



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, GATEMBU & J. MOHAMMED, J.J.A)**

**CIVIL APPLICATION NO. NAI 125 OF 2011)**

**LITHER PETER MUIA .....1<sup>ST</sup> APPLICANT**

**ROSE PETER MUIA .....2<sup>ND</sup> APPLICANT**

**AND**

**ZUENA NGANDO KABABU .....RESPONDENT**

*(Being an application to strike out the Notice of Appeal dated 14<sup>th</sup> May, 2009 against the Ruling of the High Court of Kenya at Nairobi (Rawal, J) in HIGH COURT SUCCESSION CAUSE NO. 2833 OF 2004)*

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**RULING OF THE COURT**

1. In a ruling delivered on 27<sup>th</sup> April 2009 in Succession Cause No. 2833 of 2004, the High Court (K. H. Rawal, J, as she then was) rejected claims by Zuena Ngando Kababu, the respondent that she was married to Peter Muia Ndunda, deceased. Accordingly, the High Court dismissed her objection to the grant of letters of administration to the widow and daughter of the deceased.
2. Aggrieved, and desiring to challenge that decision on appeal to this Court, the respondent lodged a notice of appeal on 14<sup>th</sup> May 2009. The respondent also applied through her advocates' letter dated 16<sup>th</sup> May 2009 to the Deputy Registrar of the High Court, to be furnished with copies of the proceedings and the ruling delivered on 27<sup>th</sup> April 2009.
3. Concerned that the time frame provided for institution of appeals under rule 82 of the rules of the Court has expired and that the respondent has taken too long to institute the appeal, the applicants filed the present application on 25<sup>th</sup> May 2011 praying that the respondent's notice of appeal dated 14<sup>th</sup> May 2011 be struck out on the ground that the notice of appeal was "*lodged over two (2) years ago and the respondent has since then failed to institute an appeal within the prescribed time.*"
4. At the hearing of the application before us, Ms. N. Muteti learned counsel for the applicants

referred us to her affidavit sworn on 16<sup>th</sup> May 2011 in support of the application and urged that the respondent served the notice of appeal on 14<sup>th</sup> May 2009; that on 16<sup>th</sup> May 2009 the respondent's advocate wrote to the Deputy Registrar of the High Court requesting for certified copies of proceedings and of the ruling; that it has been more than two years since the request was made and there has been no indication of any effort on the part of the respondent to obtain the same; that the delay in the disposal of the matter has inconvenienced the administrators and beneficiaries of the estate of the deceased; and that the respondent is not keen to pursue the intended appeal and the notice of appeal and the same should therefore be struck out.

5. According to Ms Muteti, the respondent's advocate's letter bearing the date 7<sup>th</sup> May 2014 attached to the relying affidavit in which the advocates allegedly complained to the Chief Registrar High Court of Kenya, Family Division about the delay in the processing of proceedings, should be treated with suspicion as it does not bear a court stamp to show that it was indeed delivered to the Court. It was also neither copied or served upon the applicants' advocate. In her view, counsel for the respondent should have obtained and typed out the Judge's handwritten notes with a view to expediting the matter and the Court should not therefore aid the indolent.
6. Opposing the application Mr. F. N. Mulwa learned counsel for the respondent, referred us to his replying affidavit sworn on 20<sup>th</sup> January 2015 and filed on 21<sup>st</sup> January 2015 where he deposes that the respondent's advocate has made several visits to the Family Division Registry to check on the progress of the proceedings to no avail; that his firm followed up the initial letter dated 16<sup>th</sup> May 2009 bespeaking proceedings with a reminder to the Chief Registrar dated 7<sup>th</sup> May 2014 and that the delay, which is fully explained and excusable, is attributable to the court.
7. In any event, Mr. Mulwa argued, the applicant's application is incompetent and should be struck out as it was filed outside the 30 days window permitted under the proviso to rule 84 of the rules of the Court. In that regard counsel referred us to the decision of this Court in **C.Y.O. O V R.O.O, Civil Appeal No. 148 of 2009 [2011] eKLR** and urged us to strike out the application.

### **Determination**

8. We will first consider whether, as submitted by Mr. Mulwa, the application is incompetent for having been filed outside the 30 days permitted under the proviso to rule 84 of the rules of the Court. Rule 84 provides:

***“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.*”**

***Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”***

9. Mr. Mulwa relied on the decision of this Court in in **C.Y.O. O V R.O.O** (supra) where the following passage appears:

***“The proviso to that rule [rule 84] sets a time limit for invoking it. It would be apparent, therefore, that on the face of it the motion itself was filed out of time and is liable to striking out.”***

10. The notice of appeal in this case was lodged on 14<sup>th</sup> May 2009 and served on the advocates for the applicants on the same date. If the proviso to rule 84 is applicable in this case, it would mean that at the very latest the applicants should have filed the present application to strike out the notice of appeal on 14<sup>th</sup> June 2009, being 30 days from 14<sup>th</sup> May 2009.

