



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**Civil Appeal (Appli) 271 of 2007**

**JESSIE KUTHI .....APPLICANT/RESPONDENT**

**AND**

**1. ELIAS THATHI M'NJUNGE**

**2. MURIUKI M'NJUNGE.....RESPONDENTS/APPELLANTS**

*(An appeal from the judgment and decree of the High Court of Kenya at Embu (Khaminwa, J.) dated 31<sup>st</sup> July, 2007*

**in**

**H.C.C.C. NO. 6 OF 1995)**

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**RULING OF THE COURT**

*Elias Thathi M'Njunge* and *Muriuki M'Njunge*, the applicants herein, ask us to strike out **Civil Appeal No. 271 of 2007** which was lodged against them on 27<sup>th</sup> November, 2007 by *Jessie Kuthii*, the respondent herein. The motion to strike out the appeal is brought pursuant to **Rule 80** of the Court of Appeal Rules and several grounds are stated on the face of the motion as justifying the prayer to strike out the appeal. Ground (a) is that the appeal was not instituted within sixty days of the date when the notice of appeal was lodged. Ground (b) is that the appellant did not otherwise comply with **Rule 81** of the Court of Appeal Rules in that: -

(i) *the requisite registrar's certificate of delay has not been annexed to the memorandum of appeal;*

*and*

(ii) *there is no evidence of the service of the copy of letter applying for proceedings on the respondent.*

Ground (c) is that the decree was extracted in contravention of **Order 20 Rule 7 (2) (4)** in that the parties disagreed with the draft decree and the matter should have been placed before a judge to settle the decree.

On grounds (a) and (b) we do not think there is much substance in the complaints raised therein. It is true the notice of appeal was filed on 1<sup>st</sup> August, 2007 and the record of appeal itself was lodged on 27<sup>th</sup> November, 2007 which is more than the sixty days prescribed in **Rule 81 (1)** of the Rules, but at page 84 of the record of appeal is a certificate of delay issued by the Deputy Registrar at Embu and though unapparently worded, the document shows that the respondent did apply for copies of proceedings and

judgment on 31<sup>st</sup> July, 2007 and that those documents were made available to him on 27<sup>th</sup> September, 2007. The appeal itself, as we have seen, was lodged on 27<sup>th</sup> November, 2007. The complaint by Mr. Njage about the style or manner adopted in preparing the certificate of delay cannot affect the validity of the certificate itself. There is no rule requiring that the certificate of delay be annexed to the memorandum of appeal. Nor is there any rule prescribing that the letter applying for proceedings be “served” on a respondent; all that the proviso to **Rule 81** says is that a copy of the letter be sent to the respondent. We are also not aware of any rule prescribing that a copy of such letter must be included in the record of appeal. As to whether the letter was sent to Mr. Njage, the respondent has attached to his replying affidavit the copy of the letter and at the back of the copy is a rubber stamp of Mr. Njage’s office showing that the letter was received there on 1<sup>st</sup> August, 2007. As we have said the complaints in paragraphs (a) and (b) in the motion to strike out have no merit and we accordingly reject them.

The applicants, however, are on firmer ground in their complaint in paragraph (b). It was agreed before us that the parties disagreed on the draft decree prepared by the respondent and the disagreement was eventually resolved by the Judge. It appears to us that the respondent did not wait for the Judge to resolve the dispute over the contents of the decree but instead filed the appeal using the decree approved by the Deputy Registrar. The consequence of that is that the decree settled and approved by the Judge is not in the record of appeal; Mr. Maina, learned counsel for the respondent, admitted as much and he did agree that there is in fact another decree which was settled and approved by the Judge. There can be only one decree from one judgment and in this matter the decree in the record is not the one which was settled and approved by the Judge. The decree in the record is accordingly an invalid one and that being the position Civil Appeal No. 271 of 2007 is incurably defective and can only be struck out.

In the event, we allow the notice of motion dated 17<sup>th</sup> January, 2008 and lodged in court on 18<sup>th</sup> January, 2008 with the result that Civil Appeal No. 271 of 2007 is hereby struck out. We award the costs of motion to the applicants but we make no order as to the costs of the struck out appeal. Those shall be our orders.

*Dated and delivered at Nyeri this 15<sup>th</sup> day of May, 2009.*

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**