



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**  
**(CORAM: OMOLO, GITHINJI & WAKI, J.J.A)**  
**CIVIL APPEAL 341 OF 2002**

BETWEEN

CHARLES MURITHI MUTHURI .....1ST APPELLANT

JOSPHAT NTURIBI MBOROTI ..... 2ND APPELLANT

GEOFFREY GITONGA MBOROTI ..... 3RD APPELLANT

AND

ESTHER KARAMBU .....RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Meru (Tuiyot, J) dated 15th October, 2001 and reviewed on 4 March 2002 to reflect that it was a Judgment by Hon. Justice Kasanga Mulwa

in

H.C. Succession Cause No. 233 of 2000)

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**RULING OF THE COURT**

The appeal which **Esther Karambu**, the applicant herein, asks us to strike out, i.e. Civil Appeal No. 341 of 2002, was lodged in this Court on 26th September, 2002.

The applicant's motion to strike out that appeal was not filed in Court until 23rd April, 2004, nearly two years after the lodgment of the appeal. The reason put forward for striking out the appeal is that the notice of appeal upon which the appeal is based was filed out of time, the judgment against which the appeal is brought having been delivered on 15th October, 2001 and the notice of appeal having been filed on 15th November, 2001. If that position is correct, then it is obvious that the notice of appeal was filed well outside the fourteen days prescribed under **Rule 74(2)** of the Court's Rules.

But the proviso to **Rule 80**, which proviso was brought in through Legal Notice No. 152 of 2002 and which became effective on 4th July, 2002, is in the following terms:-

***“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.”***

As we have seen, the record of appeal was lodged in the Court on 29th September, 2002. **Rule 87(1)** provides that the record of appeal is to be served upon a respondent within seven days of its being lodged in the Court. There is no allegation by the applicant that the record of appeal was not served on her within the seven days prescribed by **Rule 87(1)**. We take it that the record was served within the stated period and that would be seven days from 29th September, 2002. The applicant should have brought her motion to strike out the appeal within thirty days from the date she was served with the record of appeal. As we have said the motion was brought nearly two years after the applicant was served with the record of appeal. That being the position, the motion to strike out the appeal is itself incompetent and on that basis alone it must be struck out. Accordingly, we order that the applicant's notice of motion dated 22nd

April, 2004 and lodged in the Court on 23rd April, 2004 be and is hereby struck out with the costs thereof to the respondents.

Dated and delivered at Nyeri this 28th day of October, 2005.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**