REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appli. Nai 292 of 2003 (NYR 13/2003)

SAMUEL NYOIKE NDUATI ……...……. APPLICANT

AND

REPUBLIC ……...…..…..…… RESPONDENT

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

(*Application for reference to full Court in an application for extension of time to file and serve record of appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Nyeri (Juma, J) dated 12th March, 2003*

In

H.C. Misc. Civil Application No. 204 of 1999)

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RULING OF THE COURT

This is a reference to the full Court from a decision made by a single member of the Court (Bosire, JA) under **Rule 4** of the Court's Rules. The learned Single Judge's ruling was made pursuant to a notice of motion made to the Judge by Esther Mwembu Nyoike who had sought an order:-

"THAT this Court does extend time for substituting ESTHER MWEMBU NYOIKE in place of SAMUEL NYOIKE NDUATI the deceased Appellant to enable her be a party to an application pending before this Honourable Court being NBI NO 292 of 2003, Nyeri NO 13 of 2003."

Esther Mwembu Nyoike, hereinafter "the Applicant," is the widow of the late Samuel Nyoike Nduati who died on 14th march, 2005. Before his death Samuel had lodged in this Court Civil Application No. Nai. 292/2003 (Nyeri 13/2003) and in that motion, lodged under **Rule 4** on 1st October, 2003, the late Samuel had sought from the Court an order:-

"THAT this Honourable Court be pleased to extend time for filing and serving the Record of appeal."

Upon Samuel's demise on 14th March, 2005, the Applicant embarked on the process of obtaining letters of administration to his estate and she eventually succeeded in obtaining the same on or about 19th September, 2005. Having obtained the letters of administration, the Applicant then filed Civil Application No. 351 of 2005 (Nyeri 24/2005) on 19th December, 2005 and in that application she prayed for the basic order to the effect:-

"THAT I ESTHER MWEMBU NYOIKE, the widow and legal representative of the deceased Respondent be made a party to an application pending before this Honourable Court being NBI NO. 292 of 2003 (Nyeri No. 13 of 2003)."

We once more repeat that the Applicant's husband whom she sought to take his place died on 14th March, 2005 . The application to be substituted in place of her deceased husband, as we have seen, was 19th December, 2005, some nine months after the death of the husband.

Now, **Rule 55 (7)** which was introduced in the Rules by Legal Notice No. 152 of 2002 dated 4th July, 2002 provides that:-

"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 to be made a party in place of the deceased within six months from the date of death of the applicant or the respondent."

So that by the time the Applicant lodged Civil Application No. 351 of 2005 (i.e. by 19th December, 2005) more than six months had elapsed from the date of Samuel's death on 14th March, 2005. The Applicant's motion of 19th December, 2005 came for hearing before Githinji, J.A and by his ruling dated and delivered at Nyeri on 17th May, 2006, the learned Judge struck out the motion holding that :-

"Samuel Nyoike Nduati died on 14th March, 2005. The six months limitation period expired on or about 13th September, 2005. The present application was filed on 20th (sic) December, 2005 over three months out of time without leave of the Court.

For that reason the application is incompetent. it is stuck out with no order as to costs."

Undeterred by this set-back, the Applicant once again returned to this Court with her present motion which appears to have been filed within Civil Application No. 292 of 2003 which Githinji, J.A had ruled as having abated.

In his ruling which is now the subject of the reference before us, Bosire, J.A allowed the Applicant's motion of 7th June, 2006 and held as follows:-

"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."

Before coming to this conclusion, Bosire, J.A considered the views which had previously been expressed by Githinji, J.A in **VYATU LIMITED & ANOTHER VS. PUBLIC TRUSTEE NYANZA PROVINCE, [2003] KLR 688**. There , Githinji, J.A had been asked for two orders, namely:-

"1. That time limited for substitution of a legal representative of the deceased respondent be extended to enable the applicant to substitute the Public Trustee Nyanza Province as a legal representative of the

respondent in civil appeal No. 80 of 2000 Vyatu Limited and another v. John Oloo Ochieng.

2. That thereafter Civil Appeal No. 80 of 2000 which has abated due to effluxion of time subsequent to the death of the respondent be revived and be put back in the list of appeals to be heard."

The motion in the **Vyatu Limited** case was brought principally under **rule 4**. Githinji , J.A had rejected the motion and in doing so, he stated the following:-

"I have considered the application. Firstly, there is no provision in the Court of Appeal Rules which authorizes any party to an appeal to make an application for revival of an abated appeal. 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 for a revival of an abated suit and also power to court to revive an abated suit on terms as to costs as the Court may think fit.

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 or revising rule 96 (2) of the Court of Appeal Rules."

It is clear Githinji, J.A was dealing with an abated appeal under **Rule 96 (2)** of the Court's Rules but is agreed the provisions of that rule are the same with the provisions of **Rule 55 (7)** which deals with abated applications. It is clear from the extract we have quoted from the decision of Githinji , J.A that the learned Judge's view was that while there is a time limit within which to bring an application for substitution of a deceased party – in the case of an application six months and in the case of an appeal twelve months – there is no period at all set within which one is entitled to bring an application to revive an abated appeal. The period of six months , in the case of an application and twelve months in the case of an appeal, even if extended under **Rule 4,** would not revive an abated appeal or application. There, however, is no period to be extended in the case of an application or an appeal which has abated for the purpose of reviving either of them. So that even if time to apply for substitution of a party was extended that by itself would not revive the abated application or appeal. According to the view of Githinji, J.A, extending time for substitution of the deceased party is an exercise in futility as that would not revive the abated appeal or application.

Bosire, J.A, however, was of a different view. Having set out part of the extract from the ruling of Githinji, J.A which we have already set out herein, the learned Judge stated thus:-

"Coming back to the provisions of rule 4, if we are to adopt the reasoning of Githinji, J.A. in the case earlier cited, it will mean that a late applicant for substitution has no remedy . If such an approach were to be adopted, it is in my view, that, in an appropriate case, it would work injustice against those litigants or parties who delay to apply but 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 the delay, the reason for the delay, the likely prejudice to the opposite party and possibly the merits of the intended appeal. ….."

Bosire, J.A extended the time in the manner we have already set out herein, i.e. he extended by 30 days from the date of his order the time within which the Applicant was to apply to be substituted as the legal representative

of her deceased husband. The Respondent, Milka Wangui Nganga, was aggrieved by that order and under **Rule 54 (1) (b)** she now comes before us by way of this reference.

Mr. Wahome Gikonyo, learned Counsel for Milka, asked us to rule that the decision of Githinji, J.A rather than that of Bosire, J.A, set out the correct legal position and that we should follow the decision of Githinji, J.A. Mr. Gikonyo submitted that the decision of Bosire, J.A reflects what the legal position ought to be and not what the position actually is. Naturally, Mr. Githiga Mwangi, learned Counsel for the Applicant, told us that Bosire, J.A had properly exercised his unfettered discretion under **rule 4** and that being so there is no basis upon which we can interfere with the exercise of discretion by the learned single Judge whose decision has been brought before us for a variation, a discharge or reversal – see **rule 54 (1) (b)**.

The full Court can only interfere with the exercise of a discretion by single Judge if, and only if, it be shown that in coming to the decision the single Judge took into account an irrelevant matter or failed to take into account a relevant matter, or misapprehended the evidence or the law or, short of these, that the decision under consideration is plainly wrong. The issue raised before us seems to be plainly the question of whether the provisions of **rule 4** can be applied to revive an application or an appeal which has abated. **Rule 4** provides:-

"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." – emphasis added

We must ask ourselves: What time is the Court entitled to extend under **Rule 4**" , and the answer must be:-

"(i) Time limited by these Rules , or

(ii) Time limited by any decision of the Court or the superior court."

Obviously paragraph (ii) above did not apply to the situation under consideration and, therefore, only paragraph (i) applied .

Even if the period of six months and twelve months were extended under **Rule 4**, once an appeal has abated, there is no period set within which the abated appeal can be revived and therefore even if the six months or the twelve months are respectively extended that would not mean that the abated appeal has been revived. Githinji, J.A specifically referred to the provisions of **Order XXIII Rule 8 (2)** of the Civil Procedure Rules which provide for revival of abated suits and he went on to point out the lack of a similar provision in the Court of Appeal Rules. Since there is no provision for revival of abated appeals or applications, there can be no question of:-

"time limited by these Rules or by an order of the Court or the superior court …."

to warrant the application of **Rule 4**. We entirely agree with the interpretation of the legal position contained in the ruling of Githinji, J.A in the **VYATU LIMTIED Case** and we think Bosire, J.A did not correctly appreciate the position that **Rule 4** only applies to situations where there is a time limited by the Rules or by a decision of the Court or of the superior court. We appreciate the concern of Bosire, J.A that innocent litigants or other relevant parties may suffer injustice through no fault of their own and we hope the Rules Committee will play its part and rectify the position.

In view of what we have said herein , it follows that we must allow this reference. We do so by reversing the orders made by the learned single Judge, and substitute them with an order dismissing the notice of motion filed

by the Applicant on 7th June, 2006. As the predicament of the applicant was principally caused by provisions of the law which could be interpreted either way, we make no order as to costs. Those shall be our orders.

Dated and delivered at Nyeri this 23rd day of May 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J. ALUOCH

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.