



Gede Secondary School & 2 others v Mwambire (Suing as the Legal Representative of the Estate of Martha Paul Kazungu) & 2 others (Civil Appeal (Application) E006 of 2024) [2025] KECA 810 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 810 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E006 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MAY 9, 2025**

BETWEEN

**GEDE SECONDARY SCHOOL 1ST APPLICANT
LAND REGISTRAR KILIFI 2ND APPLICANT
THE HON ATTORNEY GENERAL 3RD APPLICANT**

AND

**ANTHONY NDUNDI MWAMBIRE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARTHA PAUL KAZUNGU) 1ST RESPONDENT
MARTHA PAUL KAZUNGU 2ND RESPONDENT
COUNTY GOVERNMENT OF KILIFI 3RD RESPONDENT**

(Being an application to strike out the Notice of Appeal dated 11th October 2022 against the Judgment of the Environment and Land Court at Malindi (Odeny, J.) dated 6th October 2022 in Malindi ELC Case No. 112 of 2015)

RULING

1. The Applicants' Notice of Motion dated 3rd April 2024 is brought pursuant to Sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, and rule 85 of the *Court of Appeal Rules*, 2022 seeking orders that the Notice of Appeal dated 11th October, 2022 be deemed to have been withdrawn, and that the costs of this application be borne by the 1st Respondent.
2. The Applicants' Motion is brought on several grounds, which are that the Judgment of the Environment and Land Court was delivered on 6th October, 2022 in favour of the Applicants.



Thereafter, the 1st Respondent filed a Notice of Appeal dated 11th October 2022 and lodged on 12th October 2022. The Notice was served on the Applicants' advocates on 7th November, 2022. The Applicants ought to have been served with the Notice within seven (7) days from the date of filing the Notice. Subsequently, the Applicants' counsel was served on 21st November, 2022 with a Notice of Motion dated 15th November 2022 seeking stay of execution of the Judgment delivered on 6th October 2022. On 20th January 2023, the court granted an injunction restraining the Applicants from evicting the 1st Respondent pending the hearing and determination of the intended appeal.

3. It was further contended that the Record of Appeal that ought to have been filed no later than 13th December, 2023 being sixty (60) days after the filing of the Notice of Appeal has yet to be filed; that the 1st respondent has never requested for the typed and certified copy of the proceedings, the Judgment or the decree and, as a consequence, he cannot rely on the proviso to Rule 84(1) of the *Court's rules*; that, furthermore, in the event that the 1st Respondent had requested for the proceedings, the letter bespeaking the proceedings was not served on the Applicants' advocate within thirty (30) days or at all, and nor has the Deputy Registrar certified the time of preparation of the proceedings.
4. It was contended that, for the above reasons, it is in the interests of justice and fairness that the Notice of Appeal dated 11th October, 2022 be deemed as withdrawn. The Motion is supported by the affidavit of Josiah Mwachanya, the Principal and Secretary to the Board of Management of the 1st Applicant in which he reiterates the grounds in the Motion.
5. When the application came up for hearing on a virtual platform, learned counsel Mr. M. Munga appeared for the Applicants while learned counsel Ms. Kivuva was on record for the 2nd respondent. There was no appearance for the 1st respondent though served, and neither did he file any written submissions.
6. The applicant filed written submissions and submitted orally that: the application seeks to have the Notice of appeal dated 11th October 2022 and filed on 12th October 2022 deemed as withdrawn; that, since the Notice was filed, the 1st respondent has not taken any further steps to lodge the Record of appeal and, further, that no letter requesting for the proceedings has been served on the applicants or their counsel. It was submitted that the 1st applicant is a school and that the dispute concerns land.
7. For their part, counsel for the 2nd respondent did not oppose the application.
9. We have considered the Notice of Motion and the parties' submissions. What is before us is an application seeking to deem the Notice of appeal as withdrawn under rule 85 of this *Court's rules*.

It provides:

- “(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 shall be liable to pay the costs arising therefrom on any persons on whom the notice of appeal was served”.
10. Rule 85 is therefore clear that this Court is empowered to deem a Notice of Appeal as withdrawn pursuant to either an application by a party or on its own motion.



11. Discerning the nature and effect of rule 85 in the case of *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others* [2016] eKLR, this Court observed:

“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 those 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”.

12. Similarly, in the case of *Judith Jemeli Kese v Moi Teaching and Referral Hospital* [2021] eKLR regarding Rule 85 (previously rule 83), this Court stated:

“We have ruled above that Rule 83 has no time limit within which to seek the Court’s intervention. It is, therefore, the proper anchor for the application under consideration, while the applicability of Rule 84 was discounted. In the result, we find sufficient basis laid for the invocation and application of Rule 83 of this Court’s Rules in favour of the applicant as no record has been filed in furtherance of the respondent’s initiated appellate process. The law has to take its own course.”

13. According to the applicants, since filing the Notice of appeal, the 1st respondent has not taken any steps towards instituting the appeal. It becomes evident that, despite the 1st Respondent having been notified of these proceedings, he failed to file a response or to attend court, which would signify his lack of interest in pursuing the appeal. Given the significant lapse of time since the Notice was filed, and the failure to take further steps to lodge an appeal, the Notice of Appeal cannot be left to subsist indefinitely without an appeal being filed.
14. This Court having been moved by the applicants pursuant to rule 85, we hereby deem the Notice of Appeal dated 11th October 2022 and lodged on 12th October 2022 as having been withdrawn. Costs of the application to the applicants.

15. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY, 2025.

A.K MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.



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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

