contravened the mandatory provisions of **O XX rule 7** of the Civil Procedure Rules. It must follow therefore that the said decree is invalid and it cannot be the basis of the appeal. Consequently, and for those reasons, the appeal is incompetent.

We allow the application and strike out the appeal being Civil Appeal No. 203 of 2008. The respondent, Sylvan Ketch, shall have the costs of the application and of the struck out appeal.

Dated and delivered at Kisumu this 5th day of February, 2010.

P.K. TUNOI
.....
JUDGE OF APPEAL

E.O. O’KUBASU
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR