



Macharia v Registered Trustees, Franciscan Sisters of Immaculate Nyeri (Civil Application E008 of 2024) [2024] KECA 1057 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KECA 1057 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E008 OF 2024
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
APRIL 26, 2024**

BETWEEN

ESTHER WAHURA MACHARIA APPLICANT

AND

THE REGISTERED TRUSTEES, FRANCISCAN SISTERS OF IMMACULATE NYERI RESPONDENT

(Being an application to strike out the appellant's notice of appeal dated 9th November 2022 from the judgment of the Employment and Labour Relations Court at Nyeri (D.K.N. Marete, J.) dated 31st October 2022 in ELRC Appeal No. E017 of 2021)

RULING

1. On 31st October 2022 the Employment and Labour Relations Court at Nyeri (D.K. Marete, J.) allowed the appeal by the applicant, Esther Wahura Macharia whose case had earlier been dismissed by the Principal Magistrate's Court at Nyeri. The learned Judge ordered the applicant to be paid compensation and other benefits for unlawful termination of employment, all totaling to Kshs 594,104.72, with costs of the appeal.
2. The respondent, The Registered Trustee, Franciscan Sisters of Immaculate Nyeri, were aggrieved by the decision, and on 10th November 2022 filed a notice of appeal indicating their intention to appeal to this Court. Under Rule 84(1) of the *Court of Appeal Rules, 2022*, the respondents were required to lodge the record of appeal within 60 days after lodging the notice of appeal. It is common ground that no such record has since been filed.
3. The applicant brought the present notice of motion dated 22nd January 2023 seeking to have the said notice of appeal be deemed to have been withdrawn, and, in the alternative, to have the notice of appeal struck out. She also asked for the costs. The notice of motion was brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, and Rules 85 and 86(a) of the *Court of Appeal Rules*. It was the



applicant's case that the respondent does not appear to be any longer interested in pursuing the appeal, and yet they were on 16th June 2023 granted a stay of execution which therefore stands in the way of the applicant's realization of the fruits of her judgment.

4. The respondent's advocate, learned counsel, Mr. Gitonga Muthee, filed a response to the motion. Essentially, he stated that, although his clients were still interested in pursuing the appeal, they were facing severe financial problems to the extent that they were unable to instruct counsel properly. He stated that their record of appeal is almost ready. In the written submissions filed on behalf of the respondent, this Court was urged to proceed under Rule 4 of the Rules and extend the time within which the respondents are to file the record of appeal, so that the respondent can file the record and have the appeal heard and determined on merits.
5. We hasten to point out that an application for an extension of time ought to be formally filed and served, as it will be heard before a single Judge of the Court. Presently, we do not have such an application on record.
6. As was stated by this Court in *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR, failure to comply with the timelines under the *Rules of this Court* invites consequences. The Rules have been promulgated to enable the just, effective, efficient, and proportionate resolution of appeals filed before the Court.
7. Rule 85 of the Rules provides as follows:-
 - “(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.”
8. This fact of the non-filing of the record of appeal within 60 days, or at all, has been brought to our attention. Under Rule 85(1), the respondents –

“ shall be deemed to have withdrawn the notice of appeal.....”

Consequently, we allow the notice of motion and hereby deem the notice of appeal dated 9th November 2022 and filed on 10th November 2022 to have been withdrawn.

9. The respondent shall pay the costs of the notice of motion to the applicant.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL 2024.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE



.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

