

**IN THE COURT OF
APPEAL AT MOMBASA**

(CORAM: GATEMBU, MURGOR & OCHIENG,

JJ.A.) CIVIL APPLICATION NO. E019 OF 2022

BETWEEN
JOSEPHINE NYEVU MWADZIWE.....1ST
APPLICANT RAYMOND GONZI MWADZIWE.....
2ND APPLICANT
AND
WYCLIFF JIRONGO MUHANGANI.....1ST
RESPONDENT FRANCIS MUJUMBA ALUHA.....
2ND RESPONDENT

(An application for setting aside the orders against the Ruling of the Court of Appeal at Mombasa (Gatembu, Nyamweya & Lesiit, JJ.A.) dated 2nd December 2022

in

Civil Application No. E019 of 2022)

RULING OF THE COURT

1. Before us for consideration is an application dated 22nd January 2025. It is brought by Josephine Nyevu Mwadziwe and Raymond Gonzi Mwadziwe, (the applicants) who have moved the Court under Section 3A, 3B of the Appellate Jurisdiction Act and Rules 84, 85 and 86 of the Court of Appeal Rules. They seek orders for the setting aside or lifting of the orders given by the Court herein on 2nd December 2022 staying the judgment of the Environment and Land Court (ELC) delivered on 18th January 2022. They also seek an order that “any Notice of Appeal, Memorandum of Appeal or Record of Appeal filed contrary to the order given by the Court on 21st October 2022 be

struck off".

2. The background in brief is that in the judgment of the ELC delivered on 18th January 2022 in favour of the applicants, the ELC ordered Wycliff Jirongo Muhangani and Francis Mujumba Aluha (the respondents for purposes of this application) to vacate the property known as Plot Block No. 96/19 and give vacant possession within 90 days. The ELC also ordered the removal, within 90 days, of a Caution the respondents had registered against that property.
3. Following an application by the respondents for extension of time to appeal out of time against that judgment, the Court (**Lessit, JA**) in a ruling given on 21st October 2022 granted them 30 days to file and serve the notice of appeal as well as the memorandum and record of appeal.
4. Subsequently, the respondents applied, within the present case number E019 of 2022, for an order to stay execution of the judgment of the ELC of 18th January 2022 pending the determination of their intended appeal. That application was granted in a ruling and order of the Court given on 2nd December 2022. That is the order the applicants in the present application seek to have set aside in addition to the prayer for the striking out of any appeal filed by the respondents.
5. Based on the grounds appearing on the face of the application, the supporting affidavit of Josephine Nyevu Mwadziwe and the written submissions dated 7th February 2025 that were highlighted before us by learned counsel Miss. Mwanzia, the essence of the application is that the

respondents continue to enjoy an order of stay of execution, yet, they have not complied with the orders that directed them to file an appeal. It is asserted by the applicants that “to date no appeal has been filed.”

6. However, through a replying affidavit sworn by Wycliffe Jirongo Muhangani and written submissions dated 27th February 2025 that were highlighted before us by learned counsel **Mrs. Wangui Waititu**, it is contended that an appeal was indeed filed, namely Mombasa Civil Appeal No. E119 OF 2022 between the same parties and that the same is awaiting case management directions with a view to thereafter having it heard and determined. Exhibited to the replying affidavit is the memorandum of appeal in that appeal.
7. We have considered the application, the affidavits and the submissions. The power of this Court to strike out an appeal is discretionary, and as urged by counsel for the respondents it is draconian and should only be resorted to in plain and clear cases. See **Tome & Another vs. Attorney General & 2 Others [2021] KECA 150 (KLR)**.
8. One of the provisions invoked by the applicants in the present application is Rule 85 of the Court of Appeal Rules. As the Court stated in **Mae Properties Limited vs. Joseph Kibe & Another [2017] KECA 238 (KLR)** in reference to the then Rule 83 (now rule 85):
“We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for

non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.

Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal.”

9. In that regard the respondents have demonstrated that they lodged an appeal, being Civil Appeal No. E119 of 2022 which is pending hearing before the Court. Therefore, to the extent that the present application is premised on the ground that “to date no appeal has been filed”, it is not well founded. The provisions of Rule 85 of the Court of Appeal Rules to deem the appeal as withdrawn would not in the circumstances apply. The pronouncement by the Court in **Esther Anyango Ochieng vs. Transmara Sugar Company [2020] eKLR** is pertinent. There, Kiage, JA stated:

“My thinking is that, given our reasoning in the MAE PROPERTIES case (supra), at the point [of] considering whether or not to exercise our powers under Rule 83, a crucial point is whether or not a record of appeal may at that time have been filed. Where none has been filed, then the Court ought, without much ado, to deem the notice of appeal as having been withdrawn.

Where, however, as in the present case the appeal has in fact been instituted, can we in clear conscience, without a dalliance with the surreal, nevertheless pronounce that the appellant’s notice of appeal is deemed to be withdrawn? I respectfully do not think so.”

10. We respectfully agree. Given that there is a pending appeal, we decline the invitation to deem it as withdrawn. And in as far as the application is made under Rule 86 of the Court of Appeal Rules, again this was on the basis that no appeal has been filed. It is not demonstrated that the appeal does not lie or that some essential step in the proceedings has not been taken or taken within the time prescribed under Rule 84 of the Court of Appeal Rules to qualify for striking out under Rule 86.
11. The application fails and is hereby dismissed with costs.
12. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this decision is delivered in accordance with Rule 34(4) of the Court of Appeal Rules.

Dated and delivered at Mombasa this 21st day of November 2025.

S. GATEMBU KAIRU, FCI Arb, C.Arb.

.....
JUDGE OF APPEAL

A.K. MURGOR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR