



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: TUNOI, WAKI, J.J.A & DEVERELL, AG. J.A)

CIVIL APPEAL (APPLICATION) NO. 311 OF 2002

VERONICAH RWAMBA MBOGOH APPELLANT

AND

MARGARET RACHEL MUTHONI

ARTHUR MUNENE MBOGOHRESPONDENTS

**An application to strike out the record of appeal
from the ruling and order of the High Court of Kenya
at Nairobi (Visram, J.) dated 14.11.2001
in
H.C.S.C NO. 989 OF 1999)**

RULING OF THE COURT

The main appeal in this succession matter was set down for hearing on 14.10.04 but was adjourned for good reasons to a date to be fixed at the Registry on priority basis in the month of November, 2004. Instead of setting down the appeal for hearing in accordance with that order, the Respondents, **Margaret Rachel Muthoni** and **Arthur Munene Mbogoh** (hereinafter the “applicants”) took out a Notice of Motion the following day (15.10.04) seeking two substantive orders:

- a) That the record of Appeal be struck off for being incompetent.
- b) That if the record is found to be competent or salvageable the applicant be given leave or be allowed time to file a supplementary record appeal (sic).

The reason given for incompetence was that some primary documents were missing.

In response to that application the appellant, Veronichah Rwaba Mbogoh (hereinafter the “Respondent”) gave notice that she would raise a preliminary objection to that application on a point of law. And so it was that on the scheduled hearing of the application, learned counsel for the Respondent, Mr. Ngatia took up that objection. It is this:

The main appeal was filed on 25.11.02 and was served on the same day. Since 30.8.02 when L/N 152/02 was published amending Rule 80 of this Court’s rules, no person affected by an appeal may seek to strike out the appeal after expiry of 30 days from the date of service of the record of Appeal. The Rule provides:

“80 A person affected by an appeal may, 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 the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty (30) days from the date of service of the record of appeal on the respondent”.

So that, the applicants had upto 24.12.02 to make any application for striking out, but did not do so. The rule is mandatory and therefore the application filed on 15.10.04 came two years too late. It was indeed an afterthought as it was filed in disregard of an order that the main appeal be set down for hearing on priority basis. Mr. Ngatia further submitted that the prayer made for leave to file a supplementary record is futile. That is because under Rule 89 there is an automatic right for a respondent in an appeal to prepare and serve a supplementary record of appeal if he is of the opinion that the record is defective or insufficient for purposes of his case. On both counts therefore the application should be rejected.

In response, learned counsel for the applicants Mr. Mbigi contended that **Rule 80** concerns itself with the time-frame of filing a competent appeal and a competent appeal can only be filed under **Rule 85** . The Rule does not cover incompetent appeals which may be struck out at any time. The objection raised was therefore misguided

With respect, we think **Rule 80** presents no peculiar difficulty in construction. The time frame within which an affected party may apply to strike out a notice of appeal or a record of appeal is expressly set in mandatory words. Before the amendment in 2002, the rule provided that such applications may be brought “at any time” and we are in no doubt that the primary focus of the amendment was to address the abuse of that provision. Mr. Ngatia is of course right in objecting to the application as it was filed out of time. We also agree that the alternative prayer for leave to file a supplementary record is superfluous as Rule 89 makes no provision for seeking leave. On both counts we order that the Notice of Motion dated 15th October 2004 be and is hereby struck out. Costs to the Respondents.

Dated and delivered at NAIROBI this 14th .day of January 2005.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR