



REPUBLIC OF KENYA



KENYA LAW
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**Ramji Ratna & Company Limited v Attorney General (Civil Application
E044 of 2023) [2024] KECA 114 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 114 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E044 OF 2023
P NYAMWEYA, A ALI-ARONI & PM GACHOKA, JJA
FEBRUARY 9, 2024**

BETWEEN

RAMJI RATNA & COMPANY LIMITED APPLICANT

AND

ATTORNEY GENERAL RESPONDENT

(An application to deem as withdrawn the Notice of Appeal dated 2nd September 2020 against the judgment of the High Court of Kenya (Grace Nzioka J.) delivered on 2nd September 2020 in Civil Suit No. 558 of 1998 as Consolidated with HCC No. 557 of 1998)

RULING

1. Ramji Ratna & Company Limited, the Applicant herein has filed an application by way of a Notice of Motion dated 16th September 2023, seeking an order that the Notice of Appeal dated 2nd September, 2020 and lodged in the High Court at Nairobi by the Attorney General, who is the Appellant in the substantive appeal (and hereinafter referred to as “the Respondent/Appellant”) be deemed to have been withdrawn. The grounds upon which the application is based are detailed in the supporting affidavit sworn on 16th September 2023 by the Applicant’s Director, Naran Shamji Pindoria, and in the submissions dated 16th March 2023 filed by Kipkenda & Company Advocates, the Applicant’s advocates on record.
2. In summary, the Applicant avers that, the High Court at Nairobi (G. Nzioka J.) delivered a judgment on 2nd September, 2020 in its favour in HC Civil Suit No. 558 of 1998 as Consolidated with HCC No. 557 of 1998, and that the Respondent/Appellant herein, being aggrieved with the judgment filed and served it with a Notice of Appeal dated 2nd September, 2020 against the entire judgment. That on the same date, the Respondent/Appellant wrote to the Deputy Registrar of the High Court of Kenya, Commercial and Tax Division, requesting to be furnished with typed proceedings and the judgment for the purposes of pursuing an appeal. However, that since filing and serving the Notice of



Appeal, the Respondent/Appellant has failed, neglected or ignored to lodge and or file the intended Appeal within the stipulated time contrary to the rules of this Court. Further, that since writing to the Deputy Registrar, the Respondent/Appellant has been neglectful and has not put in more effort towards obtaining the typed proceedings and the impugned judgment.

3. The Applicant's counsel cited the decision in the case of *Salim vs. Bafadhil* (Civil Application No. 105 of 2019) (2022) KECA 775 (KLR) to submit that a period of over two (2) years constitutes inordinate delay, and that the Respondent/Appellant is being indolent as nothing prevented him from instituting his appeal with the documents in its possession, since the rules allow a party to seek leave of court to file a supplementary record of appeal upon obtaining the documents from the Deputy Registrar. The counsel therefore invited us to invoke the "deeming rule" in *Mae Properties Ltd vs. Joseph Kibe & another* (2017) eKLR.
4. The Respondent/Appellant did not file any response to the application, and none of the parties' counsel were present during the virtual hearing of the application held on 6th November 2023, despite having been duly served with the hearing notice. We therefore reserved this ruling based on the pleadings and submissions on record.
5. The timelines for filing notices of appeal and appeals are set out in Rules 77 and 84 respectively of the Court of Appeal Rules of 2022 (and were previously provided under Rules 75 and 82 of the Court of Appeal Rule of 2010). A Notice of Appeal is required to be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged, an appeal is required to be instituted by lodging a Memorandum of Appeal and Record of Appeal in the appropriate registry, within sixty (60) days of the date when the Notice of Appeal was lodged. A person affected by an appeal may apply to the Court to strike out the Notice of Appeal or the Appeal if any steps required to be met with regards to their filing are not made within time, but such an application is required to be made before the expiry of thirty (30) days after the date of service of the Notice of Appeal or Record of Appeal. In this regard it is notable that the Respondent/Appellant's Notice of Appeal was filed within time, and the Applicant cannot rely on the provisions for striking out the Notice of Appeal, hence his application to have the Respondent/Appellant's Notice of Appeal deemed as withdrawn.
6. This Court in this regard has the power and discretion, either on application or on its own motion as was held in the case of *Mae Properties Limited vs Joseph Kibe & another* [supra], to deem a Notice of Appeal withdrawn under Rule 85 of the Court of Appeal Rules 2022 (previously in Rule 83 of the Court of Appeal Rules 2010), and provides as follows:

85.
 - (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.
7. The provisions of Rule 85 of the Court of Appeal Rules 2022 are predicated on the existence of circumstances from which the Court can deem that a Notice of Appeal had been withdrawn. It is our view that such circumstances do not exist in the instant application, for the reason that by the Applicant's own admission, the Respondent/Appellant has taken steps to file the appeal, namely by seeking and following up on the typed proceedings to enable the filing of the appeal. The Applicant in this respect annexed as Annexure "NSP-3" to its supporting affidavit, a copy of the letter dated



2nd September 2020 which the Respondent/Appellant wrote to the Deputy Registrar of the High Court requesting to be furnished with certified typed proceedings and the judgment for the purposes of pursuing an appeal. The said letter was to be served on Kipkenda & Company Advocates, the advocates on record for the Applicant, and is stamped as having been received by the said advocates on 9th September 2020.

8. The Applicant's Director further deponed as follows in the supporting affidavit:

“9. That I know on the advice of the Applicant's advocates on record that since writing to the Deputy Registrar on 2/9/2020, the Respondent has been neglectful and has not put in more effort towards obtaining or having the proceedings typed and availed to him.

10. That to demonstrate its dilatory behavior in the matter, the Respondent has only made two subsequent follow-ups after every one year. (Annexed and marked NSP-4 (a) and (b) are letters dated 25/8/2021 and 11/10/2022 respectively evidencing the Respondent's dilatory behavior)”.

9. The proviso to Rule 84(1) excludes 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 the copy of the proceedings, where an application for the proceedings was made within thirty (30) days of the date of the decision intended to be appealed against. The Rule in sub-rule (2) in addition provides that an appellant shall not be entitled to rely on the proviso unless the application for the copy of the proceedings was in writing and a copy of it served on the respondent. The Applicant has exhibited the application for proceedings and subsequent follow-up letters by the Respondent/Appellant that were clearly served on it, and from the Applicant's own exhibits it is evident that time has not started to run against the Respondent with respect to the filing of the appeal, neither is it reasonable to fault the Respondent/Appellant for any delay in obtaining the proceedings and filing the appeal.

10. It is also inconsequential in this regard whether or not the Respondent/Appellant files a supplementary appeal, since the relevant acts that stop time from running, are the application for proceedings and service of the application on the Applicant. The Respondent's Notice of Appeal dated 2nd September 2020 cannot therefore be deemed to have been withdrawn in the circumstances.

11. We therefore find that the Applicant's application by way of the Notice of Motion dated 16th September 2023 lacks merit, and the said application is hereby dismissed with no order as to costs.

12. Orders accordingly.

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

P. NYAMWEYA

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JUDGE OF APPEAL

ALI –ARONI

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

