



**Kibunja v Kirweya & 2 others (Civil Application E040 of 2022)  
[2024] KECA 363 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 363 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E040 OF 2022  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
APRIL 12, 2024**

**BETWEEN**

**JOEL KABURI KIBUNJA ..... APPLICANT**

**AND**

**MARGARET WOTHAYA KIRWEYA ..... 1<sup>ST</sup> RESPONDENT**

**SARAH WANJIRU NJIRI ..... 2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF TITLES, MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

*(An application to strike out and/or deem as withdrawn the Notices of Appeal received on 17th June, 2020 and one dated 22nd June 2022 in an intended appeal against the judgement delivered on 9th June 2020 by the ELC at Mombasa (A. Omollo, J.) in ELC No. 450 of 2010)*

**RULING**

1. This ruling arises from the Motion on Notice taken out on behalf of the applicant herein dated 29<sup>th</sup> June 2022. The motion seeks orders that the Notices of Appeal served on 17<sup>th</sup> June 2020 (undated) and the one dated 22<sup>nd</sup> June 2020 be struck out or be deemed as withdrawn. The motion was supported by an affidavit sworn by the applicant on 29<sup>th</sup> June 2022.
2. From the scanty material placed before us, we discern that, on 9<sup>th</sup> June 2020, the ELC sitting at Mombasa (A. Omollo, J.) delivered a judgement in favour of the applicant herein. Dissatisfied with the said decision, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed and served Notices of Appeal filed on 17<sup>th</sup> June 2020 and another dated 22<sup>nd</sup> June 2020 on the applicant. However, the applicant averred that, for a period of over two years thereafter, no step was taken by the said respondents to institute the appeal by filing the Memorandum and Record of Appeal.
3. It was the applicant's position that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had lost interest in their intended appeal, and that the said Notices ought to be struck out or deemed as having been withdrawn.



4. The respondents neither responded to the application nor appeared at the hearing of the Motion despite having been duly served with the hearing notices.
5. We heard this application via the Court's GoTo Meeting virtual platform on 18<sup>th</sup> October 2023 when the applicant was represented by learned counsel, Mr. Kipkorir, while there was no appearance for the respondents. Mr Kipkorir who had filed submissions on behalf of the applicant opted to adopt his submissions in their entirety.
6. We have considered the same and we need not reproduce them in this ruling.
7. It is not disputable that, under rule 84 of the [Court of Appeal Rules](#), an appeal is 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. The proviso to sub-rule 1 of the said rule excludes such time as may be certified by the Registrar of the trial court as having been required for the preparation and delivery to the appellant of a copy of the proceedings where an application for such proceedings is made within thirty (30) days of the date of the decision intended to be appealed from. In addition, rule 84(2) provides that an appellant shall not be entitled to rely on the proviso unless the application for a copy of the proceedings is in writing and a copy thereof served on the respondent.
8. This Court has power and discretion, either on application or on its own motion, as was held in the case of [Mae Properties Ltd vs. Joseph Kibe and Another](#) [2017] eKLR, to deem the Notice of Appeal as having been withdrawn under rule 85 of the [Court of Appeal Rules](#), which is in the following terms:
  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. The provisions of rule 85 of the [Court of Appeal Rules](#) are predicated on the existence of circumstances from which the Court can deem a Notice of Appeal as having been withdrawn. Firstly, the steps that are required to be taken in instituting an appeal are those required by this [Court's Rules](#). Secondly, there is no evidence that such steps namely, those of seeking typed proceedings, issuance of a certificate of delay, and filing of the record of appeal have been demonstrated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and the reasons for the delay have not been proffered. Since the relevant facts in this application have not been demonstrated, the Notices of Appeal filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents may be deemed to have been withdrawn.
10. We need to emphasise in this respect, as has been done many times before by this Court, that the timelines for the taking of certain steps are indispensable to the proper adjudication of the appeals that come before us, and that the Rules are expressed in clear and unambiguous terms and command obedience. This Court in [Salama Beach Hotel Limited & 4 Others v 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.”

11. In *Quicklubes E. A. Limited v Kenya Railways Corporation* [2014] eKLR, this Court expressed itself, in reference to Rule 83 (currently rule 85) of the *Court of Appeal Rules* 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 moto if the respondent in the intended appeal does not move the court.”

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

13. More recently in *Mombasa Water Products Limited v NIC Bank Limited & 2 others*, Civil Application No. E051 of 2021 [2022] KECA 523 (KLR), the Court stated that it possesses discretion to strike out a Notice of Appeal by using the deeming provisions of Rule 83 (now Rule 85(1) of 2022 *Rules*).
14. In the circumstances, we see no need of dealing with the limb of the application that sought orders to strike out the Notices of Appeal.



15. Accordingly, this Motion succeeds and, consequently, we hereby order and direct that the Notices of Appeal lodged on 17<sup>th</sup> June 2020 (the 1<sup>st</sup> being undated and the 2<sup>nd</sup> dated 22<sup>nd</sup> June 2020) are hereby deemed as having been withdrawn.
16. The applicant will have the costs of the application to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally.
17. Orders accordingly.

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

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

