



**Nyamasyo & 2 others v Odhiambo & 6 others (Civil Application
E074 of 2023) [2025] KECA 775 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 775 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E074 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MAY 9, 2025**

BETWEEN

**MIRIAM MBEKE NYAMASYO 1ST APPLICANT
STEPHEN MUINDI MUTISYA 2ND APPLICANT
DR. EDWARD MWARINGA 3RD APPLICANT**

AND

**DISHON ODHIAMBO 1ST RESPONDENT
PETER MUTINDA 2ND RESPONDENT
JOSEPH MUTISO 3RD RESPONDENT
SALIM MRUCHE 4TH RESPONDENT
SAID MBUJA 5TH RESPONDENT
MUDZO MBUDZA 6TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 7TH RESPONDENT**

*(Being an application to strike out the Notice of Appeal from the Judgment
and Decree of the Environment and Land Court of Kenya at Mombasa
(Munyao Sila, J.) delivered on 3rd March 2021 in E.L.C No. 238 of 2015)*

RULING

1. The applicants moved this Court vide their Notice of Motion dated 15th August 2023 and filed pursuant to rules 84(1), 85(1) and (2), and 86 of the Court of Appeal Rules, 2022 seeking orders to strike out the respondents' Notice of Appeal filed on 11th March 2021 with costs on the ground



that “no appeal lies”, and that some essential steps in the proceedings have not been taken within the prescribed time.

2. The applicants’ motion was supported by the annexed affidavit of Stephen Muindi Mutisya, the 2nd applicant, sworn on 15th August 2023 for and on behalf of the applicants, essentially deposing to the grounds on which the application was made, namely: that the impugned judgment was delivered on 3rd March 2021; that the respondents filed the Notice of Appeal on 11th March 2021; and that it has taken them more than two years and four months since then, and no steps have been taken towards filing their record of appeal.
3. In support of the Motion, learned counsel for the applicants, M/s. Mutisya & Associates, filed written submissions dated 24th November 2023, which Mr. Mutisya highlighted orally when the application came for hearing, pointing out that the respondents’ application to file their intended appeal out of time was dismissed on 26th July 2024. According to counsel, the respondents have all along taken advantage of stay orders granted by the trial court pending appeal to this Court. Counsel urged the Court to exercise its discretion to strike out the respondents’ notice of appeal or deem it as having been withdrawn.
4. It is noteworthy that the respondents did not file any reply to the applicants’ Motion despite adjournment thereof on 5th December 2023 to allow them time to file their responses. Neither did they file any submissions in response or appear either in person or by counsel at the hearing of the Motion on 16th December 2024 despite having been duly served with a hearing notice.
5. As was held in the case of Mae Properties Ltd v Joseph Kibe and Another [2017] eKLR, this Court has the discretionary power under rule 85 of the Court of Appeal Rules, either on application or on its own motion, to deem the Notice of Appeal as having been withdrawn. Rule 85 reads:
 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.
6. We take to mind the fact that 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. In this case, the respondents have not demonstrated that they took any of the steps required by this Court’s Rules to be taken in instituting their intended appeal, such as applying for typed proceedings, issuance of a certificate of delay, and filing of the record of appeal. Neither have they given any reasons for the delay in doing so. In the circumstances, the Notice of Appeal filed by the respondents may be deemed as having been withdrawn.
7. We need not overemphasise the fact that the timelines prescribed for the taking of certain steps in the proceedings on appeal to this Court are indispensable for the proper adjudication of appeals, and that the Court’s Rules are expressed in clear and unambiguous terms and command obedience. This Court in *Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others* (2016) eKLR pronounced itself thus:

“We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an



appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses. Essentially this is a practical rule that 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. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged *ex abundanti cautella* by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences.”

8. With reference to the then Rule 83 (now rule 85 of the 2022 Rules), this Court had this to say in *Quicklubes E. A. Limited v Kenya Railways Corporation* [2014] eKLR:

“Rule 83 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. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. 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.”

9. In the same vein, the Court in *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others* [2016] eKLR expounded on the same 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. 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.”

10. More recently, in *Mombasa Water Products Limited vs. NIC Bank Limited & 2 others* [2022] KECA 523 (KLR), the Court stated that it has unfettered discretion to strike out a Notice of Appeal by using the deeming provisions of Rule 83 (now Rule 85(1) of the 2022 Rules). Accordingly, we find that the



applicants' Motion succeeds and, consequently, hereby order and direct that the respondents' Notice of Appeal filed on 11th March 2021 be and is hereby deemed as having been withdrawn. The applicants' costs of the Motion shall be borne by the respondents jointly and severally.

Orders accordingly.

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

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

