



Amaka Development Limited v County Government of Taita Taveta (Civil Application E068 of 2023) [2024] KECA 446 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 446 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E068 OF 2023
P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA
APRIL 12, 2024**

BETWEEN

AMAKA DEVELOPMENT LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF TAITA TAVETA RESPONDENT

(An application to deem as withdrawn the Notice of Appeal dated 9th November 2021 and lodged by the Respondent on 10th November 2021 in ELC Case No. 140 of 2015)

RULING

1. The Applicant herein, Amaka Development Limited, seeks an order from this Court that the Notice of Appeal dated 9th November 2021 and lodged in the High Court of Kenya Registry at Mombasa on 10th November 2021 in ELC Case No. 140 of 2015 by the County Government of Taita Taveta, the Appellant herein, be deemed as withdrawn. This prayer is in a Notice of Motion application dated 31st July 2023, which is supported by an affidavit sworn on even date by Dominy Lenjo Musamuli, a director and secretary to the Board of Directors of the Applicant.
2. The main ground for the application is that it is now over two years since the judgment that is the subject of the Notice of Appeal was delivered on 4th November 2021, and the Appellant has not lodged the appeal. Further, that the delay is not only inordinate but also inexcusable as no effort was made to pursue the typed Court proceedings and compile the Record of Appeal, apart from the letter requesting for the same. Additionally, that the Appellant was taking advantage of the Notice of Appeal to commit contempt of the said judgment, which had compelled it to pay the Applicant damages, and to take corrective action to ensure that the offending drainage was removed.
3. In opposition to the application, the Appellant filed a replying affidavit sworn on 14th November 2023 by its Administrator, Gabriel Katuta. The gist of its response is that it wrote letters dated 9th November 2021 and 27th June 2023 to the Registrar of the trial Court requesting for copies of the typed



proceedings and of the judgment delivered on 4th November 2021 to enable it compile the Record of Appeal, and that the Applicant was served with the said letters through its advocates. Further, that the Appellant has since compiled the record of appeal, which was duly filed as Civil Appeal No. 158 of 2023 on 14th September 2023 and served upon the Applicant's counsel on 5th October 2023.

4. The Appellant contended that the Notice of Appeal could not be deemed as withdrawn since the Registrar of the Environment & Land Court from which the appeal arose has issued a Certificate of Delay dated 13/09/2023, declaring that the period from 15/11/2021 when the certified copies of the proceedings were requested for to 12/09/2023 when the certified copies of proceedings, judgment and decree were delivered to the Appellant's advocate, be excluded in computing time within which the appeal is to be instituted. That, accordingly, the Applicant's application has now been overtaken by events. The Appellant annexed copies of the referenced letters and of the certificate of delay.
5. We heard the application on the Court's virtual platform on 29th November 2023. Learned counsel Mr. B.O. Odongo appeared for the Applicant while learned counsel Mr. Kibara appeared for the Appellant. Both counsel highlighted their respective submissions dated 14th November 2023 and 23rd November 2023 and reiterated the averments made by the parties in their respective submissions. Mr. Odongo pointed out that it was not in dispute that the Notice of Appeal sought to be deemed as withdrawn was lodged on 10th November 2021 and that, at the time of the application, no appeal had been instituted. Further, that the decree was prepared and executed in August 2022 and the Appellant's counsel was served with a copy. Further, that if the Appellant was keen to follow up on the typed proceedings, they would have been supplied in good time.
6. Mr. Kibara's position was that the Appellant's Notice of Appeal satisfied the provisions of rule 84(1) and (2) of the *Court of Appeal Rules*, 2022 and that they wrote a letter dated 9th November 2021, 5 days from the date of judgment, which was within 30 days as stipulated under the proviso to rule 84(1), to the Registrar of the Environment & Land Court at Mombasa requesting for copies of the proceedings and judgment and that, in compliance with rule 84(2), the letter was served upon the Applicant through their advocates. Further, that by operation of law, the Respondent's Notice of Appeal dated 9th November 2021 could not be deemed as withdrawn since the Registrar duly issued a certificate of delay under the proviso to rule 84(1). Both counsel cited various decisions to support their respective positions.
7. Rule 85 of the *Court of Appeal Rules* 2022 provide 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. Similar provisions were also contained in rule 83 of the *Court of Appeal Rules*, 2010. It is thus properly within the purview of this Court's powers to deem as withdrawn a Notice of Appeal either on its own motion, as held in *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR, or on application, as in the instant case. The provisions of rule 85 of the *Court of Appeal Rules*, 2022 are in this respect predicated on the existence of circumstances from which this Court may deem that a notice of appeal has been withdrawn, particularly where the time set by the *Rules* for filing an appeal has lapsed, and no steps have been taken by the Appellant to extend time.
9. In the present application, given that the Appellant has demonstrated the steps it took to progress the appeal, namely writing a letter requesting for the typed proceedings and judgment, and in filing



the record of appeal, which we have confirmed from the record was lodged on 14th September 2023, we cannot make a finding that such circumstances exist. This is therefore not an appropriate case for deeming the subject Notice of Appeal as having been withdrawn.

10. We therefore find no merit in the Applicants' Notice of Motion dated 31st July 2023. However, we note that, since the Appellant filed his response four months down the line on 14th November 2023, and would have obviated the hearing of the application had he brought the necessary facts to the attention of the Applicant in good time, we shall make no order as to costs of the application.

11. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

