



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, SICHALE & ODEK, JJ.A)

CIVIL APPLICATION NO. NAI. 7 OF 2014

BETWEEN

**STEPHEN KAMUNYU NDWARU 1ST APPLICANT ESTHER NYIHA
NDWARU 2ND APPLICANT**

AND

FLORENCE WAMBUI KUNGU RESPONDENT

(Application to strike out the Notice of Appeal from the Ruling and Order of the High Court of Kenya at Nairobi delivered by (Koome,J.) given on the 5th August, 2005

in

HC. SUCCESSION CAUSE NO. 1131 OF 1991)

RULING OF THE COURT

The applicants **STEPHEN KAMUYU NDWARU** and **ESTHER NYIHA NDWARU** filed a Notice of Motion application dated 16th January, 2014 seeking an order that the Notice of Appeal dated 8th August 2005 be struck out. The application was supported by the affidavit of **DENNIS SILAS MBICHI MBOROKI**, counsel for the applicants sworn on 16th January 2014, in which he deponed that the respondent filed a Notice of Appeal on 8th August 2015 following the ruling of Koome, J (as she then was) delivered on 5th August 2005; that to-date no record of appeal has been prepared and served upon the applicants and finally that the delay is inordinate.

In response, the respondent **FLORENCE WAMBUI KUNGU** swore an affidavit dated 4th July, 2014 wherein she attributed the failure to file the record of appeal to non-availability of the High Court file; that a letter bespeaking the proceedings was made on 8th August 2005, 3 days after the impugned ruling; that the letter from the applicant's counsel addressed to the Deputy Registrar, dated 23rd November 2010 acknowledged that the court file was missing; that the file was eventually found in 2012; that thereafter several applications were made that caused the unavailability of the file and finally, that the delay to file the appeal was not due to negligence on her part.

We have considered the Notice of Motion application, the supporting affidavit and the respondent's

replying affidavit.

This is indeed an old matter, the Notice of Appeal having been filed on 8th August 2005, a period of now about 10 years. However, it is evident that the respondent has not been able to file the record of appeal due to unavailability of the file. We note that the respondent applied for proceedings vide a letter dated

8th August 2005, 3 days after the ruling of Koome, J. Her explanation of the missing file is given credence by the fact that the applicants counsel in a letter dated 23rd November 2010 asked the Deputy Registrar to “----- *help us to trace the Court file.*”

As deponed by the respondent the file was finally traced by the year 2012 and thereafter there were a multiplicity of applications made in respect of the parcel of land, the subject matter of the dispute. In particular, one **Charles Mucheri Ikinga** filed an application on 2nd March, 2012 and sought an order to have the Deputy Registrar execute a transfer in his favour. It would appear that this application was declined, necessitating a review application filed on 12th August 2013.

Given the above, we are of the considered view that the delay in filing the record of appeal has been caused by circumstances beyond the respondent’s control. The application to strike out the Notice of Appeal is dismissed with costs.

Dated and delivered at Nairobi this 19th day of June, 2015.

M. WARSAME

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR