



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPLICATION NO. NAI. 234 OF 2012**

**BETWEEN**

JUSTUS MAJAU ..... 1<sup>ST</sup> APPLICANT  
JOSEPH GIKUNDA ..... 2<sup>ND</sup> APPLICANT  
GERALD KINOTI NGARUTHI ..... 3<sup>RD</sup> APPLICANT  
FRANCIS RIUNGU NGARUTHI ..... 4<sup>TH</sup> APPLICANT

**AND**

ERASTUS MURIUNGI (deceased) thro' JANET  
MWARI MURIUNGI (Legal representative) ..... RESPONDENT

*(An application to strike out the Notice of Appeal arising from the judgment of the High*

*Court of Kenya at Meru (Ouko, J.) dated 2<sup>nd</sup> November, 2007*

**in**

**H.C.C.C NO. 54 OF 1986)**

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**RULING OF THE COURT**

1. Before us is a Notice of Motion application dated 3<sup>rd</sup> July, 2012 brought pursuant to **Rule 82** of the **Court of Appeal Rules** (the Rules) and **Section 3A & 3B** of the **Appellant Jurisdiction Act**, Chapter 8, Laws of Kenya. The applicants seek the following orders:-

- **The Notice of Appeal lodged on the 9<sup>th</sup> November, 2007 be struck out.**
- **The orders for stay pending appeal issued by the superior court on 23<sup>rd</sup> January, 2009 be discharged.**
- **The costs be provided for.**

The grounds upon which the applicants rely on in support of their application are that the Notice of Appeal was lodged on 9<sup>th</sup> November, 2007 against the High Court's judgment dated 2<sup>nd</sup> November, 2007 and to date no appeal has been lodged; on 23<sup>rd</sup> January, 2009 the High Court issued an order of stay of execution of the said judgment; the applicants have been denied the fruits of their judgment since the stay was granted and the respondent has not taken any steps to lodge the appeal. The time within which the respondent was required to lodge the Record of Appeal has long expired and the respondent has not filed an application for extension of time within which to file the same.

2. The genesis of this application is that the High Court vide a judgment dated 2<sup>nd</sup> November, 2007 issued a declaration that Erastus Muriungi (deceased ) held the suit property in trust for the applicants and that his legal representative (Janet Muriungi) was only entitled to a life interest on the suit property. Being dissatisfied with the said decision the respondent lodged a Notice of Appeal on 9<sup>th</sup> November, 2007. Thereafter, pursuant to an application by the respondent the High Court vide a ruling dated 23<sup>rd</sup> January, 2009 issued orders of stay of execution pending the hearing and determination of the intended appeal in this Court.
3. In opposition to the said application, the respondent's advocate on record swore a replying affidavit. He deponed that he had been on record for the deceased in this matter for almost thirty years; the deceased died before the matter was finalised in the trial court; the respondent being the legal representative of the deceased withdrew the matter from M/s Kioga and instructed the firm of M/s Muchiri Munga & Kibanga Advocates to take over the matter; the High Court entered judgment in favour of the applicants on 2<sup>nd</sup> November, 2007. The respondent then instructed M/s Kioga to act on behalf of the deceased's Estate. By that time M/s Muchiri had lodged a Notice of Appeal on 9<sup>th</sup> November, 2007 and applied for certified copies of the proceedings vide a letter dated 5<sup>th</sup> November, 2007. Since then he has made numerous requests for the certified proceedings from the High Court without success. To date no proceedings have been availed to the respondent's advocates.
4. Mr. Kariuki, learned counsel for the applicants, reiterated the grounds in support of the application to strike out the Notice of Appeal. He submitted that the respondent's intended appeal was time barred. He argued that the letter requesting for certified proceedings was not served upon the applicants' counsel as required by the law. He urged us to allow the application as prayed. Mr. Kioga, learned counsel for the respondent, in opposing the application submitted that there was no evidence indicating that the letter requesting proceedings was not served upon the applicants.
5. We have considered the application, the grounds in support of the application, the affidavits, the submissions by the learned counsel and the law. **Rule 82** of the Rules, provides that an appeal should be instituted within sixty days of the date of filing the Notice of Appeal. This rule further provides that in computing the said time any period certified by the registrar as having been required to prepare the proceedings should be excluded. In this case it is not in dispute that the judgment was delivered on 2<sup>nd</sup> November, 2007; the respondent's counsel requested for proceedings vide a letter dated 5<sup>th</sup> November, 2007. We are of the considered view that there is no evidence in support of the applicants' contention that the letter requesting proceedings was never served upon their advocates. In **Mariam Abubakar Ileri & another -vs- National Cereals & Produce Board- Civil Application No. 92 of 2008**, this Court held,

***'..in view of what we stated earlier, that upon requesting for copies of proceedings from the court and because the letter bespeaking those proceedings was copied to the applicant's counsel, time prescribed for filing an appeal stopped running. The running of the time resumed on or about 3<sup>rd</sup> September when copies of proceedings were delivered to the respondent.'***

In this case the issue at hand is whether the respondent's intended appeal is time barred. The respondent requested for certified proceedings vide a letter dated 5<sup>th</sup> November, 2007 and therefore time within which the respondent was required to file the intended appeal stopped running on 5<sup>th</sup> November and could only resume once the certified proceedings were availed. See this Court's decision in ***Nyeri Wholesalers Limited -vs- Kasturi Limited – Civil Application No. Nai. 132 of 2012***. It is not in dispute that the High Court has not availed the certified proceedings despite numerous requests to do so by the respondent. We find that the respondent's intended appeal is not time barred.

6. The upshot of the foregoing is that we find no merit in the applicants' application and dismiss the same with costs to the respondent.

***Dated and delivered at Nyeri this 10<sup>th</sup> day of December, 2013.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**