



Irungu v Nairobi City Water & Sewerage Company Limited (Civil Application E337 of 2020) [2026] KECA 822 (KLR) (30 April 2026) (Ruling)

Neutral citation: [2026] KECA 822 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E337 OF 2020
J MOHAMMED & AO MUCHELULE, JJA
APRIL 30, 2026**

BETWEEN

SOLOMON GITHAE IRUNGU APPLICANT

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .. RESPONDENT

(Being an application to strike out the Notice of Appeal dated 1st July 2016 filed against the judgment of the Employment and Labour Relations Court at Nairobi (Nduma, J.) dated 29th June 2016 in Cause No. 1931 of 2013)

RULING

1. Before us is the notice of motion dated 22nd September, 2020 by Solomon Githae Irungu (the applicant), expressed to be brought under Rule 84 of the Court of Appeal Rules, 2010, now Rule 86 of the Court of Appeal Rules, 2022. The applicant seeks principally an order that the notice of appeal dated and lodged on 1st July, 2016 by the respondent be struck out, or, in the alternative and in substance, be deemed to have been withdrawn, together with costs of the application.

Nairobi City Water & Sewerage Co. Ltd is the respondent herein.

2. The background to the application is straightforward. The dispute before the Employment and Labour Relations Court (ELRC) (Mathews N. Nduma, J.- as he then was) concerned a claim for wrongful and unfair dismissal from employment. The applicant avers that he was employed on 6th November, 1998 and was subsequently seconded to the respondent, in whose service he remained until 27th September, 2013 when he was summarily dismissed.
3. In the impugned judgment, the ELRC found, inter alia, that the respondent had not established a valid reason for the summary dismissal within the meaning of section 43(1) of the *Employment Act*, 2007 (the Act); that the dismissal was wrongful and unfair within the meaning of section 45 of the Act; and that the claimant was entitled to relief under section 49(1)(c) as read with section 49(4) thereof.



4. Aggrieved by that decision, the respondent lodged a notice of appeal dated 1st July 2016. The instant application was thereafter brought on the footing that, notwithstanding the filing of that notice, the respondent failed to institute the intended appeal within the time prescribed by the Rules; that proceedings had long been supplied; that the respondent continued to enjoy the benefit of conditional stay orders issued by the ELRC; and that the notice of appeal had been retained on the record purely to forestall the applicant's enjoyment of the fruits of his judgment.
5. In the supporting affidavit, the applicant depones that the rules of this Court require an intended appeal to be instituted within sixty (60) days, subject only to such exclusion of time as may properly be founded on a certificate of delay. He further depones that although a certificate of delay dated 1st August 2019 was issued, no record of appeal was filed and no application for extension of time was ever made. On that basis, the applicant contends that the respondent's inertia bespeaks abandonment of the intended appeal.
6. Although served, the respondent did not file any replying affidavit or written submissions in response to the application.

Submissions

7. The application was disposed of by way of written submissions by the applicant who was acting in person. In his written submissions, the applicant argued that the respondent's prolonged inaction over a period exceeding five (5) years disentitled it to continue sheltering under the notice of appeal and the stay orders attendant thereto. The applicant submitted that the respondent having failed to prosecute its intended appeal, the justice of the matter flows in favour of the applicant by granting the orders sought. The applicant urged that litigation must come to an end and that this Court should either strike out the notice of appeal or deem it withdrawn so as to pave way for the release of the decretal sum of Kshs.778,520 deposited in court. The applicant further submitted that the respondent has no arguable appeal as the trial court delivered its judgment in favour of the applicant based on the evidence tendered and the applicable law. The applicant urged that he application be allowed with costs.

Determination

8. We have considered the motion, the supporting affidavit, the applicant's submissions, the authorities cited and the law. In our view, the issue for determination is whether, in the circumstances disclosed, the notice of appeal lodged on 1st July 2016 should remain on the record.
9. Rule 86 of the Court of Appeal Rules, 2022 provides as follows:

“A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

- a. that no appeal lies; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.” [Emphasis supplied].



