



RRK v Namu (Civil Application 81 of 2018) [2024] KECA 1056 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 1056 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 81 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
APRIL 12, 2024

BETWEEN

RRK APPLICANT

AND

JMN RESPONDENT

(Being an application to strike out an appeal under Rule 84 of this Court's Rules against the decree and ruling of the High Court at Embu (F. Muchemi, J.) dated 14th November, 2017 in HCCC No. 10 of 2015(O.S))

RULING

1. Before the Court is a Notice of motion application dated 11th July, 2018 filed pursuant to sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 42,43,82 (1&2), 83, and 84 of this Court's Rules. The applicant entreats the Court to strike out Civil Appeal No. 81 of 2018 filed on 14th May, 2018 and the notice of appeal lodged in the High Court at Embu being HCCC No. 10 of 2015 on 27th November 2017.
2. It is premised on the grounds that the appeal was filed out of time without leave of the Court contrary to Rules 82(1) of the Court of Appeal Rules; the respondent failed to serve the applicant with a copy of the letter requesting typed proceedings and judgment contrary to Rule 82(1) and, therefore, cannot rely on rule 82(2); the Notice of appeal lodged at the High Court is thus deemed to have been withdrawn in accordance with rule 83 and that this Court lacks the jurisdiction to entertain the appeal which is fatally defective for non- compliance with Rules 87(b) and (h) of the Court of Appeal Rules.
3. In support of the motion is an affidavit sworn by RRK, the applicant. She deposes that their marriage was officially dissolved by the subordinate court on 15th September, 2015. She later filed an originating summons before the High Court at Embu seeking distribution of matrimonial property. Judgment in that matter was rendered on 14th November, 2017. Being aggrieved by the said judgment, the respondent lodged a Notice of appeal on 27th November, 2017 which was served upon her advocates on



1st December, 2017. The applicant avers that as no letter bespeaking proceedings was copied or served on her counsel within 30 days, then the appeal was supposed to be filed within 60 days. The record of appeal was filed on 14th May, 2018 and was served upon her advocates on 14th June, 2018. The letters requesting for typed proceedings dated 17th November, 2017 and 21st November, 2017 formed part of the record of appeal, and had not been served separately on the applicant's counsel.

4. In addition, the applicant deposes that the appeal is an afterthought filed to frustrate her; the record did not contain some of the mandatory documents required to file an appeal and this application having been filed timeously should be allowed.
5. In response to the application is a replying affidavit sworn by JMN, the respondent. He deposes that he instructed his counsel on record to file an appeal and that a notice of appeal was duly filed on 27th November, 2017 and served upon the applicant on 1st December, 2017; that through a letter dated 21st November, 2017 he requested for typed proceedings and a copy of the judgment which was delayed but a certificate of delay was issued; that the time should be exempted from the computation of time in filing the record. He deposes further, that the delay in serving the letter is not fatal to the appeal and that it was not true that filing of the appeal was an afterthought; that in the event the application is allowed he shall suffer irreparably and he is desirous of prosecuting his appeal and thus the application should be dismissed.
6. An application for either striking out an appeal or deeming it as withdrawn, is indeed a straight forward one, which basically requires calculation of the timelines set out in the Court of Appeal Rules. Luckily, the timelines here are not denied and we shall not waste too much judicial time on calculations.
7. We have considered the application, the rival affidavits and both written and oral submissions by learned counsel Mr. Ngugi and Mr. Heyi for the applicant and the respondent respectively. We note that the Notice of appeal was filed and served within the stipulated time. The issue is whether the letter bespeaking the proceedings was copied and served on the applicant's counsel. The respondent seems to concede non-service of the letter in question.
8. Contrary to the respondent's deposition at paragraph 10 of his replying affidavit. Such service is not a technicality. This Court has pronounced itself on this issue time without number. Before we go to the law, we need to point out that a cursory look of the letter attached to the supporting affidavit and marked JMN2 reveals that the letter was not copied to the applicant. There is no evidence either that it was served on applicant's counsel within the prescribed time.
9. Rule 82 (1), of the Court of Appeal Rules provides for institution of appeals and states as follows:

“Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- a. a memorandum of appeal, in quadruplicate
- b. the record of appeal, in quadruplicate;
- c. the prescribed fee; and
- d. security for the costs of the appeal

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the



superior court as having been required for the preparation and delivery to the appellant of such copy.” (Emphasis added).

The import of this provision is that where no application for typed proceedings is made, the appeal must be instituted strictly within 60 days of lodging the notice of appeal and where that is not done, a party forfeits its right to invoke the above proviso, and cannot rely on the certificate of delay.

10. On the other hand, Rule 83 provides for deeming as withdrawn a Notice of Appeal. Rule 83 states as follows:

“Effect of default in instituting appeal:

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.” (Emphasis added)

11. This position was very articulately reiterated by this Court in *Mae Properties Limited v. Joseph Kibe & Another* [2017] eKLR as follows;

“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 appointed 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 cautela* 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.



It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion...” (Emphasis added).

12. We need not say more. The non-compliance with the clear timelines set by this Court’s rules is not a technicality that can be cured under Article 159(2) (d) of *the Constitution*. The Notice of appeal herein, though filed on time died a natural death 60 days later for non-service of the letter bespeaking the proceedings within 30 days as prescribed by the Court of Appeal Rules. It is also apposite to clarify that an application to deem as withdrawn under Rule 83 (which the applicant has cited in her application) is not subject to the 30 days limitation within which to file the application unlike the case where the application is only for striking out.
13. We find this application with merit and allow it with costs to the applicant, with the result that Civil Appeal No. 81 of 2018 filed on 14th May, 2018 and the Notice of appeal lodged in the High Court at Embu in respect of HCCC No. 10 of 2015 (OS) on 27th November 2017 are hereby deemed as withdrawn with costs to the applicant.

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

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

