

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM; OMOLO, OWUOR & O'KUBASU, JJ.A.)
CIVIL APPLICATION NO. NAI. 204 OF 2000
BETWEEN**

1. MOHAMED HAMISI MWABWAGIZO

2. SALIM HAMISI MWABWAGIZO

3. MASUDI MWACHIBUKU

MWABWOGIZO.....APPLICANTS

AND

JUMA MOHAMED

TUWANO.....RESPONDENT

**(Application to strike out the notice of appeal in an
intended appeal from the judgment & decree of the High Court
at Mombasa (Waki, J.) dated 7th December, 1998**

in

H.C.C.C. NO. 1 OF 1991)

RULING OF THE COURT:

The point raised by Mr. Gikandi, learned counsel for the applicants is interesting and somewhat ingenious but we do not think he has convinced us that the notice of appeal is fatally defective and that we ought to strike it out. As Mr. Gathuku for the respondent says, rightly so, in our view the notice says that the respondent to this motion intends to appeal against the decision given at Mombasa on 7th day of May, 1998. Our understanding of the phrase "the decision" is the same as that of Mr. Gathuku - it is the whole of it and that is the plain meaning of the English phrase "the decision". It is true Rule 74(3) of the Courts Rules says that the notice shall state whether it is intended to appeal against the whole or only part of the decision but Rule 74(6) says the notice shall be substantially in form D. We do not understand that expression to mean that the notice of appeal must in all respect comply with Form D. It is enough if the notice substantially complies with Form D. In our view the current notice does so. It must be clear to the applicants that the intended appeal shall be against the whole decision. The position will be different if the appeal were to be brought only against part of the decision. In that event the applicants would be entitled to take the challenge they are raising now. We reject Mr. Gikandi's submissions and accept those of Mr. Gathuku. That being our view of the matter we order that the motion be and is hereby dismissed but we decline to award the costs thereof to the respondent and reserve those costs to be in the intended appeal.

Dated and delivered at Mombasa this 26th day of January, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. OWUOUR

.....

JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR