



**REPUBLIC OF KENYA**

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

**CORAM: GICHERU, O'KUBASU & KEIWUA, J.J.A.**

**CIVIL APPEAL NO. 211 OF 2001**

**BETWEEN**

**MULTIPLE HAULIERS E.A. LIMITED**

**JOSEPH NGUGI KAMAU ..... APPELLANTS**

**AND**

**JOHN ODONGO HAGAI ..... RESPONDENT**

**(Appeal from the decision of the High Court of Kenya at  
Kisumu (Tanui J) dated 6th June, 2001**

**in**

**H.C.C.A. NO. 107 OF 1999)**

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**RULING OF THE COURT**

This is an application brought under *rule 80 of the Court of Appeal Rules* for striking out the appeal because the record of appeal is incurably defective in that the original decree from the subordinate court to the High Court is incurably defective.

That is because though judgment was delivered and dated **September 7, 1998**, the decree therefrom has **September 9, 1999**, as the date when the judgment was delivered. The other complaint is that judgment was entered against the defendants jointly and severally but the decree is drawn to indicate that judgment was only entered against one of them, **Multiple Hauliers E.A. Limited**.

The judgment did not indicate any rate of interest to be applied but the decree purports to indicate that rate is at 8% per annum. The judgment did not specify the period within which interest was to be calculated, the decree purports to limit the period to be between September 9, 1999 and November 4, 1999.

The record of appeal does not contain the application made on November 11, 1999 for enlargement of time in order to deposit money and also the ruling arising from that application dated November 23, 1999, is missing from the record of appeal.

The need to include a decree of the subordinate court in a record of appeal in this Court is a requirement of **rule 85 (2) (v)** of the Rules . The decree of the subordinate court must be one which conforms to the provisions of **Order XX rule 7 of the Civil Procedure Rules** in that the date therein must correspond with the date of judgment the decree emanates from.

It is also one of the holdings of the learned Judge that the defendants were jointly and severally liable to the plaintiff. But the decree omits to reflect that and shows that judgment had been entered against the 1st defendant only.

We also note that the name of one of the defendants has been incorrectly stated in the decree. This is the name of the 1st defendant Multiple Hauliers (E.A.) Limited. The omission is also reflected in the Notice of Appeal filed in the appeal on June 6, 2001 which, of course, cannot be amended under any circumstances.

The respondent opposes the application because the faults admittedly in the decree are not those of the respondent but of the subordinate court and those mistakes have been compounded by the applicants who should not be heard to complain when they have benefited from the judgment which they sought to enforce. It has also been submitted on behalf of the respondent that because the applicant has not been entirely innocent in the breaches of the Rules it complains of, there be no order as to costs.

This Court in **Civil Appeal NO. 15 of 2000 - JAMES MBUGUA MACHARIA V AGNES WANJIKU MBUGUA** had this to say:

*"Ms Karua submit ted that although she had approved the decree in draft, that cannot be a bar to her raising the preliminary point that the decree was not in accordance with the judgment of the superior court because there can never be any estoppel against the law. In CATHERINE KARUNGARI KARL V GUTENTER OTTO KARL NO. 227 OF 1997 (Unreported) this Court said: "Order XX rules 6 (1) and 7 (6) of the Civil Procedure Rules which applies here makes it mandatory for a decree or an order to specify clearly all the reliefs gra nted or other determination of the suit. Mr Osmond did not contradict Ms Karua's contention that he approved the draft order. But we do not hold that by two counsel agreeing to the form or contents of a decree or an order they render correct a defective copy of the order or decree. All that they have done is to agree to a defective order.*

*Consequently as the appellant's record of appeal does not include a certified copy of the order appealed from the appeal is incompetent and we order that it be struck out with no order as to costs."*

For all these reasons set out hereinabove, we strike out the appeal with costs.

Dated and delivered at Kisumu this 21st day of June, 2002.

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**M. Ole KEIWUA**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR