



**REPUBLIC OF KENYA**

**COURT OF APPEAL AT MALINDI**

**CIVIL APPEAL APPLI 330 OF 2003**

**HUSSAMUDIN GULAMHUSSEIN POTHIWALA**

*(Administrator, Trustee and Executor of the Estate of the late*

**GULAMHUSSEIN POTHIWALA .....APPLICANT/RESPONDENT**

**AND**

**KIDOGO BASI HOUSING CORPORATIVE**

**SOCIETY LIMITED AND 31 OTHERS .....RESPONDENTS**

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**RULING OF THE COURT**

By this application expressed to be brought under **rules 80, 85 and 42** of the Court of Appeal Rules, the applicants who are the respondents in the appeal, move the Court to strike out **Civil Appeal No. 330 of 2003** on the ground that the decree the subject matter of the appeal is defective in that it is wrongly dated. The applicants state that the judgment is dated 8<sup>th</sup> day of December, 1997 but was delivered on 9<sup>th</sup> December, 1997. Thus, they aver that no judgment having been delivered on 8<sup>th</sup> December, 1997, the date given on the decree and on the Notice of Appeal i.e 9<sup>th</sup> December, 1997 is wrong. They contend therefore that in the circumstances the appeal is against a non-existent decree. The applicants further submit that the error or omission to insert the correct date in the decree contravenes **Order XX rule 7 (1)** of the Civil Procedure Rules which mandates that a decree shall bear the date of the day on which the judgment was delivered.

The records of appeal are bulky and untidy due to multiple varied and sometimes frivolous

applications obviously meant to delay expeditious disposal of the appeal. However, we have carefully gone through the records. They show that the same objections now raised had been raised before this Court and were conclusively determined in Civil Appeal (Application) No. 268 of 2002 and by an order of the Court made on 18<sup>th</sup> July, 2003, it was recorded:

**“Mr. Gikandi concedes very properly in our view that this appeal is incompetent in the absence of a certified copy of the decree. This omission is fatal and renders the appeal incurably defective. Accordingly, it is struck out with costs including costs of this application.”**

The matter directly and substantially in issue in that application was the validity of the decree and it having been raised was heard and finally decided by the Court. The validity of the same decree cannot again be raised herein for to do so would amount to an abuse of the court process. We think therefore that this application is misconceived and should be struck out. We so order.

In the result the Notice of Motion dated 16<sup>th</sup> January, 2004 is hereby ordered struck out with costs.

*Dated and delivered at Mombasa this 27<sup>th</sup> day of July, 2007.*

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

I certify that this

is a true copy of the original.

**DEPUTY REGISTRAR**

