



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal (Appli) 103 of 2005

WILSON NZIOKA MUTISO.....APPELLANT/RESPONDENT

AND

JAMES MUHORO NDUNG’U

RUTH WANGECI NDUNG’URESPONDENT/APPLICANTS

(Application for extension of time to file and serve a record of appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang’awa, J.) dated 23rd May 2002

in

H.C.C.C. No. 995 of 2001)

RULING OF THE COURT

This application by Notice of Motion made under **rules 42, 80 and 81** of the Court of Appeal Rules seeks the striking out of the appellant’s appeal dated and filed in court on 16th May 2005 and for costs thereof to be awarded to the applicant. It is based on the grounds set out thereon; namely:

“1. THAT the applicant having received the certified copies of proceedings and judgment on the 8th July 2004 should have instituted the appeal by the 6th September 2004; within 60 days of 27th May 2002 when the notice of appeal was lodged excluding the time certified to have been necessary to prepare and deliver the proceedings and judgment which was certified to have been between 29th July 2002 and 8th July 2004.

2. THAT the appellant delayed in instituting the appeal by over 250 days, which delay is inordinate and without explanation.

3. THAT the appellant, though aware of the lapse of time within which to institute the appeal has not moved this court for leave to appeal out of time.”

The application was also supported by an affidavit sworn to by one **Mrs. Mary Wangui Kiarie** practicing in the firm of **Messrs C. W. Maina, Kiarie & Kariuki Advocates** who represent the applicant. The contents of the affidavit focuses on the appellant’s delay in filing the appeal outside the prescribed time.

When this application came for hearing on 6th July 2009, only counsel for the applicant appeared. Neither the appellant nor his counsel appeared though counsel was served with hearing notice, hence the application to strike out the appeal was heard *ex parte*. Counsel for the applicant relied on the application, the grounds set out thereon as well as the supporting affidavit. She also referred to an application filed in this court seeking leave to file the intended appeal out of time which application was withdrawn on 30th February 2007. In the circumstances, it is our view that the record of appeal filed herein on 16th May 2005 was so filed out of time and without the court leave to do so. We therefore order that appeal be struck out with costs of the appeal as well as those of this application to be paid to the applicant/respondent.

The amount of money awarded to the respondents in whichever financial institution it may be, and ordered by the superior court to be deposited in the East African Building Society, in the joint names of the respondent's administrators and the Registrar of the High Court be released to them if they have reached the age of majority.

Dated and delivered at Nairobi this 10th day of July, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR