



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karurie v Kamau (Civil Appeal (Application) E134 of 2021)  
[2025] KECA 366 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 366 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E134 OF 2021  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**NJUE KARURIE ..... APPLICANT**

**AND**

**JOSEPH GACHECHE KAMAU ..... RESPONDENT**

*(Being an application for orders that the notice of appeal dated 24<sup>th</sup> September 2021 be marked as withdrawn and the record of appeal filed on 30<sup>th</sup> December 2021 be struck out in HC. Misc Appl. No. of 2020)*

**RULING**

**Background**

1. Njue Karurie (the applicant), filed a notice of motion dated 1<sup>st</sup> March 2024 expressed to be brought under Sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and Rules 79, 84(1), 85(1) and 86 of the Court of Appeal Rules 2022 (this Court's Rules) seeking orders in the main:
  - i. That the notice of appeal dated 24<sup>th</sup> September, 2021 and filed on 30<sup>th</sup> September, 2021 be deemed and/or marked as withdrawn;
  - ii. That the record of appeal filed on 3<sup>rd</sup> December, 2021 be struck out; and
  - iii. That costs of the application be provided for.Joseph Gacheche Kamau is the respondent herein.
2. A brief background will help place the application in context. The respondent had filed an appeal before the High Court being Civil Appeal No. 96 of 2010 at Embu against the judgment of the Principal Magistrate at Embu in Civil Suit No. 11 of 1992. The said appeal was dismissed for want of prosecution by a ruling dated 8<sup>th</sup> October, 2018. The appellant applied for stay and/or review of



the dismissal orders but the same was declined on 9<sup>th</sup> December, 2019. Consequently, the respondent moved the High Court through a Miscellaneous Application No. 13 of 2020 at Embu seeking leave to appeal out of time.

3. The High Court (L. Njuguna, J.) held in part as follows:

“In the application, the substantive prayer is that the applicant be granted leave to file an appeal out of time. From the reading of the grounds in support of the application, there is no indication as to what orders the appellant seeks leave to appeal against... The appellant’s application dated 18<sup>th</sup> April 2019 seeking stay of execution of the orders of 8<sup>th</sup> October 2018 by Muchemi J was dismissed on 9<sup>th</sup> December 2019. The appeal having been dismissed, he cannot file another appeal from the same judgment and thus seek leave in that respect. In the view of the foregoing, the application is frivolous and an abuse of the court process. The same is hereby dismissed with costs to the respondent.”

4. Aggrieved by that ruling the respondent filed a notice of appeal dated 24<sup>th</sup> September, 2021. The applicant filed the instant application seeking orders that the notice of appeal be deemed as withdrawn and that the record of appeal be struck out. The application is premised on grounds on the face of it that: the respondent filed the notice of appeal on 30<sup>th</sup> September, 2021 but failed to file the record of appeal within 60 days contrary to Rule 84 of this Court’s Rules. The applicant contended that the notice of appeal was served upon him on 19<sup>th</sup> October, 2021, which was out of time in contravention of Rule 79 of this Court’s Rules. That the record of appeal was filed on 3<sup>rd</sup> December, 2021, which was out of time and without leave of this Court. The applicant further contended that the record of appeal was not served upon the applicant and that counsel for the applicant learnt of the record of appeal from the Case Management Session held on 5<sup>th</sup> February, 2024. Further, that failure to file the record of appeal within the stipulated time meant that the record is deemed withdrawn pursuant to Rule 85(1) of this Court’s Rules. The applicant further contended that the aforesaid defect is fatal as it goes to the root of the appeal. The application is supported by a sworn affidavit of Joe Kathungu, learned counsel for the applicant, who rehashed the grounds in support of the application.

5. In opposing the application, the respondent filed a replying affidavit sworn on 12<sup>th</sup> July, 2024. The respondent maintained that the instant application is frivolous and an abuse of the court process meant to delay the finalization of the appeal. The respondent averred that if the notice or the record of appeal was served out of time, the applicant’s recourse was to apply to have it struck out within 30 days; that the instant application was filed on 1<sup>st</sup> March, 2024, which was a delay of more than 2 years. That the instant application was filed after the expiry of 30 days from the time the applicant was served hence the provision to apply for striking out the notice and the appeal was spent and that the appeal should be allowed to proceed to full hearing. Further, that the impugned ruling, was delivered on 22<sup>nd</sup> September, 2021 while the notice of appeal was filed on 30<sup>th</sup> September, 2021 which was within the 14 days required by law. That the notice of appeal was signed and ready for service on 7<sup>th</sup> October, 2021 and was served on the applicant on 19<sup>th</sup> October, 2021 which was within time. That the memorandum of appeal was filed on 3<sup>rd</sup> December, 2021, which was within the 60 days from the date the notice of appeal, was signed and ready for service.

### **Submissions by Counsel**

6. At the hearing of the application both counsel had filed their written submissions. Learned counsel, Mr. Joe Kathungu represented the applicant while learned counsel, Mr. Manacha Oonge represented the respondent. Mr. Kathungu submitted that the respondent had not filed his replying affidavit and the instant application was, therefore, unopposed and should be allowed as prayed. On the other hand,



Mr. Oonge filed a replying affidavit and written submissions on 12<sup>th</sup> July, 2024. Counsel submitted that the application to deem the notice of appeal filed on 30<sup>th</sup> September, 2021 as withdrawn and the record of appeal filed on 3<sup>rd</sup> December, 2021 struck out was filed 2 years late while the law required the application to be filed within 30 days from the date of service of the notice and the memorandum of appeal.

7. Mr. Oonge relied on the decision of *Tome & Another vs Attorney General & 2 Others* (Miscellaneous Application 185 of 2019) [2021] KCECA 150 (KLR) where this Court held as follows:

“... This court held that parties are bound by the mandatory nature of provision of Rule 84 of the Court of Appeal Rules, an application seeking to strike out a notice of appeal must be filed within (30) days of service of the Notice of Appeal or the filing of the appeal ought to be struck off. The failure to do so renders such an application fatally defective and liable to be struck out.”

### **Determination**

8. We have considered the application, the submissions filed, the authorities cited and the law. The notice of appeal dated 24<sup>th</sup> September, 2021 was filed on 30<sup>th</sup> September, 2021 against the decision of the High Court delivered on 22<sup>nd</sup> September, 2021. It is not disputed that the notice was served upon the applicant on 19<sup>th</sup> October, 2021. Counsel for the respondent submitted that the notice of appeal was signed on 7<sup>th</sup> October, 2021 and was served on 19<sup>th</sup> October, 2021 and it was well within time.

9. Counsel for the respondent took issue with the filing of the instant application and relied on Rule 86 of this Court Rules and asserted that the instant application is fatally defective as it was filed 30 days after the service of the notice of appeal. Counsel for the applicant asserted that they were never served with the record of appeal and only became aware of its existence on 5<sup>th</sup> February, 2021 at the Case Management Session. There is no evidence of service of the record of appeal on counsel for the applicant.

10. Rule 85 (1) of this Court’s Rules empowers this Court to act on its own motion and deem the notice of appeal as withdrawn. The said Rule provides as follows:

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.

11. This Court, in *Quicklubes E. A. Limited vs. Kenya Railways Corporation* [2014] eKLR discussed the significance of Rule 83 (now Rule

85) of this Court’s Rules in the following terms:-

“Rule 83 (now Rule 85) gives this court unfettered discretion to deem an appeal as withdrawn if a party files a notice of appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. ... An appellant may also lack interest in the appeal, or the parties may even settle the matter out of court but fail to inform the court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the court process and also promote efficiency in terms of case management. That is



why the Court of Appeal Rules allow the court to invoke Rule 83 suo motu if the respondent in the intended appeal does not move the court.”

12. Further, this Court in *John Mutai Mwangi & 26 Others vs Mwenja Ngure & 4 Others* [2016] eKLR stated as follows regarding the intent and purport of Rule 83 (now Rule 85) of this Court’s Rules:

“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 succor. 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.”

13. The prevailing circumstances call for the exercise of a balancing act between the applicant’s right to enjoy the fruits of his judgment and the respondent’s right to appeal. Considering that there is no evidence of service of the record of appeal on counsel for the applicant, we find that the scales of justice tilt in favour of the applicant.
14. In view of the foregoing, this Court invokes its discretion under Rule 85(1) of this Court’s Rules and deems the notice of appeal as withdrawn. Consequently, the record of appeal is hereby struck out. We award costs of the application to the applicant. It is so ordered.

**DATED AND DELIVERED AT NYERI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

