

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 125 of 2005

LUCY WANGARI WAIGWA1ST APPELLANT

DAVID MWANGI WAIGWA.....2ND APPELLANT

VERSUS

BETH WANGUI WAIGWA.....RESPONDENT

RULING

Beth Wangui Waigwa, the respondent in this appeal seeks in her Chamber Summons dated 4th December 2008 and brought under **Order 41 Rule 31(2)** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act** the dismissal of this appeal on the grounds that no leave to appeal was obtained; that the appeal is incompetent as it was filed out of time; that the Memorandum of Appeal was not accompanied by a certified copy of the order appealed against as required by **Order 41 Rule 1A** of the **Civil Procedure Rule** and that since filing the appeal the appellants has not taken any step to prosecute it.

Though served, the Appellants have not filed any grounds of opposition or replying affidavits. The application is therefore unopposed. In his brief submission Mr. Wahome for the respondent relied on the affidavit in support and urged me to grant the application as prayed.

This appeal is against the decision of the Principal Magistrate delivered on

15th June 2005 in Nyahururu PM Succ. Cause No.158 of 2001 in which he sustained the respondent's objection that she was the first wife of the late Gerald Waigwa Ndegwa and declined to confirm the grant of letters of administration that had been issued to the appellants.

By virtue Rule 63(1) of the **Probate and Administration Rules**, the **Civil Procedure Act and Rules** apply to administration causes. I do not agree with the Respondent that this appeal was filed out of time. The ruling appealed against was delivered on

15th June 2005 and the appeal was filed on 15th July 2005 which is within 30 days period provided for by **Section 79G** of the **Civil Procedure Act**. I therefore dismiss that ground.

The decision appealed against was a ruling. By dint of **Section 75(1)(h)** of the **Civil Procedure Act** an appeal from it does not lie as of right. I agree with counsel for the Respondent that the Appellants required leave of court to prefer an appeal but they did not obtain it. In the circumstances I find that this appeal is incompetent. Aside from this the Appellants have, since the filing of the appeal, not taken any step to prosecute it. In the circumstances I find that the Respondent's application is merited. Consequently I allow it and dismiss this appeal with costs to the Respondent.

DATED and DELIVERED at Nakuru this 31st day of March, 2010.

D. K. MARAGA

JUDGE.