



**Khamis & another v Bader & 300 others (Civil Application
E085 of 2024) [2026] KECA 48 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KECA 48 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E085 OF 2024
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
JANUARY 30, 2026**

BETWEEN

MBARUK KHAMIS & ANOTHER APPLICANT

AND

FEISAL BADER & 300 OTHERS & 300 OTHERS RESPONDENT

*(Being an application to deem as withdrawn the Notice of Appeal
from the Judgment and Decree of the Environment and Land Court
of Kenya at Kwale (A. E. Dena, J.) delivered on 15th January 2024)*

RULING

1. Before us is the applicants' Notice of Motion dated 9th July 2024 pursuant to rule 85 of the Court of Appeal Rules, 2022 seeking to have the respondents' Notice of Appeal dated 22nd January 2024 and lodged on 23rd January 2024 deemed as having been withdrawn; and that the costs of their Motion be borne by the respondents.
2. The applicants' Motion is supported by the annexed affidavit of Mbaruk Khamis Mohamed, the 1st applicant, sworn on 9th July 2024 essentially deposing to the 10 grounds on which it is made, namely: that since they lodged their Notice of Appeal on 23rd January 2024 and received typed copies of the proceedings on 20th March 2024, the respondents are yet to file and serve the applicants with their memorandum and record of appeal; that the respondents have failed to take any essential steps to institute their intended appeal; that the respondents have not moved the Court for extension of time to institute their intended appeal out of time; and that the respondents have lost interest in their appeal; that they have abandoned it and, consequently, their notice of appeal should be deemed as having been withdrawn.
3. In support of the Motion, learned counsel for the applicants, M/s. O. G. Makowade Advocates, filed written submissions dated 30th May 2025 and a list of authorities dated 9th July 2025. Counsel cited



the cases of *Gamma Villa Limited v Kenya Ports Authority* [2023] KECA 921 (KLR) where the Court held that observing timelines in the Court of Appeal Rules is not optional but, rather, mandatory;

Maina v Macharia & 5 Others [2023] KESC 97 (KLR) where the Supreme Court allowed a similar application, noting that the appellant had failed to institute the appeal within the prescribed timelines after filing their notice of appeal; *Nicholas Kiptoo Arap CKorir Salat v IEBC & 7 Others* [2014] eKLR where the Supreme Court emphasised the fact that timelines in litigation are not technicalities, but part of substantive justice; *Chepkwony v CKiberenge* [2024] KECA 65 (KLR); and *Mistry Premji Ganji C(Investments) Limited v KENHA* [2019] eKLR where the Court of Appeal, on similar grounds, allowed the applicants' Motions and deemed the respondents' notices of appeal as having been withdrawn.

4. In response to the applicant's Motion, the respondents filed a replying affidavit of Feisal Bader, the 1st respondent, sworn on 29th May 2025 decrying his financial constraint. In his words, the 1st respondent stated:

"12. that on my account of being financially constrained I plead that this Honourable Court do bear with me and consider my humble request that my appeal be allowed to continue as the delay in filing the appeal is regrettable but it is not inordinate."

5. In rebuttal, learned counsel for the respondents, M/s. Kasina & Associates, filed written submissions and a list of authorities dated 30th May 2025 citing the cases of *James Mangele Musoo v Ezeetech Limited* [2014] eKLR, highlighting the principle that justice shall be administered without undue regard to procedural technicalities;

Githiga & 5 Others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR) where the Supreme Court observed that the right to a fair trial was a non-derogable right; and *Ivita v Kyumbu* [1984] KLR 441, highlighting the principle that the test is whether the delay is prolonged and inexcusable and, if it is, whether justice can be done despite such delay. The remaining two cases cited in their submissions are of no relevance to applications under rule 85.

6. Rule 85(1) of this Court's Rules provides:

85.

- (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.

7. The respondent does not take issue with the dates on which they were said to have lodged their notice of appeal and received typed proceedings. Having received the proceedings on 20th March 2024, they had 60 days within which to lodge the intended appeal as mandated by rule 84(1) of this Court's Rules subject, however, to the indication in the certificate of delay of the period to be excluded.

7. By the time the applicants' Motion came up for hearing before us on the Court's virtual platform on 11th June 2025, more than two



- (2) years had gone by without any essential steps having been taken to institute the intended appeal. To our mind, the delay is inordinate and inexcusable and, least of all, by the alleged financial constraints on the part of 301 respondents.
7. We need not overemphasise the mandatory duty to comply with the timelines prescribed in the Rules of this Court.
8. This Court sitting in Nakuru in *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR held that:

“The filing of a record of appeal is required to be done within 60 days of the lodgment of the notice of appeal by dint of Rule 82 [now rule 84] of the Court of Appeal Rules. That timeline is strict and is 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 the same vein, the Court reasoned as follows in *MAE Properties Limited vs. Joseph Kibe & Another* [2017] eKLR:

“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.”

7. The appellant’s disobedience of, and failure to comply with, the mandatory provisions of rule 84(1) of the Court of Appeal Rules invites the inevitable consequence of the Notice of Appeal being deemed to have been withdrawn.
7. Having considered the applicants’ Motion, the affidavits in support and in reply, the respective submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the applicants’ Notice of Motion dated 9th July 2024 succeeds and is hereby allowed as prayed. Consequently, the respondents’ Notice of Appeal dated 22nd January 2024 and lodged on 23rd January 2024 be and is hereby deemed as having been withdrawn.
7. The respondents shall bear the costs of the application. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JANUARY 2026

A. K. MURGOR

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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

