



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & KANTAI, J.J.A.)

CIVIL APPEAL NO. 290 OF 2017

BETWEEN

MERCY MUTHONI.....1ST APPELLANT

MIRINGU KINYANJUI.....2ND APPELLANT

AND

ROSEMARY ALICE KINYANJUI ALIAS

ROSEMARY BALDWIN KINYANJUI.....1ST RESPONDENT

NANCY NYOKABI DOLORES KINYANJUI.....2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 21st June, 2017

in

Succession Cause No. 518 of 2012)

RULING OF THE COURT

Following the death on 24th January, 2012 of **Maxwel Kinyanjui Miringu “(the deceased)”** the applicants, his widow **Rosemary Alice Kinyanjui alias Rose Baldwin Kinyanjui** and daughter **Nancy Muthoni Kiromo** filed a petition for grant of probate with will annexed at the High Court of Kenya, Nairobi. The respondents, **Mercy Muthoni Kiromo** (who claimed also to be a wife of the deceased) and her son **Miringu Kinyanjui** objected to such grant, claiming that they were entitled to a share of the estate. The petition was heard by Kimaru, J, who did not find any merit in the objection filed by the respondents and the applicants were allowed to apply for confirmation of grant in the judgment delivered on 21st June, 2017.

There is on record Civil Appeal No. 290 of 2017 filed on 17th August, 2017. In the motion taken before us by **M/S Musyimi & Company Advocates** for the applicants it is prayed in the main that we strike out the appeal with costs for the reasons set out on the face of the motion and in a supporting affidavit of the 1st applicant, Rosemary Alice Kinyanjui. These reasons include: that judgment was delivered on 21st June, 2017 as we have already seen; that notice of appeal was lodged on 12th July, 2017 and that the notice was filed out of the requisite time for filing such notice without leave of court. It is also said that no letter bespeaking proceedings has been served on the applicant by the respondents, again contrary to the rules of this Court.

The 1st respondent in a replying affidavit sworn at Nairobi on 7th November, 2017 depones that immediately after judgment was delivered proceedings were applied for by the respondents; that the respondents applied for stay of execution pending appeal; that:

“... with all the activities happening in the file from the application, to the typing of proceedings and subsequent verification, the notice of appeal was never presented to registrar for execution and was subsequently misplaced.” – paragraph 7 of replying affidavit.

It is deponed that it was after those events that the respondents’ lawyer filed another notice of appeal dated 10th July, 2017, lodged on 12th

July, 2017 and that the High Court had ordered that an appeal be lodged within 30 days, a decision that, according to the respondent, had not been appealed.

When the appeal came up for hearing before us on 29th October, 2019 Mrs. Anne Mbugua, learned counsel for the applicants, requested that the application for striking out be heard first. We allowed that to happen, noting, in any event that an order had earlier been made that the motion be heard before the appeal.

In brief submissions Mrs. Mbugua stated that no valid notice of appeal had been filed after the judgment delivered on 21st June, 2017, the notice of appeal lodged on 12th July, 2017 being out of time. She wondered why the respondents had not up to the day of hearing filed an application to regularize the position. Counsel cited the Supreme Court case of **Teachers Service Commission v Simon P. Kamau & 19 Others [2015] eKLR** for the proposition that a notice of appeal is a jurisdictional requisite, lack of which cannot be bailed out by the invocation of **Article 159** of the **Constitution**. According to counsel, no appeal can be filed out of time without leave of court.

Mr. Muguro Irungu, in opposing the motion, submitted that the issue of whether a notice of appeal had been filed had been dealt with by the High Court when it directed that an appeal be filed within 30 days.

Rule 75 of the rules of this Court at **sub-rule (1) and (2)** is in the following terms:

“75. Notice of Appeal

(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3)”

In the **Teachers Service Commission** (supra) case this is what the Supreme Court said on the importance of a notice of appeal:

“We find that notice of appeal, as a prelude to the filing of an appeal, was a requirement both in the 2011 rules, and under the current (2012) Rules of the Supreme Court; and that the Appellate Court while it acted as the Supreme Court, had a long-standing practice as regards notice of appeal. The applicant did not file a notice of appeal, until late in 2014— and then without the leave of the Court. Clearly, the applicant did not appreciate the importance of the notice of appeal; for even this time, the applicant has not endeavoured to make a case for extension of time to file the notice. By past practice, this Court has not favoured the practice by parties of filing a document improperly, and then seeking ex post facto endorsement by the Court. In the case of Nicholas Kiptoo Arap Korir Salat v. the Independent Electoral and Boundaries Commission & 7 Others, Sup. Ct. Application No. 16 of 2014, this Court thus stated its position in relation to such a practice:

“To file an appeal out of time and seek the Court [extending] time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, [what] he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s record.”

It is admitted in our case by the respondents that no notice of appeal was lodged with the Registrar of the High Court within 14 days as required in law. As properly pointed out by Mrs. Mbugua, counsel for the applicants, who informed us that she had raised objection to the validity of the appeal all along, without the respondents moving the court for extension of time to file an appeal out of time, there is no valid appeal before us. We allow the Motion with the consequence that the record of appeal being Civil Appeal No. 290 of 2017 is hereby struck out. The applicants will have costs of the Motion.

Dated and delivered at Nairobi this 7th day of February, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR