



**Mohammed v Adan & 3 others (Civil Appeal (Application)
E680 of 2023) [2025] KECA 301 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 301 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E680 OF 2023
SG KAIRU, P NYAMWEYA & LA ACHODE, JJA
FEBRUARY 21, 2025**

BETWEEN

HUSSEIN UNSHUR MOHAMMED APPELLANT

AND

YUSUF ABDI ADAN 1ST RESPONDENT

HUSSEN AHMED FARAH 2ND RESPONDENT

ABDIKADIR ADAN 3RD RESPONDENT

BIRD AVIATION LIMITED 4TH RESPONDENT

*(Being an appeal from the Ruling of the High Court of Kenya at Nairobi
(Njoki Mwangi, J.) dated 25th April 2023 in HCCC No. 100 of 2016)*

RULING

1. In his application dated 11th December 2023, Yusuf Abdi Adan, the 1st respondent, seeks an order that the Notice of Appeal dated 27th April 2023 lodged by the appellant, Hussein Unshur Mohammed, be deemed to have been withdrawn. The grounds in support of the application as set out on the face of the application are that the Record of Appeal dated 24th August 2023 is incomplete and deficient; was filed out of time; that there is no certificate of delay forming part of the record; and that the appeal does not lie.
2. The context, in brief, is that the applicant, Yusuf Abdi Adan (the 1st respondent in the appeal) applied before the High Court seeking, among other reliefs, an order to set aside a valuation report in respect of the 4th respondent, Blue Bird Aviation Limited. In a ruling delivered on 25th April 2023, the High Court (Njoki Mwangi, J.) allowed that application, set aside a valuation report dated 6th December 2021 by RSM (East Africa) Consulting Limited. The Judge directed the parties to appoint another valuer to conduct a valuation of the 4th respondent to ascertain the true value of the



applicant's shareholding therein; that should the value thus established be less than the amount of Kshs.320,912,500 already deposited into the Judiciary bank account, the difference be refunded to the 3rd respondent Mohammed Abdikadir Adan; and that subject thereto, the said amount be released to the applicant.

3. Aggrieved by that decision, the appellant promptly filed the Notice of Appeal dated 27th April 2023 and on the same date applied for a copy of the proceedings of the High Court in accordance with the proviso to Rule 84 of the Court of Appeal Rules. The Memorandum and Record of Appeal herein was then lodged on 24th August 2023 and served 25th August 2023.
4. About four months later, the applicant lodged the present application dated 11th December 2023, seeking, as already indicated, an order that the Notice of Appeal be deemed as withdrawn.
5. Later, the 2nd respondent filed a supplementary record of appeal dated 11th March 2024 containing a Certificate of Delay issued by Deputy Registrar of the High Court certifying that an application for proceedings was made by letter dated 27th April 2023; that the Deputy Registrar notified the advocates that the copy of proceedings was ready by letter dated 4th August 2023 and that the period between 27th April 2023 and 4th August 2023 was required for the preparation and delivery of the copy of the proceedings.
6. Against that backdrop, we heard the application dated 11th December 2023 on 9th October 2024 during which the parties were represented by learned counsel. Mr. Lorot appeared for the applicant. Mr. Sagana appeared for the appellant and held brief for counsel for the 3rd respondent. Jan Mohammed, SC, appeared for the 2nd respondent, while Mr. J. Kemboi appeared for the 4th respondent.
7. Having considered the application, the affidavits in support and in opposition and the written and oral submissions by learned counsel, we take the following view of the matter. The application is avowedly made under Rules 84(1), (2) and 85(1), (2) of the Court of Appeal Rules and the applicant prays, as already indicated, for an order that the Notice of Appeal be deemed as withdrawn. This Court in *Mae Properties Limited vs. Joseph Kibe & Another* [2017] eKLR explained that Rule 83 (present Rule 85) of the Court of Appeal Rules "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" and that it "is a power meant to unclutter our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals."
8. Subsequently in *Esther Anyango Ochieng vs Transmara Sugar Company* [2020] eKLR, Kiage JA expressed as follows:

"My thinking is that, given our reasoning in the MAE PROPERTIES case (supra), at the point (of) considering whether or not to exercise our powers under Rule 83, a crucial point is whether or not a record of appeal may at that time have been filed. Where none has been filed, then the Court ought, without much ado, to deem the notice of appeal as having been withdrawn.

Where, however, as in the present case the appeal has in fact been instituted, can we in clear conscience, without a dalliance with the surreal, nevertheless pronounce that the appellant's notice of appeal is deemed to be withdrawn? I respectfully do not think so. I cannot shut my eyes to the fact that the appeal, the future filing of which was signified by the notice of appeal, in fact exists in verity." [Emphasis added]

9. We respectfully agree. In the present case, there is, in our view, a duly filed and served record of appeal. There is no contest, as already indicated, that the appellant applied for a copy of the proceedings in



accordance with the proviso to Rule 84 and the Deputy Registrar of the High Court certified the period required for the preparation and delivery of the same. In our view, the record of appeal was filed within the prescribed period. The submission by Mr. Lorot that the Certificate of Delay contained in the supplementary record of appeal is a sham because it was obtained and filed after the applicant's present application is not supported by any material.

10. Moreover, looking at the grounds in support of the application as set out on the face of the application, there is merit in the argument by counsel for the appellant that the application is essentially one seeking to strike out the notice of appeal under Rule 86. Rule 85 is conveniently invoked, it would seem, to avoid the thirty-day period within which such application should have been made.
11. All in all, there is no merit in this application. It is accordingly dismissed with costs to the appellant and to the 2nd and 4th respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

