Cloy & 2 others v Kiniaru (Substituted by Hiram Warui Ndirangu) (Civil Application E055 of 2024) [2025] KECA 943 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 943 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E055 OF 2024

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MAY 23, 2025

BETWEEN

MARK MC CLOY ..... 1ST APPLICANT

THE COUNTY LANDREGISTRAR, LAIKIPIA KIBUE GAHIE NDURO ..... 2ND APPLICANT

MAWE MINGI LIMITED ..... 3RD APPLICANT

AND

NDIRANGU KINIARU ..... RESPONDENT

SUBSTITUTED BY HIRAM WARUI NDIRANGU

(An application to strike out and/or deem as withdrawn the notice of appeal dated 20th December 2023 in an intended appeal against the Judgment of the Environment and Land Court in Nanyuki (K. Bor, J.) delivered on 13th December 2023 in ELC No. 39 of 2021)

RULING

1. Before the court is an application by way of a notice of motion dated 10th June 2024, which is expressed to be brought under Sections 1A & 1B of the *Civil Procedure Act* and Order 42 rule 35 of the Civil Procedure Rules 2010. The application seeks the deeming of the withdrawal of the notice of appeal dated 20th December 2023 and in the alternative to be struck out.

2. The application is predicated on the grounds on the face of the application and the affidavit of the applicant's counsel, Gitonga Muthee, dated 10th June 2024, stating that judgment in the High Court was delivered in favour of the applicant on 13th December 2023. Aggrieved with the judgement, the respondent filed a notice of appeal on 23rd December 2023 and was granted an order for a stay of execution pending the intended appeal on the same day the judgment was delivered. However, following the filing of the notice of appeal, the respondent has failed to initiate the intended appeal

within the prescribed sixty (60) days period; further, the applicant has never been served with a letter bespeaking proceedings as required by Rule 84(2) of this Court's rules, which is mandatory; the respondent will not suffer any prejudice as it is apparent that he is no longer interested in pursuing the appeal; and that the applicant should enjoy the fruits of his judgment.

3. In response, the respondent, Hiram Warui Ndirangu, filed a replying affidavit sworn on 21st November 2024, opposing the application. He deponed that the notice of appeal was filed on 23rd December 2023 and that he had requested for certified copies of the proceedings on 17th January 2024. However, the proceedings have not yet been supplied; he has been informed that they are incomplete. It would be just to allow him time to file the record once he receives the requested documents, and therefore, the application should be dismissed.

4. In his submissions dated 22nd November 2024, learned counsel for the applicant asserted that the key issue for the court's determination is whether the applicant has met the necessary threshold for the orders sought. The applicant argues that it is undisputed that the intended appeal has not been lodged within the stipulated time frame. That learned counsel has never been served with a letter requesting the proceedings, as required under Rule 84(2) of the rules. Additionally, Rule 85(1) states that if a party who has lodged a notice of appeal fails to initiate the appeal within the designated time, that party is deemed to have withdrawn their notice of appeal, allowing the court to make such an order on its own or upon the application of another party.

5. Learned counsel further submitted that one (1) year has elapsed since the notice of appeal was filed, with no action taken to pursue the appeal. Regarding costs, counsel refers to Rule 85(2) of the rules, which stipulates that the party in default is responsible for any costs incurred by those served with the notice of appeal. She urged that the application be granted with costs awarded to the applicant.

6. Learned counsel for the respondent did not file any submissions. He made brief oral submissions at the hearing of the application. He admitted that the letter bespeaking the proceedings was not served on the applicant. However, learned counsel urged that the application was premature as it was brought outside 30 days.

7. We have carefully considered the application, the replying affidavit and the parties' submissions. We must point out if for nothing else, to remind the applicant's counsel that the *Civil Procedure Act* and Civil Procedure Rules are not applicable in this Court. The Court of Appeal has its rules (The Court of Appeal Rules 2022), and the *Appellate Jurisdiction Act* governs the court. Nevertheless, we shall not belabour the point in line with this Court's sentiments in Peter Obwogo O & 2 Others vs. H O Suing as Next Friend of P O (Minor) & Another [2017] eKLR, where the court stated:

> " Whereas the rules for procedure are handmaidens of justice and play an important role in the administration of justice, they should not, in appropriate cases, impede the administration of substantial justice. Article 159(2) (d) of *the Constitution* of Kenya 2010, now requires that: "justice shall be administered without undue regard to procedural technicalities."

8. Going back to the application, examining the relevant provisions upon which the application should have been anchored is imperative. Rule 84 of the rules stipulates as follows:

    1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged

        a. a memorandum of appeal, in four copies;

        b. the record of appeal, in four copies;

c. the prescribed fee; and

d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.

Rule 85, in addition, states that:

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 sub-rule (1) shall be liable to pay the costs arising from any persons on whom the notice of appeal was served.

9. Rule 84, as read with Rule 85, requires that a party intending to appeal institute the appeal within 60 days after the date the notice of appeal was lodged. In the situation the respondent finds himself in, having failed to copy the letter bespeaking the proceedings to the applicant, the court, of its own motion or through an application by another party, may deem the appeal to have been withdrawn.

10. The applicant does not deny non-compliance with the rule. However, he has attempted to seek refuge under Rule 86, which states that an application to strike out a notice of appeal or an appeal shall not be filed after the expiry of 30 days.

11. The application before us falls 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 sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

12. In Kibunja vs. Kirweya & 2 Others [2024] KECA 363 (KLR), in addressing this issue, the court stated:

> " The provisions of rule 85 of the Court of Appeal Rules are predicated on the existence of circumstances from which the Court can deem a Notice of Appeal as having been withdrawn. Firstly, the steps that are required to be taken in instituting an appeal are those required by this Court's Rules. Secondly, there is no evidence that such steps namely, those of seeking typed proceedings, issuance of a certificate of delay, and filing of the record of appeal have been demonstrated by the 1st and 2nd respondents, and the reasons for the delay have not been proffered. Since the relevant facts in this application have not been

demonstrated, the Notices of Appeal filed by the 1st and 2nd respondents may be deemed to have been withdrawn."

13. In Kibunja vs. Kirweya (supra), the court referred to John Mutai Mwangi & 26 Others vs. Mwenja Ngure & Others [2016] eKLR, where this expounded on the rule as follows:

> " 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.
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> 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.
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> 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."

14. In this matter, there is no dispute that no record of appeal has been filed. The letter bespeaking the proceedings was not served on the other side, yet the appeal has not been filed. The respondent, in his replying affidavit, states that he was informed that the proceedings were not ready despite the delay of one (1) year. The applicant has not demonstrated what action or steps he has taken. There is no follow-up letter to the Registrar, and there is no telling whether, indeed, there was any communication with the respondent as alleged. The respondent appears to have gone to slumber after the stay was granted. Rule 85 mandates the court to withdraw the appeal on its own or be moved by the other side. In the words in Mutai Mwangi & 26 Others (supra), the rule is meant to check on litigants who are content with stay orders and move at a snail's speed content with the situation.

15. We accordingly allow the application with costs to the applicant.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR