

**IN THE COURT OF  
APPEAL AT  
MOMBASA**

**(CORAM: GATEMBU, MURGOR & NYAMWEYA, JJ.A.)**

**CIVIL APPLICATION NO. E020 OF 2023**

**BETWEEN**

**TOTAL KENYA LIMITED.....APPLICANT**

**AN**

**D CHRISTOPHER MWACHIA**

**TUJA**

**T/A TUWA INVESTMENTS.....RESPONDENT**

*(Being an application to withdraw and/or deem withdrawn the respondent's notice of appeal against the Judgment of the High Court of Kenya at Mombasa (Olga Sewe, J.) dated 5<sup>th</sup> May 2022*

***in***

***HCCA No. 28 of 2020)***

**\*\*\*\*\***

**RULING OF THE COURT**

1. Total Kenya Limited, the applicant, moved the Court by its application dated 9<sup>th</sup> February 2023 seeking orders that the Notice of Appeal dated 18<sup>th</sup> May 2022 lodged in Court on 19<sup>th</sup> May 2022 by the respondent Christopher Mwachia Tuja t/a Tuwa Investments, be deemed as withdrawn. The application

is made under Rules 42 (1), 43 (1), 82(1) and 83 of the Court  
of

Appeal Rules, 2010. The Notice of Appeal in question relates to a judgment of the High Court at Mombasa delivered on 5<sup>th</sup> May 2022.

2. The background is that under a Young Dealer Marketing Licence, the applicant granted the respondent a licence to operate a petrol station. Upon termination of the Licence, the respondent filed suit against the applicant before the Magistrate's Court seeking judgment for, among other reliefs, Kshs.6,265,880.00 and general damages.
3. The respondent's suit was not successful. It was dismissed by the Magistrate's Court. The respondent appealed to the High Court which similarly dismissed his appeal in the judgment delivered 5<sup>th</sup> May 2022. Still dissatisfied, and intending to file a second appeal before this Court, the respondent filed the Notice of Appeal the subject of the present application.
4. The grounds on which the applicant seeks to have the Notice of Appeal be deemed as withdrawn as appearing on the face of the application and in the supporting affidavit sworn by

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Wakaba the Legal Manager of the applicant, are that despite filing and serving the Notice of Appeal on time; and despite applying for typed proceedings, the respondent had yet to institute the appeal by lodging a memorandum and record of appeal in accordance with Rule 82(1) (Now 84(1)) of the Court of Appeal Rules; that the delay was causing the applicant hardship and uncertainty and the Notice of Appeal should therefore be deemed as withdrawn.

5. In his replying affidavit in opposition to the application, Shukran Mwabonje, the advocate for the respondent deponed that the delay in lodging the memorandum and record of appeal was beyond the respondent's control; that it was caused by delay in typing of proceedings in the High Court despite the same having been applied for within the prescribed timelines; that there was also oversight in follow up of the proceedings on account of transition of associates within his law firm; that the proceedings had since been typed and were awaiting certification by the High Court; and that the typing and

certification of proceedings is a matter entirely in the hands of the High Court and beyond the respondent's control.

6. We heard the application on 8<sup>th</sup> July 2025. **Ms. Okata**, learned counsel appeared for the applicant while **Mr. Otwoma**, learned counsel held brief for **Mr. Mwabonje** for the respondent. Counsel relied entirely on written submissions dated 3<sup>rd</sup> July 2025 and 7<sup>th</sup> July 2025 respectively which we have duly considered. The issue we need to determine is whether the applicant has met the requirements for the Court to deem the Notice of Appeal as withdrawn.
7. Rule 84(1) of the Court of Appeal Rules provides that “an appeal shall be instituted...within sixty days after the date when the notice of appeal was lodged.” However, the proviso to that rule states that where an application for a copy of the proceedings is made within thirty days after the date of the decision against which it is desired to appeal, the time certified as having been required for the preparation and delivery of the copy of the proceedings is excluded in computing the sixty days.

8. Rule 85(1) of the Court of Appeal Rules, which the applicant has invoked provides that:

***“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.”***

9. The Court explained the rationale behind that rule, in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others [2016] eKLR** as being an “inbuilt case-management system” which enables the Court:

***“...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...”***

***...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.”***

10. In the same vein, the Court in the case of **Mae Properties Limited vs. Joseph Kibe & Another, Nbi Civil Appeal (Application) No. 201 of 2016 [2017] eKLR**, stated that:

“... a Notice of Appeal dies a natural death after the expiry of 60 da

See also **Lalitchandra Durgashanker Pandya & Another vs. E K Baya & 3 Others, Civil Application No. E057 of 2020; Kibunja vs. Kirweya & 2 Others [2024] KECA 363 (KLR)**; and **Quickclubes EA Limited v Kenya Railways Corporation [2014] eKLR**.

11. With those provisions and principles in mind, it is not disputed that the Notice of Appeal was filed and served within the timelines set out in the Rules. It is also not in dispute that the respondent's advocate's letter bespeaking a copy of the proceedings from the High Court was made within 30 days and a copy of that letter was duly served on the applicant.
12. The respondent has explained that although the transition of the advocate who was handling the matter within the respondent's advocates law firm slowed the push for the High Court registry to expedite the typing of the proceeding, the advocates had since been informed by the registry that the proceedings had been typed and what remained, at the time the replying affidavit was sworn, was certification and issuance of certificate of delay, matters beyond the control of the respondent.
13. We are satisfied with the explanation. In the circumstances, this in our view is not a proper case for the exercise of the

Court's discretion under Rule 85(1) of the Court of Appeal Rules.

14. The application dated 9<sup>th</sup> February 2023 fails and is hereby dismissed. Costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Mombasa this 13<sup>th</sup> day of March 2026.**

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

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

**A.K. MURGOR**

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

**P. NYAMWEYA**

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

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

*Signed*

**DEPUTY  
REGISTRAR**