



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Civil Appeal (Appli) 213 of 2008

PREMIER DAIRY LTD RESPONDENT/APPELLANT

AND

1. AMARJIT SINGH SAGOO..... 1ST RESPONDENT

2. KURSHBIKAUR

HARJEET SINGH CHANDHA

(Suing as

the legal administrator of the Estate of

HARJEET SINGH CHARAN SINGH CHANDHA.....APPLICANT/2ND RESPONDENT

(Being an application to strike out the appeal lodged on 23.9.2008 and numbered 213 of

2008, from the judgment and decree of the High Court of Kenya at

Kisumu (Warsame J.) dated 18th September 2007

in

H.C.C.C. NO.61 OF 2001)

RULING OF THE COURT

Following the delivery of a judgment awarding damages against it on 25th September, 2007, Premier Dairy Limited, the appellant, timeously filed a notice of appeal on 1st October, 2007 declaring its intention of appealing against the whole of that judgment. The notice of appeal indicated the correct date of the judgment. Subsequently, the appellant lodged a record of appeal and in that record, it included a copy of that judgment but which shows that the judgment was prepared by M.A. Warsame J. and signed by him on 18th September, 2007. However, because he did not deliver it personally, the judgment shows that M.G. Mugo J. delivered it on 20th September, 2007, instead of 25th September, 2007, when, it was common ground, it was actually delivered. The record of appeal also includes a copy of decree which is correctly drawn signed and sealed but not certified as required by **rule 85(1)(h)** of the Court of Appeal Rules.

The record of appeal was timeously served upon Mr. Gichaba for the 2nd respondent in the appeal, Kurshbikaur Harjeet Singh Chandha, the legal representative of the Estate of Harjeet Singh Charan Singh Chandha. The said advocate caused a notice of motion expressed to be brought under rules **42(1), 80, 85(1) (2) and (4)** of the Court of Appeal Rules, to be filed, seeking an order striking out **Civil Appeal No. 213 of 2008**, which Premier Diary Ltd filed pursuant to the notice of appeal aforesaid. The grounds proffered in support of the application are that the record of that appeal contains an uncertified copy of decree, the copy of judgment and decree are at variance as regards the date of delivery of the judgment, the record of appeal omits certain primary documents and that the appeal was lodged out of time. Mr. Gichaba swore an affidavit to highlight those aspects.

In a replying affidavit sworn on 23rd but which was filed in Court on 25th June 2009, respectively, Mr. Walter Amoko for the respondent concedes that indeed the judgment on record bears the wrong date of delivery, there is no specific certification on the copy of decree on record, and that judgment was not delivered on 20th but on 25th September, 2007. In his submissions before us, however he urged the view that the wrong date does not render the appeal incompetent because the judgment is correct, is signed by the Judge who prepared it and countersigned by the Judge who delivered it. As for the copy of decree, Mr. Amoko submitted that it contains the superior court's stamp and because it is the document the appellant was furnished with by the superior court, there can be no doubt that it is authentic. Mr. Amoko cited this Court's decision in the case of **Andrew Kamau Mucuha v. Ripples Ltd** Civil Appeal (Application) No. 19 of 1998, in which the Court, as material, rendered itself thus:

“It is the duty of the trial court or indeed any court to ensure that copies of either proceedings or ruling or judgment agree with the original before giving it out to any person asking to be supplied with a copy thereof. we have checked the copies of proceedings included in the record of appeal and it is clear to us that they bear at the end a certificate by the Deputy Registrar of the High Court that they are a true copy of the original.”

Mr. Amoko was in effect saying that since the impugned documents were given to the appellants by the superior court whose duty it was to ensure that the documents are authentic, the appellant should not be blamed for relying on those documents.

Mr. Gichaba for the applicant abandoned the ground relating to the appeal having been filed out of time. Consequently that ground is not for consideration here. There is no doubt whatsoever that the copy of decree on record is not certified as required. Mr. Amoko appears to us to suggest that if a copy of decree is shown to be properly drawn, signed and sealed by the Deputy Registrar of the superior court, that suffices for purposes of rule **85(1)(h)**, aforesaid. To him there is no clear distinction between certification and sealing, as both are intended to show the document concerned is authentic.

The legal provisions which deal with the drawing of decrees are **O.XX rules 6 and 7** of the Civil Procedure Rules. **O.XX rule 6(1)** provides, thus:

“XX r.6(1) The decree shall agree with the judgment, it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit”

O.XX rule 7(1) provides:

“7(1) A decree shall bear the date of the day on which the judgment was delivered.”

O.XX rule 7(2), as far as is material, provides:

“7(2) Any party in a suit in the High Court may prepare a draft decree and submit it for approval of the other parties to the suit. ... and if the draft is approved by the parties, it shall be submitted to the registrar who, if he is satisfied that it is drawn up in accordance with the judgment shall sign and seal the decree accordingly.”

The framers of the Court of Appeal Rules must have been aware of the aforesaid provisions relating to the drawing, signing and sealing of decrees. It would not have been a difficult thing to say in **rule 85**, that an appellant shall include a copy of a decree drawn, signed and sealed as provided in the Civil Procedure Rules. The requirement of certification in our view is to provide an opportunity to the superior court to look afresh and confirm the contents of a judgment and satisfy itself that the decree as drawn represents what the superior court adjudicated upon and its decision thereof. Certification is meant to guarantee correctness.

A certified copy of decree is a primary document. It is not one of those documents which under **rule 85(2A)** of this Court's Rules, may be brought in by filing a supplementary record of appeal or which if defective may be amended and brought in through the filing of a supplementary record of appeal under **rule 89(3)** of this Court's Rules. As we stated earlier, Mr. Amoko, for the appellant concedes that the record does not contain a certified copy of decree. In view of what we have stated above, the omission is not curable and his argument that a copy of decree signed and sealed as required by **O.XX**, of the Civil Procedure Rules suffices, is not tenable. This Court rejected such an argument, in the recent decision of **Damaris Wangui Elizabeth v. Nzuki Mwinzi and Kenya National Assurance Co.[2001]Ltd**, Civil Appeal (Application) No.261 of 2006.

There is also the fact that there is variance between the date of the judgment as contained in the copy of the judgment and the copy of the decree. Mr. Gichaba for the applicant, the respondent in the appeal, urged the view that as the copy of the judgment on record does not bear the correct date, it cannot be said to be the judgment of the superior court delivered on 25th September, 2007. Consequently, he argued, the record of appeal omits a primary document, to wit the judgment delivered on 25th September, 2007, and thus renders the appellant's appeal incompetent. This Court has ruled time and time again that a copy of a judgment included in the record of appeal must accord with the provisions of **O.XX rule 3** of the Civil Procedure Rules. It is quite clear that the copy included in the appellant's record of appeal does not satisfy that legal requirement and thus renders the appeal incompetent. True, as argued by Mr. Amoko, the superior court or indeed any court is duty bound to give a party who requests for it, a copy of a document which is correct in every respect. This does not however, excuse a litigant from satisfying himself or herself that the document given to him or her by a court on request are accurate or reflect the correct position. In this matter the appellant was aware of the date the judgment against which an appeal was filed was delivered, namely, 25th September, 2007. It was therefore obliged to make inquiry from the court as to why the date on the judgment was different.

In the foregoing circumstances we allow the application dated and filed in Court on 17th October 2008 and order that **Civil Appeal No. 213 of 2008** be and is hereby struck out. The costs of both the application and the appeal are awarded to the applicant against the respondent, the appellant herein.

Dated and delivered at Kisumu this 17th day of July 2009.

R.S. C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR