



**Electrical Services Limited v Kenya Wildlife Services (Civil Suit
86 of 2000) [2024] KEHC 13310 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT 86 OF 2000
DKN MAGARE, J
OCTOBER 24, 2024**

BETWEEN

ELECTRICAL SERVICES LIMITED PLAINTIFF

AND

KENYA WILDLIFE SERVICES DEFENDANT

RULING

1. This is a ruling on the application dated 18/8/2023. The application seeks for an order authorizing the Manager of Consolidated Bank of Kenya at Nyeri to release monies held in the joint interest earning account together with costs and interests.
2. The application is premised on the ground that there is no appeal as none was filed after the Respondent was given 14 days to file Notice of Appeal. The notice of appeal is said to have been filed on 27/9/2022 but there is no record of appeal filed.
3. The application is opposed. In the replying affidavit sworn on 4/7/2024 by Jesca Hellen Njoki, Advocate for the Respondent, it was deposed that the Respondent had lodged the Notice of Appeal and requested for typed court proceedings but the proceedings had taken long and a certificate of delay dated 12/7/2024 had been issued.

Submissions

4. In its undated submissions, the Applicant submitted that it had demonstrated effort to support there being an intended appeal after the lapse of the 60 days required to lodge appeal following a notice of appeal. No authorities were however cited.
5. The Respondent also filed submissions dated 5/8/2024. It was submitted that under Order 42 Rule 6(4) of the Civil Procedure Rules, an appeal was deemed to be filed by lodging a Notice of Appeal, which the Respondent duly did.



6. Further, it was submitted that under Rule 82(1) of the Court of Appeal Rules, the time limit to lodge the record of appeal was 60 days but the same would be extended to take into consideration the duration taken in preparing proceedings in the High Court, which applied to this case as there was a certificate of delay. Reliance was placed on *Mistry Premji Kanji (Investments) Limited vs Kenya National Highways Authority* (2019) eKLR.

Analysis

7. On the one hand, the Applicant holds the view that there is no appeal and on the other hand, the Respondent holds the view that the notice of appeal was lodged and the certificate of delay has been obtained, so the Record of Appeal will be lodged soon.
8. Whether the appeal is alive or not is the province of the Court of Appeal. Whether the appeal is deemed as withdrawn is beyond this court. Rule 85 of the Court of Appeal Rules provide as follows:
 - 1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.
 - (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.
9. *Ipsa facto*, it is only the Court of Appeal that can deem an appeal or a notice of appeal as withdrawn. Even so, there needs to be an application made under Rule 85 of the Court of Appeal Rules. Requiring that the court deems an appeal as withdrawn is outside the province of this court. The Respondent can be lazy and do nothing, though that does not appear to be the case. However, there needs to be an order from the Court of Appeal regarding withdrawal of the appeal. There is no such order on the record before the court.
10. This court therefore does not need to establish whether the Applicant would suffer substantial loss or not. The condition precedent was for the appeal to be determined.
11. It is not that the court does not understand the position the Applicant is coming from since justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother to all and sundry and is anathema to good order and use of judicial space. The Court of Appeal stated as follows regarding intent and purport of Rule [85] of the Court of Appeal Rules in *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [supra], on the 83:

“This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the



notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice”.

12. The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. However, the court cannot take up jurisdiction it does not have. In *Muzaffer Musafée Essajee & another v Anne Njeri Mwangi* [2021] eKLR, the court of Appeal (Nambuye, Asike-Makhandia & Kantai, JJ.A), posited as follows: -

As was explicitly stated in the case of *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [supra], the Respondent was obligated to process the filing and service of the record of appeal within sixty (60) days as stipulated in Rule 82(1) of the Court’s Rules or alternatively within the time envisaged in the proviso to the said rule. No such efforts were made prompting the Applicants to seek to have the notice of appeal deemed as withdrawn under Rules 83 of the Rules of the Court in the application under consideration.

The above being the uncontroverted position herein, we adopt the position taken by the Court in the *Mae Properties vs. Kibe* case (supra), in which it approved the holding of the Court in *Martin Kabaya vs. David Mungania Kiambi Nyeri Civil Application No. 12 of 2015* as follows:

“The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by complaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”

13. The *raison d’être* for holding as I do is because this court cannot expand its jurisdiction through judicial craft or innovation as held in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. The supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

14. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. I have said enough to show that the application, however merited, is in a wrong court. The application is thus not merited and is dismissed.

15. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows: -



- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
16. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

17. In the circumstances, noting that the Respondent is successful, they are entitled to costs.

Determination

18. The upshot of the foregoing is that I make the following orders:
- a. The Application dated 18th August 2023 is dismissed.
 - b. The Respondent shall have costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF OCTOBER, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Karweru for the Applicant

Miss. Njoki for the Respondent



Court Assistant – Jedidah

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