



which no issue was raised. The decree was in the following terms:-

“**Claim For:-**

- a) An order of Declaration that the Repossession of motor vehicles registration number KYG. 484 and KYE. 363 from 15th May 1989 up to date is a breach of trust and amounts to negligence and a fraud.
- b) A declaration that the loan was limited to a maximum of Kshs.60,000/-.
- c) An order for specific performance against the Defendants to return the motor vehicles KYJ 484 and KYE. 363 in good order or condition or compensate for current value of the same.
- d) Special damages at the rate of Kshs 1,840/-per day from the date of repossession to date of release of the same.
- e) General damages for the loss of the security documents and negligence and breach of trust and general loss and use of the said motor vehicles.
- f) Interest and costs of this suit.
- g) General damages to be assessed by the Honorable Court may deem fit to grant.(sic)

**THIS SUIT** coming for hearing on diverse dates before the Honourable Justice J.K.Ngibuini of Mr. Gikandi & Co Advocates, the Advocates for the Plaintiff and Mr. Mabeya Alfred of Timamy & Company, the Advocate for the Defendants **AND UPON HEARING** the evidence of the Plaintiff witness Mr. Joseph Mbugua Gichanga and Mr. Jamlick Muchiri Kibetu and the Defence witness Mr. Dominique Nyongo and Mbithi **AND UPON ANALYSING** submissions by counsels of all the parties and exhibits produced.

**THIS SUIT** coming up for judgment by Honorable Justice J. K. Serگون read by the Honorable Justice Mr. Maraga this 19 December, **2,003 IT IS HEREBY DECREED:-**

**1.** that the defendants do pay to the plaintiff special damages of kshs.28,522,382/- made up as follows

(a) special damages awarded Kshs.1,840/-per day from 15/5/89 to date plus Kshs. 128,000/- Kshs.26,522,383.00

(b) general damages Kshs. 2,000,000.00 TOTAL Kshs. 28,522,383.00

**2.** That the Defendants do pay to the plaintiff costs of this suit to be taxed and certified by the Mater of this Honourable Court.

**3.** That the Defendant's Counterclaim be and is hereby dismissed with costs to be taxed and certified by the Taxing Master of this Honourable Court.

**4.** That the Defendants do pay the Plaintiff the interest at court rates **GIVEN** under my hand and seal of this court this 19th day of December 2003.

**DEPUTY REGISTRAR**

**HIGH COURT OF KENYA, MOMBASA**

**ISSUED** at Mombasa this 15th day of April 2004.”

The first example relied on by the respondent as a failure of the decree to follow the judgment was the omission of any reference to the counterclaim under the heading “**CLAIM FOR**” in the decree. **Mr. Gikandi** submitted that the decree was completely silent as to the counterclaim—as to whether it was presented or prosecuted. It was, he argued, a nullity since it did not comply with **Order XX rule 6(1)** of the Civil Procedure Rules which provides that :

“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 the relief granted or other determination of the suit. ”

**Mr. Gikandi** relied on the case of **Samaki Industries (Nairobi) Limited v. Samaki Industries (Kenya) Ltd.** Civil Appeal No. 108 of 1996 (Unreported). In that case this Court (*Omolo, Tunoi and Lakha JJA.*) struck out the decree as being incurably defective on the grounds that, *inter alia*, it was completely silent as to the counter-claim having been instituted, prosecuted or dismissed. The decree being a primary document the Court went on to strike out the appeal as being itself incurably defective.

We note that in the present case the decree was not completely silent as to the counter-claim. It was not referred to in the items (a) to (g) under the heading "**Claim for**" but it was referred to in Paragraph 3 under the heading "**IT IS HEREBY DECREED.**" There it is made clear that a counterclaim of some sort existed which counterclaim was dismissed.

This was not the only criticism of the Decree by **Mr. Gikandi**. He also pointed out that though the decree was amended with leave of the superior court the amendments were not correctly indicated in red. As a further irregularity he drew our attention to the word "special" which was erroneously included before the word "damages" in Paragraph 1 under "**IT IS HEREBY DECREED**". Special damages were otherwise correctly dealt with so that there was no confusion resulting from this obvious mistake. While not condoning the obvious lack of care in the drafting of the decree we would not consider this slip sufficient to render the decree a nullity.

**Mr. Gikandi** also took the point that documents, which should have formed part of the record of appeal, were not included in the record of appeal and had to be included in a supplementary record but did not elaborate on this aspect.

The next issue which needs to be tackled in this ruling on the preliminary point as to jurisdiction raised by the respondent is whether the application is time barred by the proviso to rule 80 which is as follows:-

***"Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty (30) days from the date of service of the record of appeal on the respondent."***

It is not disputed that the application now being made is well outside the 30 days. It cannot be contended that the application does not seek the striking out of the appeal.

**Mr Gikandi** mentioned **rule 101 (b)** as enabling him to raise the issue. This reads:-

***"At the hearing of an appeal.....(b) a respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 80"***

As we have seen the leave of the Court was neither sought nor granted. This is another reason why the objection raised by the respondent should be dismissed. In order to consider whether to grant leave under **rule 101 (b)** the court considered it desirable to hear what the objection was about. Having understood the nature of the objection we would not have granted leave for it to be raised, had leave been applied for. If we had reached a different conclusion on the merits of the objection as to our lack of jurisdiction we could have struck out the appeal on our own motion.

The respondent's preliminary objection is accordingly dismissed. Given the laxity in the drawing up of the decree which was the cause of the objection we order that the costs of and occasioned by the hearing of the objection be in the appeal.

**Dated and delivered at Nairobi this 29th day of April, 2005.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**