



REPUBLIC OF KENYA



KENYA LAW
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**Al Zurul Farm & 2 others v Gurto & 8 others (Civil Application
E014 of 2023) [2024] KECA 87 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 87 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E014 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 9, 2024**

BETWEEN

**AL ZURUL FARM 1ST APPLICANT
YUSUF AHMED HASSAN 2ND APPLICANT
JAMAL AYELA SISAI 3RD APPLICANT**

AND

**MAHAD GODHANA MAKORANI 1ST RESPONDENT
MOHAMMED BORU GURTO 2ND RESPONDENT
MAHAMUD WARIO 3RD RESPONDENT
ABUBAKAR SALAT GARACHA 4TH RESPONDENT
ISMAIL ABAJILA WATICHU 5TH RESPONDENT
YUSSUF MARAFU ICANO 6TH RESPONDENT
MAHAD BARISA JILO 7TH RESPONDENT
ABDULAHI ADHAN ASHAKO 8TH RESPONDENT
MOHAMED DIKAYU KARANI 9TH RESPONDENT**

*(An application for an order of evacuation/striking out the Notice of Appeal
dated 26th September, 2022 under rules 83 and 84 of the Court of Appeal
Rules, 2010 being an appeal from Malindi ELC Court Petition No. 06 of 2019)*



RULING

1. By Notice of Motion dated 5th April 2023 brought pursuant to section 3A and 3B of the *Appellate Jurisdiction Act*, rule 1 (2), rule 42 and rules 83 and 84 of the *Court of Appeal Rules* 2010, (current rules 44, 85 and 86 of the *Court of Appeal Rules* 2022) the applicants; Al Zurul Farm, Yusuf Ahmed Hassan and Jamal Ayela Sisai seek an order to strike out the Notice of appeal dated 26th September, 2022. The motion is brought pursuant to the grounds on its face and is supported by the sworn affidavit of the 2nd applicant.
2. A brief background of the instant application is that the respondents, who were the petitioners, filed a land matter in the Environment and Land Court (ELC) Petition No. 06 of 2019; that after filing of the petition, they lost interest in the suit and the applicants then filed an application on April 11, 2022 to have the suit dismissed for want of prosecution; that when the application came up for hearing, on 15th June, 2022, the respondents applied for time to respond to the application, which the trial court allowed, but granted the day's costs to the applicants. The trial court further directed the respondents to comply within 14 days and fixed the application for hearing on the 20th September, 2022; that, on the hearing date, the respondents failed to comply with the court's directions pursuant to which the court allowed the applicants' application and dismissed the Petition. Thereafter, the respondents sought leave to appeal against the orders of dismissal and filed a notice to appeal dated 26th September, 2022.
3. It was the applicants' case that since then, the respondents neglected and refused to lodge any appeal which situation persisted for over 6 months. It was contended that the certified copies of the proceedings in the court below were ready for collection way back on 13th October, 2022, and that the respondent had not taken any steps to file the Record of appeal; that, in the interest of justice, the Notice of appeal should be struck out and the applicants allowed to enjoy the fruits of the decision.
4. During the hearing on a virtual platform, learned counsel for the applicants, Ms. Bujra relied on their written submissions and submitted that the respondents herein have clearly shown that they are uninterested in pursuing their appeal; that, despite filing the Notice of Appeal against the trial court's decision, they have never collected the certified pleadings, nor have they shown any interest to prosecute the intended appeal. Counsel prayed that the application be allowed as prayed .and invited the Court to consider the decision in the case of *Mae Properties Limited v Joseph Kibe & Planfarm Investments Limited* [2017] eKLR in support of the submissions on the consequences of failure to comply with rule 82 of this *Court's rules*.
5. There was no appearance for counsel for the respondents them having been duly served.
6. The application before this Court seeks to strike out the respondents' notice of appeal for failure to lodge a record of appeal within the time specified under the Rules.
7. On filing of an appeal, rule 82 (current rule 84 of the *Court of Appeal rules* 2022) provides:
 - (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - 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 of 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.”

8. Further, rules 83 and 84 then go on to address situations where no appeal has been filed.

Rule 84 States:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

9. Hence, the above is clear that this Court is empowered to strike out a notice of appeal or a record of appeal for want of form or failure to follow the rules of procedure. However, before doing so, the proviso to rule 84 expressly states that the power to strike out a notice or an appeal shall not be brought “...after the expiry of thirty days from the date of service of the notice of appeal or record of appeal...”

10. The consequence for non-compliance with the prerequisites in rule 82(1) and (2) of the *Court's rules* was addressed in the case of *Mae Properties Limited v Joseph Kibe* [supra] as follows:

“It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgement of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo moto, on its own motion and at its sole discretion, presumably with neither notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure.”

11. In the case of *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR the court stated thus:

“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the Respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High



Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.”

12. In the instant case, the application to strike out the Notice of appeal was lodged on 5th April 2023, which was over five months after the Notice of appeal was filed and, to this extent, rule 84 of this Court Rules cannot be relied upon to strike out the Notice of appeal.

Needless to say, the applicants have also relied upon rule 83, given that the application was brought more than 30 days after the filing of the notice of appeal. It provides:

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay the costs arising therefrom on any persons on whom the notice of appeal was served”.

13. So that, in terms of rule 83, this Court has the power to deem a Notice of appeal as withdrawn pursuant, either on application or on its own motion.
14. Discerning the nature and effect of rule 83 in the case of *John Mutai Mwangi & 26 others vs 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”.

15. Similarly, in the case of *Judith Jemeli Kese vs Moi Teaching and Referral Hospital* [2021] eKLR, this Court stated thus:

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 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.

16. A review of the application discloses that the respondents have not taken any steps towards instituting the appeal since filing the Notice of appeal. There is no explanation for this glaring omission. We are



left to conclude that they have lost interest in their appeal. Given the significant lapse of time since it was filed with no further steps having been taken at all, it goes without saying that a notice of appeal such as this cannot be left unattended indefinitely. Having been moved by the applicants pursuant to rule 83, we hereby deem the Notice of appeal dated September 26, 2022 as having been withdrawn with no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

