IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KIAGE & ODEK, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 277 OF 2010

BETWEEN

FLORENCE IMATHIU …..... APPLICANT/ 2ND RESPONDENT

AND

MWONGERA MUGAMBI

RINTURI..... 1ST RESPONDENT/ 1STAPPELLANT

FESTUS GUANTAI

MUGAMBI …..... 2ND RESPONDENT/ 2ND APPELLANT

JOSEPHINE KAARIKA …..... 1ST RESPONDENT

ADVENTURE TECHNOLOGY

CO. LTD …..... 3RD RESPONDENT

(An application to strike out the Record of Appeal from the ruling of the High Court of Kenya at Meru (Kasango, J.) dated 28th May, 2010

in

H.C Succession Cause No. 213 of 1997)

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RULING OF THE COURT

1. Before us is Notice of Motion application brought pursuant to ***Section 1A, 1B & 3A*** of the ***Civil Procedure Act,*** Chapter 21 Laws of Kenya, and ***Rules 4 & 84*** of the ***Court of Appeal Rules (***the Rules). The 2nd respondent/ applicant in the said application seeks:-

    a) That this Honourable Court be pleased to grant leave to the applicant to bring this application out of time.

b) That this Honourable Court be pleased to strike out the entire Record of Appeal, including the Memorandum of Appeal presented to the Court by the appellants.

c) That costs of this application be provided for.

2. The grounds upon which the 2nd respondent relies on in support of her application are firstly, that the ***Law of Succession Act,*** Chapter 61, Laws of Kenya, does not provide for an appeal from the decision of the High Court to the Court of Appeal. Therefore, according to her the current appeal before us is incompetent. Secondly, that the appellants' appeal had been overtaken by events as the 1st respondent has since passed away and the High Court vide its ruling dated 21st July, 2011 reviewed it ruling dated 28th May, 2010 by directing the 2nd respondent to be the sole administrator of the estate of the deceased. Therefore, the ruling dated 28th May, 2010 no longer exists. Thirdly, that there is no pending appeal from the judgment dated 1st April, 2009 in respect of the mode of distribution of the deceased's estate. Fourthly, that the current appeal remains a burden to the 2nd respondent by subjecting her to unnecessary expenses. Lastly, that as an administrator of the deceased's estate she has already transmitted most of the assets of the estate to the respective beneficiaries.
3. The backgound of this application is that the appellants and the 1st and 2nd respondents are children of Perminus M'Mugambi Rinturi who died in 1985. After the death of the deceased, the appellants were appointed as joint administrators of the estate. On 1st April, 2009 the High Court (Emukule, J.) in his judgment declared the 1st and 2nd respondents beneficiaries to the estate and directed the mode of distribution of the deceased's estate amongst the beneficiaries. The appellants were aggrieved with the said judgment and filed a Notice of Appeal in respect of the same before this Court.
4. Subsequently, the 1st and 2nd respondents vide an application dated 16th July, 2009 sought *inter alia* to be appointed as the administrators of the deceased's estate in place of the appellants. The High Court (Kasango, J.) vide a ruling dated 28th May, 2010 annulled the grant issued to the appellants and appointed the 1st and 2nd respondents as administrators of the estate. The learned Judge was convinced that the appellants were incapable of concluding administration of the Estate since the matter had been pending in court for over 22 years. The learned Judge further directed that the grant issued to the 1st and 2nd respondents be confirmed in terms of the judgment dated 1st April, 2009. This is the ruling which is the subject of this appeal.
5. Mr. A. G. Riungu, learned counsel for the 2nd respondent/applicant, submitted that the application seeks an order striking out the appeal herein for being incompetent. He submitted that there was nothing left in the deceased's estate to be administered. Mr. Riungu relied on ***Rule 104 (b)*** of the Rules in justifying the current application. He also relied entirely on the above mentioned grounds and the supporting affidavit sworn by the 2nd appellant. He urged us to allow the application.
6. Mr. Gikunda, learned counsel for the 3rd respondent, in supporting the application submitted that the application had merit and that the matter was old and already some of the parties therein had passed away. He further submitted that the appeal herein was premised on the ruling and orders dated 28th May, 2010 which were no longer in existence. According to him the said orders were reviewed by subsequent orders of the High Court dated 21st July, 2011 which directed the 2nd respondent to be the sole administrator of the estate after the demise of the 1st respondent.
7. Mr. M. M. Kioga, learned counsel for the appellants, in opposing the application, submitted that the learned counsel for the respondents had not addressed the Court on why the current application was not filed on time and why extension is needed. He argued that the supporting affidavit annexed to the application was purely based on opinion. Mr. Kioga submitted that ***Rule 84*** of the Rules was not applicable in this case and that extension of time to file the current application could not be granted under ***Rule 4*** of the Rules. He emphasised that although the power exercised under ***Rule 4*** is discretionary the same ought to exercised judiciously. Mr. Kioga submitted that the other prayers sought in the application hinged on leave to file the said application being granted; and that the prayer for striking out the appeal could only at this stage be advanced at the hearing of the appeal.

8. We have considered the application before us, the grounds in support of the application, submission by learned counsel and the law. ***Rule 84*** of the Rules provides:-

> ***"A person affected by an appeal may at any time either before or after institution of the appeal apply to the Court to strike out the Notice of Appeal or the appeal, as the case may be on the ground that no appeal lies or that some essential step in proceedings has not been taken or has not been taken within the prescribed time.***
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> ***Provided that an application to strike out a Notice of Appeal or appeal shall not be brought after the expiry of 30 days from the date of service of the Notice of Appeal or Record of Appeal as the case may be."***

In this instant case the Record of Appeal was filed on 12th October, 2010 and by virtue of the fact that the issue of late service has not been raised we assume that the same was served within 7 days of lodging the Record of Appeal in accordance with ***Rule 90*** of the Rules. Therefore, the 2nd respondent ought to have filed the current application seeking the striking out of the appeal herein within 30 days from the date of service of the Record of Appeal. The 2nd respondent by virtue of the current application seeks in the first prayer extension of time to apply for an order striking out the appeal herein for being incompetent.

9. We are of the considered view that the first issue for our consideration is whether by virtue of ***Rule 4*** of the Rules we have the power to extend the time within which the 2nd respondent can file an application seeking an order striking out the Record of Appeal. ***Rule 4*** of the Rules provides,

> ***"The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a Superior Court, for doing any act authorized or required by these Rules, whether before or after doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."***

This Court in ***Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004***, held:-

> ***"It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-"Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-***
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> ***It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."***

10. The 2nd respondent ought to have filed the current application within 30 days of service of the Record of Appeal which was lodged on 12th October, 2010. The current application was filed on 23rd November, 2011, almost a year after the prescribed period of filing such an application. We cannot help but note that the 2nd respondent has not given any reason either in her affidavit or through the submissions of her counsel why she failed to file the current application on time. From the foregoing in order for this Court to exercise it unfettered discretion under ***Rule 4*** of the Rules

it is incumbent for us to consider whether the reasons for delay are reasonable. The discretion exercised under ***rule 4*** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. We therefore, find that the first prayer of extension of time in the current application has no merit for the reason that no grounds for the delay in filing the same have been adduced.

11. Having expressed ourselves as above we find no need to consider the second prayer of the application which seeks an order striking out the appeal. Accordingly, we dismiss the current application with costs to the appellants.

Dated and delivered at Nyeri this 25th day of September, 2013.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

PATRICK KIAGE

….....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR