



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 157 OF 2009

BETWEEN

CATHERINE WAMUYU WAITHAKA.....1ST APPLICANT
MURIUKI BENSON.....2ND APPLICANT

AND

CHRISTOPHER KIRAGU NGIBUINI.....1ST RESPONDENT
EUNICE WAIRIMU MBOGO AND ESTHER WANJIRU MBURU (Suing as the
administrators of the estate of the late GERALD MBOGO.....2ND RESPONDENT
EUNICE MBOGO.....3RD RESPONDENT

(An application for striking out the Notice of Appeal filed o 29th September, 2004 from the ruling of
the High Court of Kenya at Nairobi (Lenaola, J.) dated 24th September, 2004
in

H.C.C.S.NO.1798 OF 1999)

RULING OF THE COURT

The application before us is based on rules 76(1), 80 and 81 of the Court of Appeal Rules. It seeks an order to strike out the notice of appeal filed in Court by the firm of Kibuchi & Company advocates on 29th September, 2004.

The application is based on two principal grounds namely:-

- i. That the notice was not served within 7 days as required by the rules.
ii. That the appeal is time barred as the letter requesting for copies of the proceedings was never served on the advocates on record as required by the rules.

Further particulars of the grounds are set out in the affidavit of the first applicant in support of the application sworn on 4th June 2009. At the hearing Mr Saende, advocate appeared for the applicants and Ms Diana Githuku, advocate ap peared for the 1st respondent, while Mr Patrick Kibuchi advocate appeared for the 2nd and 3rd respondents. Ms Diana did not oppose the application.

In his submission, Mr Saende submitted that the decision the subject-matter of the intended appeal was made on 24th September, 2004 and although a conditional order of stay was granted in 2004 the applicants had not complied with the conditions and that the applicants were pursuing the non-compliance

in the superior court. In addition proceedings were received by the applicants in 2005 but the appeal was filed in 2009 and it now bears the title CA 251 of 2009.

On his part Mr Kibuchi invited the Court to note that the application to strike out the notice of appeal was filed on 22nd October, 2009, the same date that the applicants were served with a record of appeal and that he believed that the service of the record of appeal was what prompted the current application and that the notice of appeal was timeously filed on 30th September, 2004 and the effect of the two events was to render the application un-meritorious.

Having taken into account the submissions of counsel including the averments in the affidavit in support and in view of the fact that it is conceded that a record of appeal has already been filed, we consider it just to dismiss the application so that both parties can concentrate their efforts in having the appeal prosecuted on merit. We believe that our ruling is in the circumstances prevailing, within the letter and the spirit of the overriding objective because the final outcome in the matter shall have been facilitated by the hearing of the appeal.

The application is accordingly dismissed. In the face of the procedural lapses by the 2nd and 3rd respondents we award the costs of the application to the applicants in any event.

It is so ordered.

Dated at Nairobi this 8th day of July, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL