**Magana Holdings Ltd v Mungai**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 3 December 1999

**Case Number:** 143/96

**Before:** Gicheru, Omolo and Shah JJA

**Sourced by:** LawAfrica

**Summarised by:** W Amoko

*[1] Practice and procedure – Court of Appeal – Record of appeal – Contents – Orders – Form of the*

*orders – Whether an order should be drawn up in the same manner as a decree – Consequences of the*

*record of appeal containing an order not drawn up in the same manner as a decree – Court of Appeal*

*Rules – Rule 851(*h*) and Order XX, Rule 7(1) and (6) of the Civil Procedure Rules – Section 89 – Civil*

*Procedure Act (Chapter 21).*

**RULING**

**GICHERU, OMOLO AND SHAH JJA:** Mr *Ochieng Oduol* who appears for the Respondent in the appeal has moved this Court by way of a notice of motion in the appeal for orders to the effect that the appeal itself be struck out with costs. He also sought orders to the effect that his client be at liberty to apply for further orders and/or directions as this Court may deem fit and just to grant. The grounds upon which he seeks the striking out of the appeal are as follows: “The order against which this appeal has been preferred is fatally defective in so far as it does not comply with the requirement of Order XX rules 6(1) and 7(6) of the Civil Procedure Rules. It does not set out the relief sought in the application, which was the subject matter of the ruling appealed from which renders the appeal incurably defective. The order granting leave to appeal is totally defective in so far as it does not comply with the requirement of Order XX rules 6(1) and 7(6) of the Civil Procedure Rules. An essential step has not been taken as is required by the Rules”. The sub-stratum of Mr *Oduol*’s argument is that an order appealed against must follow the same format as is used in the drawing of a decree of the superior court, that is to say, that it must first set out the claim and then the body of the order must set out what is normally set out in a decree. He says that the formal order appealed against is a primary document and therefore must comply fully with the Civil Procedure Act and Civil Procedure Rules. A decree is defined in section 2 of the Civil Procedure Act as follows: “ ‘decree’ means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91 of this Act, but does not include: Any adjudication from which an appeal lies as an appeal from an order; (underlining supplied) or Any order of dismissal for default”. The same section defines “order” as follows: “ ‘Order’ means the formal expression of any decision of a court *which is not a decree* and include rule *nisi*”. It is clear that section 2 of the Civil Procedure Act defines a “decree” and an “order” separately and that a “decree” does not include “any adjudication from which an appeal lies as an appeal from an “order”. The order against which this appeal has been lodged was made on 13 February 1996 by the superior court (Hayanga J). It is common ground that the Appellant’s advocates drew the order in question, as well as the order giving leave to appeal and sent the same to Mr *Ochieng Oduol* for approval. He did not respond to the request and the registry of the superior court approved and sealed the same upon request by the Appellant’s advocates in terms of Order XX, Rule 7(2) of the Civil Procedure Rules as read with sub-rule (6) thereof. Mr *Ochieng Oduol* cannot now be heard to say that the order as drawn does not comply with procedural requirements. Further in so far as this Court is concerned the requirement in rule 85(1)(h) does not call for drawing of an order in the manner a decree is drawn. Mr *Ochieng Oduol* drew our attention to what was stated by this Court in the case of *Shah v Aperit Investment SA* [1999] LLR 1014 (CAK). The Court said, *inter alia*: “Another defect of similar effect is that the Order does not as required by Order 20 rules 6(1) and 7(6) of the Civil Procedure Rules, to be prepared in a like manner as a decree, set out as it should, the particulars of the claim or the relief sought in the application which was the subject matter of the Ruling. We will no longer condone this kind of infringement of the provisions of the Civil Procedure Rules where a primary document is involved”. We do not know whether the attention of the Court was drawn to the fact that there are forms prescribed under the Civil Procedure Rules. The format of a decree is separate from the format of an interlocutory order. The definitions of “decree” and “order” in the Civil Procedure Act are different. We need not say any more on this point; suffice it to say that section 89 of the Civil Procedure Act mandates that the procedure in regard to suits shall be followed as far as it may be applicable (underlining supplied) in any court of civil jurisdiction. As an illustration of what we are saying, Form Number 6 in Appendix B to the Civil Procedure Rules, sets out the format of an order to produce documents for inspection. Although it is the form of an order made after hearing both parties it does not follow the format of a decree. It follows the kind of format adopted by the Appellant in this appeal. The same observations would apply to Form Number 8 in Appendix E or Forms Number 13 and 14 in Appendix G. It may well be that the court’s attention was not drawn to these Forms and if that is so, the observations in the case of *Shah* (*supra*) would have been made *per incuriam.*

In the result the application dated 26 November 1999 is dismissed with costs.

For the Applicant:

*Information not available*

For the Respondent:

*Information not available*