



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**Civil Appli 292 of 2003 (NYR.13/03)**

**SAMUEL NYOIKE NDUATI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**MILKA WANGUI NG'ANG'A ..... INTERESTED PARTY**

***(Application for extension of time to file and serve Record of Appeal out of time from a Ruling***

***& Order of the High Court of Kenya At Nyeri (Juma, J.) dated***

***12<sup>th</sup> March, 2003 In H.C.C.MISC. APPL. NO. 204 OF 1999)***

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**R U L I N G**

On 17<sup>th</sup> May, 2006, *Githinji, J.A.* struck out as incompetent an application by *Esther Mwembu Nyoike*, the applicant, for her substitution in place of her deceased husband, *Samuel Nyoike Nduati*, as the applicant in *Civil Application No. Nai. 292 of 2003*. The application for substitution was made after the six months duration provided under *rule 55(7)* of the Court of Appeal Rules for making such an application and for that reason alone the learned Judge struck out the application. The sub-rule provides:-

***“An application shall abate on the death of the applicant or the respondent unless an application is made by any interested party to cause the legal representative of the deceased within six months from the date of death of the applicant or the respondent.”***

In the motion before me filed on 7<sup>th</sup> June, 2006, the applicant has returned to this Court seeking, principally, an order extending the time within which to apply to be substituted in place of her aforesaid deceased husband, to enable her prosecute *Civil Application No. Nai. 292 of 2003*, which she says is pending before this Court. The application is brought under **rule 4** of the Court of Appeal Rules, which gives the Court unfettered discretion to extend time. **Rule 4**, aforesaid, in its present form, provides thus:-

***“4. 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 the doing of any act authorized or required by these Rules, whether before or after the 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.”***

An application in the Superior Court, presumably, by *Milka Wangui Ng'ang'a* against *Samuel Nyoike Nduati* to wit *Misc.Application 204 of 1998*, for an order of certiorari to quash a decision of the Senior

Principal magistrate Nyeri dated 27<sup>th</sup> October, 1999, was allowed by Juma, J. on 12<sup>th</sup> March, 2003. He was aggrieved and filed, timeously, a Notice of Appeal declaring his intention of appealing against that decision. He did not lodge a record of appeal within time and on 1<sup>st</sup> October, 2003, he filed an application in this Court seeking an order extending the time within which to file and serve the record of appeal. He, however, died on 14<sup>th</sup> March, 2005 before he could prosecute that application and hence the first application by his widow to be made a party in his place. It is that application which Githinji J.A. struck out as incompetent having been made outside the stipulated period.

Does the Court have jurisdiction to extend time? Githinji, J.A. in the case of **Vyatu Limited & Another v. Public Trustee, Nyanza Province, [2003] KLR. 688**, implied that the Court has no jurisdiction to extend the time within which to apply to substitute a party after the time limited for doing so has expired. The learned Judge rendered himself thus, on the issue.

***“Similarly, there is no provision in the Court of Appeal Rules which gives this Court jurisdiction to order the revival of an abated appeal.***

***In the case of suits, Order XXIII rule (2) (sic) of the Civil Procedure Rules gives a plaintiff or his legal representative a right to apply.....***

***There is no corresponding right given to an appellant in the Court of Appeal by the Rules to apply for the revival of an abated appeal or corresponding power given to the Court of Appeal to revive an abated appeal. Extending time for filing an application for making a legal representative of the deceased a party would in effect be tantamount to amending of (sic) revising rule 96 (2) of the Court of Appeal Rules.”***

The learned judge did not make any reference to the provisions of **rule 4** above, which gives this Court wide powers of extending the time for the doing of any act authorized by the Rules. Neither **rule 51, rule 55(7)**, nor **96(2)** expressly or otherwise exclude the application of rule 4 in abated applications or appeals. It is trite law that no party shall be substituted in place of a deceased litigant unless the party to be brought into a suit holds a grant of letters of administration or probate of the estate of the deceased litigant. The time within which to apply for substitution in the case of applications is such a short time that in many instances, those intending to apply for substitution may not be in time. I find nothing in the Rules to suggest that the Court lacks the jurisdiction to extend the time stipulated in **rule 55(7)** whether or not the time stipulated has expired.

In the matter before me, for instance the applicant has deponed that she petitioned for letters of administration of her husband’s estate on 8<sup>th</sup> June, 2005, less than three months after his death. She got a limited grant on 19<sup>th</sup> September, 2005 slightly over three months after filing the application. Yes, she took some time before filing the petition for letters of administration, but I cannot say a delay of about three months is inordinately long and inexcusable, where as here, the applicant, is a widow of the deceased litigant. Beside, a litigant has to work according to the calendar and listings of the Court, which he has no control over.

Coming back to the provisions of **rule 4**, if we were to adopt the reasoning of *Githinji, JA*, in the case I earlier cited, it will mean that a late applicant for substitution has no remedy. If such an approach were to be adopted, it is my view, that, in an appropriate case, it would work injustice against those litigants or parties who delay to apply but who may not be at fault or who would be having good reason for the delay. I believe that **rule 4**, above, empowers the Court in cases as the one before me to make such orders as are necessary for the ends of justice or to obviate hardship. In exercise of that power, the Court is guided by principles it has evolved over time, for instance the length of delay, the reason for the delay, the likely prejudice to the opposite party and possibly, the merits of the intended appeal. I have already considered the length of delay and obliquely the reason for delay.

The dispute between **Samuel Nyoike Nduati**, and his former neighbour Milka Wangui Ng’ang’a concerned a boundary between their respective parcels of land. A boundary was fixed by the Land

Registrar of the area after which, the dispute was taken before the Magistrate's Court afresh as a trespass issue, by the aggrieved party, notwithstanding that fixation of boundary had taken place.

In such a dispute, no irreparable prejudice is likely to result if I were to grant the extension of time prayed for. Any loss that may result can be compensated in costs.

Mr. Gikonyo, for the respondent, submitted before me that the application in which the applicant seeks to be made a party is no more, nor is the notice of appeal. Consequently, there is no appeal or application respecting which substitution can be made.

In my view, the effect of an extension of time is to extend the life of the application. That submission does not therefore assist the respondent.

I am persuaded that this is a fit case in which I should exercise my discretion under **rule 4**, above and extend the time within which to make an application for substitution by **30 days** from the date hereof. The applicant shall, however, bear the costs of this application to be agreed, failing agreement to be taxed. Order accordingly.

*Dated and delivered at Nyeri this 9<sup>th</sup> day of May, 2007.*

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**