11. The ground on which the applicants have applied for the notice of appeal to be struck out is that the respondent has not instituted the appeal within the period prescribed under rule 82 of the rules of the Court. Given that the respondent has at least 60 days from the date of lodging the notice of appeal to institute the appeal by filing the record of appeal, an application to strike out a notice of appeal on the ground that the appeal has not been instituted cannot possibly be presented before the expiry of the permitted 60 days. Having served the notice of appeal on 14<sup>th</sup> May 2009, the applicant had up to 14<sup>th</sup> June 2009, without taking into account such time as may be excluded as having been required for preparation and delivery of a copy of the proceedings, to institute the appeal.
12. In other words, the 30 days restriction under the proviso to rule 84 cannot apply in the present circumstances. To hold otherwise would be tantamount to reducing the time permitted for filing the appeal under rule 82 of the rules of the Court. In our view, rule 84 cannot apply to the circumstances of this case as it is intended to apply to situations where, for instance, it is contended that the notice of appeal has been lodged or served out of time or, where leave to appeal is required and has not been sought and obtained or where no appeal lies or where a step precedent to lodging the notice of appeal or appeal has not been taken. To that extent, the authority cited in support of striking out the motion, the C. Y. O. O. case (supra) is distinguishable.
13. Here, the applicants are seeking to strike out the notice of appeal on the grounds that the record of appeal has not been filed. A party cannot be penalized for failing to do something in 30 days when that party has at least 60 days within which to perform such act. Consequently there is no merit in the respondent's contention that the application is incompetent for having been filed outside the 30 days window permitted under the proviso to rule 84 of the rules of the Court.
14. The applicant also relies on rule 83 of the rules of the Court which provides that: ***"If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."***
15. As already noted the notice of appeal in this case was lodged on 14<sup>th</sup> May 2009. The respondent's advocate's letter dated 16<sup>th</sup> May 2009 to the Deputy Registrar requesting for typed proceedings was delivered to the court on 18<sup>th</sup> May 2009. Although the respondent says there has been follow up by a letter dated 7<sup>th</sup> May 2014 addressed to the Chief Registrar, there is no evidence of that letter having been delivered to the court or a copy having been served on the applicant's advocates. It would also seem that the formal order in respect of the ruling intended to be appealed from has not been extracted. From the record, there is no evidence that the respondent has been proactive in getting the record of appeal ready.
16. Be that as it may, it is evident that the court has a big part of the blame to share for the delay in making the proceedings available. Having regard to the fact that the respondent has a right of appeal, and filed the notice of appeal and also requested for the typed proceedings, and made the applicants aware of these intentions, it is our view that the respondent should have a chance to prosecute the appeal. We will adopt the approach taken in **Githara Chuchu and 473 others v Kenya Planters Co-operative Union Ltd**, in **Civil Application No Nai 337 of 2013, [2014] eKLR** where the Court recognized that the delay in procuring typed proceedings cannot be blamed solely on the appellant and provided time frames within which steps should be taken for the expeditious disposal of the appeal despite expressing the view that counsel should have pursued the typed proceedings pro-actively. This is in line with the Court's duty under section 3A and 3B of the Appellate Jurisdiction Act to facilitate the "just, expeditious, proportionate and affordable resolution" of the appeal.
17. Observing as we do that the impugned ruling is typed and forms part of the record of the application before us, we direct as follows:
  - a. The Registrar of the Court shall immediately upon delivery of this Ruling cause the same

to be served on the Deputy Registrar of the High Court, in any event within 7 days of delivery.

- b. The Deputy Registrar of the High Court shall within 30 days from the date of service of this Ruling supply the parties with the typed proceedings and ruling upon payment of the requisite charges.
- c. The respondent shall institute the appeal within 30 days from the date of compliance with (b) above failing which the notice of appeal shall be deemed to have been withdrawn with costs to the applicant, pursuant to Rule 83 of the Court of Appeal Rule without further application to the Court.

18. The result is that the application dated 16<sup>th</sup> May 2011 fails and is dismissed. The costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Nairobi this 27th day of February, 2015.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