10. Rule 86 empowers a person affected by an appeal to apply to strike out a notice of appeal or an appeal on the ground, among others, that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The proviso to that rule is, however, explicit that such an application shall not be brought after the expiry of thirty (30) days from the date of service of the notice of appeal or record of appeal, as the case may be.
11. It follows, and this Court has repeatedly stated, that an application strictly grounded on Rule 86 is constrained by the thirty-day limitation in the proviso. In *HFC Limited v Kinyanjui* (Civil Application E103 of 2023) [2025] KECA 893 (KLR), the Court reiterated that while the jurisdiction to strike out is discretionary, it must be invoked within the timeline prescribed by the proviso to Rule 86. A similar approach was taken in *JOP v AKM* (Civil Application E093 of 2023) [2024] KECA 1922 (KLR), where this Court underscored that procedural timelines in the Rules are neither ornamental nor optional.
12. The applicant was plainly alive to that difficulty. The instant application, having been lodged long after service of the notice of appeal, could not properly be sustained as a pure Rule 86 application to strike out the notice. That, however, is not the end of the matter.
13. Rule 85 of the Court of Appeal Rules, 2022 provides that where 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, either on its own motion or on the application of another party, make such order. The rule is designed to prevent a litigant from filing a notice of appeal and thereafter lapsing into indolence while the opposite party remains prejudiced by uncertainty and delay.
14. The modern jurisprudence of this Court on Rule 85 is now settled. In *Gamma Villa Limited v Kenya Ports Authority* (Civil Application E068 of 2022) [2023] KECA 921 (KLR), this Court held that where the requisite steps towards institution of the appeal, such as demonstrating the bespeaking of proceedings, obtaining a certificate of delay where appropriate, and lodging the record of appeal, have not been shown to have been taken, the notice of appeal may properly be deemed withdrawn. The Court stressed that explanations for delay are matters for an application for extension of time, not a substitute for compliance with the Rules.
15. The same principle was reaffirmed in *Cloy & 2 others v Kiniaru* (Substituted by Hiram Warui Ndirangu) (Civil Application E055 of 2024) [2025] KECA 943 (KLR), where this Court held that Rule 85 may be invoked notwithstanding the limitation proviso in Rule 86, because the former addresses the legal consequence of failure to institute the appeal within time. Likewise, in *Igweta & Another v Kathambi & 2 Others* (Civil Appeal (Application) E442 of 2024) [2025] KECA 457 (KLR), this Court emphasized that failure to take the essential step of filing the appeal within the time directed or prescribed leads to the notice of appeal being marked as withdrawn, with the necessary consequence that any stay founded on the intended appeal cannot stand indefinitely.
16. We also derive guidance from *Karurie v Kamau* (Civil Appeal (Application) E134 of 2021) [2025] KECA 366 (KLR), where this Court, citing earlier authority, explained that Rule 85 serves the dual purpose of curbing abuse of process and promoting efficient appellate case management. It is intended to arrest the mischief of a litigant who lodges a notice of appeal and then goes to sleep, leaving the other party exposed to needless delay and uncertainty.
17. Applying those principles to the application before us, the chronology is telling. The notice of appeal was lodged on 1st July, 2016. Even taking into account the certificate of delay said to have been issued on 1st August, 2019, no record of appeal was filed. No application for extension of time was presented.



No explanation was offered by the respondent in response to the application now before us. In short, there is absolutely nothing on record to demonstrate any subsisting diligence in the prosecution of the intended appeal.

18. In those circumstances, we are satisfied that the respondent failed to institute the appeal within the time set out by the Rules and has, by operation of Rule 85, been deemed to have withdrawn the notice of appeal. This is not a case of a mere technical lapse. Rather, it reflects a prolonged and unexplained delay extending over several years. Letting the notice of appeal stay on the court record would excuse delay in following procedure and would continue to unfairly prejudice the applicant who obtained judgment in his favour.

19. The upshot is that, while the prayer to strike out the notice of appeal under Rule 86 would face the obstacle of the proviso to that rule, the justice of the matter lies in the making of an order under Rule 85 which provides as follows:

“(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.”

20. Accordingly, we order that the respondent’s notice of appeal dated 1st July 2016 be and is hereby deemed to have been withdrawn. The respondent shall bear the costs of this application.

21. It is so ordered.

22. The ruling has been delivered under Rule 34(4), Judge Ochieng, JA. having passed on before delivery of the ruling.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2026.

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

