

**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: MURGOR, LAIBUTA & NGENYE,**  
**JJ.A.) CIVIL APPLICATION NO. E132 OF 2024**

**BETWEEN**

**JULIANA MWEDE SIMON**

*(Suing as the Legal Representative of the Estate of **SAMMY MAWEU MUTHAMA - Deceased**).....***APPLICANT**

**AND**

**CHINA ROAD & BRIDGE CORP. OF KENYA.....RESPONDENT**

*(Being an application to deem the Notice of Appeal from the Judgment and Decree of the High Court of Kenya at Voi (George Dulu, J.) delivered on 14<sup>th</sup> July 2023 as withdrawn)*

\*\*\*\*\*

**RULING OF THE**

**COURT**

1. Before us is a Notice of Motion dated 14<sup>th</sup> November 2024 filed by Juliana Mwende Simon (the applicant) seeking orders to have the notice of appeal lodged by China Road & Bridge Corporation of Kenya (the respondent) on 27<sup>th</sup> July 2023 from the judgment and decree of the High Court of Kenya at Voi (George Dulu, J.) dated and delivered on 14<sup>th</sup> July 2023 in Voi HCCA No. E029 of 2022 be deemed as withdrawn pursuant to rule 83 of the

Court of Appeal Rules (now rule 85 of the 2022 Rules).

2. The applicant's Motion is supported by her affidavit sworn on 14<sup>th</sup> November 2024 essentially deposing to 5 grounds on which the Motion is anchored, namely: that judgment was delivered on 14<sup>th</sup> July 2023; that the respondent lodged its notice of appeal on 27<sup>th</sup> July 2023, but that the notice of appeal was not served upon the applicant within 7 days and remains unserved as at the date of the Motion; that no application for certified copies of the proceedings was made within 30 days of the impugned decision and served upon the applicant within the prescribed period; that the record of appeal was not filed within the prescribed period of 60 days from the date of judgment nor served on the applicant as at the date of the instant Motion; and that it is almost one-and-a-half years and the respondent has not taken any steps to institute its intended appeal.

3. In support of the applicant's Motion, learned counsel M/s. Mutunga Muindi & Co. filed written submissions dated 12<sup>th</sup> May 2025, submitting that under rule 82 (now rule 84 of the 2022 Rules), the respondent was required to institute the appeal within

60 days of lodging the notice of appeal; that, to date, no record of appeal has

been filed; that the 60 days lapsed on 27<sup>th</sup> September 2023; that no application has been made for a copy of the proceedings within 30 days of the lodging of the notice of appeal, and none was served on the applicant's advocates as required under the Rules; that it is clear that the notice of appeal on record was only meant to frustrate the applicant, which is what rule 83 (now rule 85) was meant to cure; and that, since the respondent obtained orders to stay execution on the basis that it had lodged a notice of appeal on 18<sup>th</sup> July 2024, it went into a slumber and has never bothered to take any steps to institute the intended appeal. Consequently, the notice of appeal should be deemed as having been withdrawn.

4. It is noteworthy that the respondent did not file any affidavit in reply to the applicant's Motion or written submissions in opposition thereto, save for brief oral submissions by its learned counsel Mr. Antony Masila, who stated that they have not been successful in obtaining their client's file from its previous advocates to enable them take the necessary action in the intended appeal. According to counsel, the respondent was keen

in instituting and prosecuting its

appeal. He urged us to disallow the applicant's Motion and sustain the Notice of Appeal.

5. Rule 85 of the Court of Appeal Rules, 2022 provides:

***85. Effect of default in instituting appeal***

***(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 subrule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.***

6. This Court has on several occasions pronounced itself on the consequences of noncompliance with the timelines prescribed under the Court's Rules. In that regard, we adopt the position taken by the Court in **John Mutai Mwangi & 26 Others v Mwenja Ngure & 4**

**Others** [2016] eKLR in which it was appreciated that the strict

timelines are ***“...meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.”***

7. In ***MAE Properties Limited vs. Joseph Kibe & Another*** [2017]

eKLR, this Court had this to say on the timelines prescribed under the Rules:

***“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience ... Failure to comply with the timelines set invites sure consequences.”***

8. The rationale for strict adherence to rules of practice and procedure was also explained in ***Chelashaw v Attorney***

**General &**

**Another** [2005] 1 EA 33 where it was held that without rules of

practice and procedure, the application and enforcement of the law

and the administration of justice would be chaotic and impossible, and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. That enforcement of such rules is imperative was emphasized by this Court in **Onjula Enterprises Ltd v Sumaria**

[1986] KLR 651 where it was held that:

***“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs. Greenlands Limited [1916] 2 AC 15 at 38.”***

**9.** This Court in **Taracisio Githaiga Ruithibo v Mbutia Nyingi**

[1984] KLR 505 cautioned that no court, particularly this one,

should wish away the Rules of Court so ignobly.

10. We have carefully considered the applicant's Notice of Motion, the affidavit in support, the grounds on which it is anchored, the rival submissions, the cited judicial authorities and the Rules of this Court. We take to mind the fact that the respondent's notice of appeal was not served on the applicant within 7 days as mandated by rule 79(1); that there is no evidence to show that the respondent applied for a copy of the proceedings and/or served the letter bespeaking such application within the timelines prescribed under the proviso to rule 84(1) and rule 84(2) respectively of the Court's Rules.

11. The foregoing procedural infractions are further compounded by the respondent's failure to file its record of appeal within the appointed 60 days next following the lodging of the Notice of Appeal from the impugned judgment and decree. Neither has the respondent moved the Court for extension of time to do any of the things required to regularise its intended appeal.

12. In view of the foregoing, we reach the inescapable conclusion that the applicant's Notice of Motion dated 14<sup>th</sup>

November 2024 succeeds and is hereby allowed with costs.

Consequently, the

respondent's Notice of Appeal dated 27<sup>th</sup> July 2023 is hereby deemed as having been withdrawn pursuant to rule 85 of the Court of Appeal Rules, 2022. Orders accordingly.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of December 2025.**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

.....

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....

.....

**JUDGE OF APPEAL**

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

*Signed*  
**DEPUTY REGISTRAR**