



REPUBLIC OF KENYA



**Waudi v Nguma & another (Civil Application E066 of 2021)
[2024] KECA 499 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 499 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E066 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
APRIL 26, 2024**

BETWEEN

VICTOR OKOTH WAUDI APPLICANT

AND

KAZUNGU KALAMA NGUMA 1ST RESPONDENT

JUSTINE MWANYALE MLANDA 2ND RESPONDENT

(Being an Application to strike out the Notice of Appeal from the Judgment and Decree of the Employment and Labour Relations Court at Mombasa (O.N Makau J.) dated 13th January 2017 in ELRC Cause No. 466 of 2015 Consolidated with ELRC Cause No. 468 of 2015)

RULING

1. Kazungu Kalama Nguma and Justine Mwanyale Mlanda, the 1st and 2nd respondents instituted ELRC No. 466 of 2015 which was consolidated with ELRC No. 468 of 2015 against the applicant claiming terminal dues plus compensation for unfair termination of their employment by the applicant on 17th April, 2015. In his defence, the applicant denied liability for the alleged unfair termination and averred that there had never been any employment relationship between him and the respondents.
2. On 13th January, 2017, Makau J. found that the applicant did not fit within the definition of an employer as contemplated under Section 2 of the *Employment Act* hence there was no employer-employee relationship between the applicant and the respondents. The Learned Judge dismissed the claims with an order that each party bears own costs.
3. Aggrieved, the 1st and 2nd respondents lodged a Notice of Appeal dated 23rd January, 2017 on 24th January, 2017.
4. The subject of this ruling is an application dated 14th September, 2021 taken out by the applicant in which the applicant seeks an order that the said Notice of Appeal by the respondents be deemed to



have been withdrawn or in the alternative be struck out. In the affidavit sworn by the applicant on 14th September 2021, it was averred that the said Notice of Appeal was served upon the applicant's advocates on 27th January, 2017; that the typed and certified proceedings were ready as at 22nd July, 2019 but the respondents have not filed their intended appeal to date; that the time for lodging the appeal expired after 60 days from the date the typed proceedings became available; that it is only fair and just that the Notice of Appeal be struck out or be deemed as having been withdrawn.

5. The respondents did not respond to the application.
6. On 6th December 2023, the application came before us for virtual hearing on the Court's GoTo platform during which learned counsel, Mr Amuga, appeared for the applicant while there was no appearance for the respondents' advocates despite due service of the hearing notice. Mr Amuga informed us that he was relying on the submissions dated 29th September 2023 in their entirety.
7. We have considered the said written submissions and we see no need of rehashing the same.
8. Rule 85 of the *Court of Appeal Rules* 2022 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.
9. It is thus properly within the purview of this Court's powers to deem as withdrawn a Notice of Appeal, even on its own motion, as held in *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR. This Court in *Salama Beach Hotel Limited & 4 Others vs Kenyariri & Associates Advocates & 4 Others* (2016) eKLR expressed itself as follows:

“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.”

10. In *Quicklubes E. A. Limited vs. Kenya Railways Corporation* [2014] eKLR this Court expressed in reference to Rule 83 of the *Court of Appeal Rules*, 2010 as follows:

“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.”

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

12. We are of the view that the circumstances in this application justify such an intervention, arising from the inaction on the part of the respondent since the lodging of the Notice of Appeal on 24th January 2017. We therefore find that the applicants’ Notice of Motion dated 14th September, 2021 is merited and we allow it. Accordingly, we direct that the Notice of Appeal dated and lodged on 24th January 2017 be and is hereby deemed and marked as withdrawn.
13. We award the costs of the application to the applicant.
14. Orders accordingly.

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

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL



I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

