



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 703 OF 2014

(Formerly NYERI HCCC NO. 161'A' OF 2010 (O.S))

PETER MAHINDA KANYORA.....1st PLAINTIFF/APPLICANT

DANIEL MUKUHA WAHOME.....2nd PLAINTIFF/APPLICANT

JOHN MIRING'U KIMANI (*Suing for and on*

behalf of themselves and the members of

MAKI PLOT OWNERS SELF HELP GROUP).....3rd PLAINTIFF/APPLICANT

-VERSUS-

JULIUS MUGO GACHAGUA

(Sued as the Administrator/legal

representative of the Estate of MARY MWERU

ACHAGUA, the Administrator of the Estate

of JOHN GACHAGUA KIBIRU).....DEFENDANT/RESPONDENT

RULING

1. On the 17th April 202, this Court found the Respondent/Defendant herein Julius Mugo Gachagua, in blatant contempt of Court Orders of the 10th December 2012 and 27th September 2017 which Orders had directed parties to stop disposing off, transferring or alienating the parcel of land pending the hearing of the suit, the sentencing of the Applicant had thereafter been reserved due to the Covid- 19 pandemic.
2. Thereafter the Respondent/Defendant filed an application under certificate of urgency dated 25th April 2020 wherein he sought for stay of execution of the ruling delivered on the 17th April 2020 pending the determination of an Appeal whose Notice had been filed simultaneously with the Application.
3. A conditional **stay of execution was granted** via a ruling delivered on the 8th day of June 2020 which was **premised on the condition that should the Respondent/Defendant continue to be in contempt of the Court Orders** restraining parties from alienating or howsoever otherwise dealing with the subject matter herein LR No. 10422/9, then the stay Orders shall automatically stand discharged and the Respondent shall be summoned for sentencing.
4. While awaiting the determination of the Appeal, the Applicants herein filed two chamber summons dated 28th August, 2020 on the 4th September, 2020 by way of certificate of urgency to which they sought to have the Notice of Appeal filed by the Respondent marked as withdrawn pursuant to Rule 83 of the Court of Appeal rules, and the sentencing of the Respondent to be conducted immediately.
5. The said applications were supported by the ground their face and the supporting affidavit of David Komu Kabui the Vice Chairman of the Plaintiff/Applicant, herein dated the 31st August 2020.

6. Pursuant to the filing of the said Applications and in response thereto, the Respondent herein filed their Preliminary Objection dated 22nd September 2020 objecting to the jurisdiction of the Court to deal with the said Applications.

7. The matter proceeded orally at an inter parties hearing on the 1st October 2020 wherein Counsel for the Respondent submitted on his Preliminary objection in the first instant to the effect that the same was predicated upon Rule 83 of the Court of Appeal Rules. That in terms of the said Rule, the matter before the Court lay with the Court of Appeal since the Court was being asked to deem the Notice of Appeal to be withdrawn.

8. That the Rule provides that the Court may on its own motion or on application by the party make an order as to what the suit is being moved to do. That Court was not the present Court but the Court of Appeal as is referred to under Rule 2 of the Court of Appeal rules. (Interpretation clause).

9. That there was no dispute that the Notice of Appeal was filed and the Applicant admits as much in their application. That the Applicant had also cited the High Court parties and Procedure Rules Section 3A, 63 (c), (e) of the Civil Procedure Act which provisions were about the abuse of the process of the Court and would only apply where there was no provision of the law applying to the matter. That in the present case, there was the provision which was Rule 83.

10. In response Counsel for the Applicants submitted that there was a deliberate reason why they had filed their application dated 28th August, 2020 in the High Court and this had been because as at 28th August, 2020 there was no file in the Court of Appeal regarding the matter because Counsel for the Respondent had not filed his Notice of Appeal.

11. That from their annexures on their application dated the 28th August, 2020 it was evident that via an e-mail dated 10th August, 2020 at 10:26 am, the Court of Appeal registry had written a brief e-mail to Respondent's Counsel asking him to lodge their Memorandum.

12. That the Notice of Appeal from High Court had not been lodged and neither had the Respondent's Counsel produced the said filed copy of Notice of Appeal. That in a nutshell, this matter did not leave the High Court.

13. Their submission was that as submitted by the Respondent's Counsel since **Rule 83** referred to the Court of Appeal, then if the Respondent did not file an Appeal, they would have to wait until the Court of Appeal makes an order without any file before it.

