

**IN THE COURT OF  
APPEAL AT MOMBASA**

**(CORAM: MURGOR, LAIBUTA & NGENYE,**

**JJ.A.) CIVIL APPLICATION NO. E039 OF 2024**

**BETWEEN**

**EVEREST MATOLO LENJO**

**DOMINY LENJO MUSAMULI** (*Legal Representatives of Estate  
of Edward Lenjo Musamuli (Deceased)*)

.....  
**APPLICANTS**

**AND**

**ISANGAWISHI GROUP RANCH.....RESPONDENT**

(*Being an application to deem as withdrawn the Notice of Appeal  
filed by the respondent in the High Court of Kenya at Voi*)

*in*

***Succession Cause No. 50 of 2015)***

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**RULING OF THE COURT**

1. By a Notice of Motion dated 2<sup>nd</sup> April 2024, **the applicants**, Everest Matolo Lenjo and Dominy Lenjo Musamuli (**Legal Representatives of the Estate of Edward Lenjo Musamuli (the deceased)**) seek orders that this Court be pleased to have *Isangawishish Group Ranch's (the respondent)* Notice of Appeal dated 9<sup>th</sup> August 2021 and lodged in the registry at Voi High Court on 13<sup>th</sup> August 2021 in Succession Cause No. 50 of 2015 be deemed as withdrawn; and that costs of the application be provided for.
2. A brief background to the application is that the

respondent filed an application before the High Court seeking revocation of grant of letters of administration issued to the applicants

on 4<sup>th</sup> November 2016 and confirmed on 31<sup>st</sup> July 2017. The main ground upon which the application was premised was that the deceased was indebted to the respondent in the sum of Kshs.7,434,045, which was awarded to it in High Court Misc. Civil Application No. 225 of 2000; and that the same was not included as a debt/liability of the deceased's estate. By a ruling dated 29<sup>th</sup> July 2021, the learned Judge (**Ong'ijo, J.**) found that there were no plausible grounds advanced to warrant revocation of the grant. She however allowed the respondent to file its claim as an interested party in the cause. That decision prompted the respondent to file the Notice of Appeal, the subject of this application.

3. The application is premised on the grounds on its face and the applicants' joint supporting affidavit sworn on 2<sup>nd</sup> April 2024. They contend that the ruling of Ong'ijo, J. paralyzed their operations in terms of administering the estate of their deceased father; that, as at the time of filing the application, almost three years had passed since the Notice of Appeal was filed, yet the respondent had not taken any further steps by either filing the record of appeal, or in ensuring that the appeal is prosecuted; that this was a testament that the respondent had lost interest in the appeal; and that the existence of the Notice of Appeal on record is intended to frustrate their efforts to finalize their obligation as administrators of the deceased's estate.
4. When the application came up for hearing on 18<sup>th</sup> March 2025, none of the parties were present either in person or

through their appointed counsel. We satisfied ourselves that

proper service of the hearing notice had been effected. However, the applicants' counsel, M/s. Odongo B. O. & Company filed submissions dated 13<sup>th</sup> June 2025, but the respondent did not file any written submissions.

5. In their written submissions, the applicants' counsel relied on the provisions of **Rule 85(1)** of this **Court's Rules, 2022**, submitting that, if a party does not file an appeal within 60 days of lodging a notice of appeal, the notice of appeal is to be deemed as withdrawn. Counsel cited this Court's decisions of **Muzaffer Musafee Essajee & another vs. Anne Njeri Mwangi (2021) KECA 716 (KLR)**; and **Transnational Bank Limited vs. Daniel Munene Kabogo (2009) KECA 402 (KLR)** where the Court emphasised the principle that judicial proceedings ought to be concluded in a timely manner.
6. The applicants submitted that since the respondent lodged the Notice of Appeal on 13<sup>th</sup> August 2021, no further steps had been taken to ensure that the appeal was prosecuted, including requesting for certified copies of proceedings; and that they had therefore met the threshold for grant of the application.
7. We have considered the application, the joint affidavit in its support, the applicants' submissions and the law. The singular issue that falls for determination is whether the Notice of Appeal dated 9<sup>th</sup> August 2021 and lodged in the registry at Voi High Court on 13<sup>th</sup> August 2021 ought to be deemed as having been withdrawn.

8. **Rule 84(1)** of this **Court's Rules, 2022** provides that an appeal should be instituted within 60 days after the notice of appeal has been lodged. In default thereof, as per **rule 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.”***

9. It is not disputed that the impugned Notice of Appeal dated 9<sup>th</sup> August 2021 was filed on 13<sup>th</sup> August 2021 and served upon the respondent on 16<sup>th</sup> August 2021. The respondent has not demonstrated that it has thereafter taken any steps to prosecute its intended appeal. The timeous filing of an appeal is meant to ensure that justice is dispensed with in a just, expeditious, proportionate and cost-effective manner in line with the principles enshrined in **Sections 3A** and **3B** of the **Appellate Jurisdiction Act, Cap 9**.

10. **Rule 84(1)** cures the eventuality of a party who abandons his intention to appeal by not formally filing a notice of withdrawal under **rule 83(1)**. This Court in **John Mutai Mwangi & 26 others vs. Mwenja Ngure & 4 others (2016) KECA 655 (KLR)** expounded more on the rationale behind **rule 84(1)** by holding that:

***“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.”**

11. Further, in **Mae Properties Limited vs. Joseph Kibe & another (2017) KECA 238 (KLR)**, this Court held that:

**“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. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged ex- abundanti cautela by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences.**

**It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgement of the appeal within 60 literal days, or such longer time**

***as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order***

**extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo motu, on its own motion and at its sole discretion, presumably with neither notice nor reference to the parties.**

**The Court has this inherent power to make the formal order of the notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure.**

**Under the same Rule 83, and assuming that the Court will not have sooner made the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been lodged. Once those two facts are established, we do not see why the Court should not, unless persuaded by some compelling reason in the interests of justice, simply make the order deeming the notice of appeal as withdrawn.”**

12. We add that it serves no purpose to keep a notice of appeal on record while a party has not demonstrated any intention whatsoever of prosecuting the intended appeal. This appears to be the case with the respondent. It filed

the subject Notice of Appeal and sat back without taking any further steps towards prosecuting the appeal. The Notice merely exists and

operates as a signal that an impending appeal abounds thereby standing in the way of any intention of the respondent progressing matters pertaining to the deceased's estate. The best action to take in the circumstances is to have the notice deemed as having been withdrawn so as to pave way for the applicants' continued administration of the deceased's estate.

13. In view of the foregoing, it follows that this is a fit and proper case to deem the Notice of Appeal dated 9th August 2021 as withdrawn in accordance with **rule 84(1)** of this **Court's Rules**. Accordingly, the applicants' Notice of Motion dated 2nd April 2024 is hereby allowed as prayed with costs to the applicants.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of January, 2026.**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**

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

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**