**Shah v Aperit Investments SA**

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

**Date of Ruling:** 18 November 1999

**Case Number:** 143/99

**Before:** Gicheru, Akiwumi and Owuor Jja

**Sourced by:** LawAfrica

**Summarised by:** W Amoko

*[1] Practice and procedure – Court of Appeal – Record of appeal – Contents – Distinction between primary documents and secondary documents – Consequences of failure to include a primary document like an order – Rules 80 and 85(1) – Court of Appeal Rules. [2] Practice and procedure – Court of Appeal – Record of appeal – Contents – Distinction between primary documents and secondary documents – Whether documents included in an affidavit included in the record of appeal had to have certified translations thereof – Consequences of failure to include certified copies of a document in a language other than English – Rule 85(1)*(f) *– Court of Appeal Rules. [3] 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 – Order 20, Rules 6(1) and 7 – Civil Procedure Rules.*

**RULING**

**GICHERU, AKIWUMI AND OWUOR JJA:** There are several reasons why we think that the appeal is incurably incompetent. As a primary document for the purpose of the appeal, the order appealed against must unambiguously set out the date on which the ruling was delivered. As the order now stands, and even though it is stated in the notice of appeal that the intended appeal is against the ruling delivered on 24 February, 1999 the order, apart from this date, gives the wrong impression that the ruling had also been given on 3 May 1999. What happened may well have been as submitted by Mr *Deverell* for the Appellant that on 3 May 1999, the ruling of 24 February 1999, had been amended under section 99 of the Civil Procedure Act to correct a clerical mistake. But this does not change the status of the ruling namely, that it was delivered on 24 February 1999. This ambiguity in a primary document like the order is fatal. (See *Anjumani v Ali* [1998] LLR 868 (CAK). 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. Thirdly, there are two share certificates referred to in, and annexed to, several important affidavits which form part of the pleadings in the application. These share certificates are in Spanish. As required by Rule 85(1)(*f*) of the Rules of this Court, certified translations of the share certificates must be included in the record of appeal. The only exception to this, is if the share certificates are not relevant to matters in the controversy on the appeal. But the share certificates being the basis upon which the Respondent’s application to amend the plaint and which the application was the one which was the subject of the ruling of 24 February 1999, we are unable to say that the share certificates are not relevant to the matter in controversy on the appeal. The fact that the record of appeal does not contain certified English translations of the share certificates also makes the record of appeal fatally invalid and so rendering the appeal incurably incompetent. For each of the foregoing reasons, the appeal is incompetent and is therefore struck out. We will make no order as to costs as the issues raised herein above, were all raised by us *suo moto*. It is so ordered. For the Appellant:

*Mr Deverell*

For the Respondent:

*Information not available*