14. That since as at the 28th August, 2020, there was no file before the Court of Appeal, they could not file an application in the said Court to strike out an Appeal that did not exist. That Counsel had personally called and confirmed with the Court of Appeal wherein he had been advised that there was no Notice of Appeal filed for which he took a step further and perused the High Court file wherein he had discovered that indeed the Notice of Appeal in the Court file had not been filed or lodged.

15. It was Counsel's submission that if the intention of Rule 83 of Court of Appeal Rules was that the Court must make an order then it would read 'then the Court may on its own motion or on application by any party make an order to strike off the Notice of Appeal.' That whether or not the Court made an order, by operation of the law, the Notice of Appeal would be deemed withdrawn and that it is not deemed withdrawn because the Court makes an order.

16. That the positions that the Respondent's Counsel was trying to derive would mean that this matter would rest in abeyance forever because there would be no file to the Court of Appeal in which the Applicant could file an application which was the current situation. That as at the time the matter was in Court, no Notice of Appeal had been filed.

17. In rebuttal Counsel for the Respondent submitted that the Applicant's Counsel had confirmed that the application was brought under **Rule 83** of the Court of Appeal Rules. That the application was not premised on failure to file a Notice of Appeal but failure to file an Appeal within the statutory period after filing a Notice of Appeal.

18. That the Notice of Appeal dated the 21st April, 2020 was lodged on 14th August, 2020 and it was therefore absurd for Counsel for the Applicants to seek that the same be marked as withdrawn on a claim that it had not been filed.

19. That it was not be far from the truth that there was no file in the Court of Appeal as the Notice of Appeal was a document of the High Court. That transmission of the Notice of Appeal by the Registrar was administrative and not the preserve of the parties. That the absence of the file in the Court of Appeal Registry did not bar Counsel from seeking for withdrawal of the appeal to the Court of Appeal by a Miscellaneous Application and that is what is contemplated by **Rule 83**.

20. That further **Rule 83** did not contemplate an application in another Court other than the Court of Appeal. The e-mail from the Court of Appeal only confirmed that there was an Appeal and what was sought was for an order from this Court. Counsel submitted that the Applications dated the 28th August 2020 lacked jurisdiction and should be struck out.

Determination.

21. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd- v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the

jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. It is evident that a **Preliminary Objection** consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of **Quick Enterprises Ltd. vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

23. In the case of **Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

24. In the matter before Court, the Applicants herein vide their Applications dated 28th August, 2020 seek to have the Notice of Appeal filed by the Respondent marked as withdrawn pursuant to Rule 83 of the Court of Appeal Rules and the sentencing of the Respondent to be conducted immediately. The Respondent on the other hand has raised a Preliminary Objection dated the 22nd September 2020 to the effect that pursuant to the provisions of Rule 83 of the Court of Appeal Rules this Court had no jurisdiction to deal with the said application.

25. The provisions of **Rule 83** of Court of Appeal Rules stipulate as follows:

If a party who has lodged a Notice of Appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his Notice of Appeal and the Court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the Notice of Appeal was served.

26. The Court of Appeal in the case of **John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others [2016] eKLR** held as follows in light of Rule 83 of the Court of Appeal Rules;

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 succor.

*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.*

27. Similarly in the case in **Bamburi Cement Ltd v Evanson Mwasasi Mwasasi [2018] eKLR** the Court of Appeal held as follows;

*This Court while discussing the import of **Rule 83** in **Quickclubes E. A. Limited vs. Kenya Railways Corporation [2014] eKLR** aptly observed:*

“Rule 83 gives this Court unfettered discretion to deem an appeal as withdrawn if a party files a Notice of Appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of Court but fail to inform the Court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the Court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allow the Court to invoke Rule 83 suo motu if the Respondent in the intended appeal does not move the Court.”

28. Section 2 of the Court of Appeal Rules, 2010 defines the Court as the *Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone*. To this end and pursuant to the decisions herein above stated I uphold the Preliminary Objection dated the 22nd September 2020 to the effect that this Court has no jurisdiction over the Applicant's Applications dated 28th August, 2020 which are herein dismissed.

29. Costs to abide by the outcome of the Appeal.

Dated and delivered at Nakuru this 17th day of December 2020.

M.C. OUNDO

