



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Chepkwony v Kiberenge (Civil Application E015 of 2022)  
[2024] KECA 65 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 65 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E015 OF 2022  
F SICHALE, P NYAMWEYA & WK KORIR, JJA  
FEBRUARY 2, 2024**

**BETWEEN**

**KIPROTICH ARAP CHEPKWONY ..... APPLICANT**

**AND**

**MICHAEL KIBERENGE ..... RESPONDENT**

*(Being an application to strike out the Notice of Appeal dated 16th December 2019, against the Judgment and Decree of the ELC Court at Eldoret (Ombwayo J), dated 6th December 2019) In (Eldoret ELC Case No. 1 of 2012 (OS))*

**RULING**

1. The motion before us is the one dated 29<sup>th</sup> September 2022, brought pursuant to the provisions of Rules 44, 84 and 86 of the *Court of Appeal Rules* of 2022 (hereinafter “The Rules”) in which Kiprotich Arap Chepkwony (the applicant herein), seeks the following orders:
  - “a. That this Honourable Court be pleased to strike out the Notice of Appeal dated 16<sup>th</sup> December 2019, against the Judgment and Decree of the Environment and Land Court at Eldoret delivered by Honourable Justice A.O Ombwayo on the 6<sup>th</sup> day of December 2019.
  - b. That in the alternative and without prejudice to the foregoing, the Notice of Appeal dated 16<sup>th</sup> December 2019, be deemed to have been withdrawn.
  - c. That costs of this application be borne by the respondent.”
1. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia, that pursuant to a judgment and decree dated 6<sup>th</sup> December 2019, the respondent lodged his Notice of Appeal on 17<sup>th</sup> December 2019 and



served it upon the applicant on 19<sup>th</sup> December 2019. On 16<sup>th</sup> December 2019, the respondent requested for typed proceedings.

2. He further deposed that copies of proceedings and judgment were ready for collection on 29<sup>th</sup> March 2022, as evidenced by the Certificate of Delay and that the respondent's advocates on record collected the same on 5<sup>th</sup> August 2022, whereupon they were issued with a Certificate of Delay on 8<sup>th</sup> August 2022.
3. That, his advocates subsequently wrote to the respondent vide a letter dated 24<sup>th</sup> August 2022, demanding to be served with the Record of Appeal and that to date they have never been served with a Memorandum of Appeal nor a Record of Appeal despite the proceedings having been ready for collection on 29<sup>th</sup> March 2022.
4. He thus deposed that it was patently clear that the respondent had lost interest in the appeal as he had failed to institute it as by law required.
5. When the matter came up for plenary hearing on 17<sup>th</sup> October 2023, Mr. Koech learned counsel appeared for the applicant. There was no appearance on part of the firm of Onyinkwa & Company Advocates for the respondent despite having been served with a copy of the hearing notice on 4<sup>th</sup> October 2023 at 11: 27 AM. Mr. Koech sought to rely on his written submissions and list of authorities dated 12<sup>th</sup> October 2023.
6. It was submitted for the applicant that since the respondent had clearly failed to institute the appeal as dictated by the provisions of Rule 84 of the Rules, the same ought to be struck out. The applicant further conceded that as per the dictates of Rule 86 of the Rules, he ought to have filed the instant application within 30 days from the date of service of such Notice of Appeal, but nevertheless, and in the alternative, urged us to invoke our discretion and deem the same to have been withdrawn pursuant to Rule 85. For this proposition, reliance was placed on the case of *Mae Properties Limited V Joseph Kibe & Another* [2017] eKLR.
7. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's written submissions, the cited authorities and the law.
8. The applicant herein seeks to have the Notice of Appeal dated 16<sup>th</sup> December 2019, struck out. In the alternative, he seeks to have the same deemed to have been withdrawn. It is indeed not in dispute that the respondent herein had on 17<sup>th</sup> December 2019, lodged a Notice of Appeal against the judgment of Ombwayo J. dated 6<sup>th</sup> December 2019. It is also not in dispute that despite the proceedings herein being ready for collection as early as 29<sup>th</sup> March 2022, the respondent has not filed a Memorandum of Appeal or a Record of Appeal despite being served with a letter by the applicant on 24<sup>th</sup> August 2022, demanding to be served with the record of appeal.
10. Additionally, the respondent did not even appear for plenary hearing of this application on 17<sup>th</sup> October 2023, despite having been served with a copy of the hearing notice and neither has he filed any response to the applicant's application.
11. Rule 86 of the Rules donates to this Court the power to strike out a Notice of Appeal or an appeal as the case maybe. The said Rule provides as follows;

“



“86. Application to strike out notice of appeal or appeal 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—

a. That no appeal lies; or

b. 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 after the date of

service of the notice of appeal or record of appeal, as the case may be.”

12. It is conceded that the instant motion is in contravention of Rule 86 (*supra*), as it has been brought outside the 30-day period as provided by the proviso in Rule 86. Be that as it may, under Rule 84 of the *Rules*, the respondent was required to file an appeal within 60 days from the date of lodging the Notice of Appeal and to date none has been filed almost 4 years down the line. Essentially therefore, there is no appeal on record.

13. Rule 85 of the *Rules* on the other hand provides for effect of default in filing an appeal. The same provides thus;

“85. Effect of default in instituting appeal

i. 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. (Emphasis ours).

(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.”

14. Faced with a similar situation in the case of *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR, this Court rendered itself thus;

“It is not in dispute that the notice of appeal was lodged at the High Court registry on 26<sup>th</sup> May, 2015.

It is also not in dispute that by dint of Rule 82(1) of the *Court of Appeal Rules* 2010, the appeal should have been instituted within sixty days thereafter, but was not. It in fact had not been instituted as at the date of the filing of the motion some 15 months later. As at the hearing of the motion, more than two years had elapsed. We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience. Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus;



'83. 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 of any persons on whom the notice of appeal was served.'

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."

15. From the circumstances of this case, we have no doubts in our minds as rightly contended by the applicant that the respondent has clearly lost interest in the appeal, having failed to institute the same within the stipulated timelines. This would perhaps explain why he never bothered to file a response to the application nor appear for hearing of the same.
16. Accordingly, and in view of the above, we find merit in the applicant's motion dated 29<sup>th</sup> September 2022 and invoke our discretion by dint of Rule 85 of the Rules and declare the respondent's Notice of Appeal dated 16<sup>th</sup> December 2019, withdrawn with costs to the applicant.
17. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF FEBRUARY, 2024.**

**F. SICHALE**

**JUDGE OF APPEAL**

.....

**P. NYAMWEYA**

**JUDGE OF APPEAL**

.....

**W. KORIR**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

