



**Mwangi & another (Suing as heirs and legal representatives of the Estate of Mwangi Gichuka - Deceased) v Gatundu (Sued as legal representative of the Estate of Gatundu Kariuki - Deceased) & 2 others (Civil Application 208 of 2018) [2024] KECA 621 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 621 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 208 OF 2018  
DK MUSINGA, SG KAIRU & M NGUGI, JJA  
MAY 24, 2024**

**BETWEEN**

**JULIUS KABUI MWANGI ..... 1<sup>ST</sup> APPLICANT  
TERESIA NJERI MWANGI ..... 2<sup>ND</sup> APPLICANT  
SUING AS HEIRS AND LEGAL REPRESENTATIVES OF THE ESTATE OF  
MWANGI GICHUKA - DECEASED**

**AND**

**VIRGINIA NJOKI GATUNDU (SUED AS LEGAL REPRESENTATIVE OF THE  
ESTATE OF GATUNDU KARIUKI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT  
MARGARET MAINA (SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF MAINA NGURA - DECEASED) ..... 2<sup>ND</sup> RESPONDENT  
MARY WANGECHI KARIUKI (SUED AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF KARIUKI WANJANGI - DECEASED) ..... 3<sup>RD</sup> RESPONDENT**

*(An application to deem as withdrawn or strike out the notice of appeal dated 19th May 2015 against the ruling/order of the High Court of Kenya at Nairobi (Onyancha, J.) dated 6th May 2015 in High Court Civil Case No. 853 of 1999)*

**RULING**

1. The transcript of the proceedings before the High Court shows that this matter has a rather long history and has been handled by many judges of the High Court since its inception about 25 years ago in 1999. It appears that the original disputants have since died and substituted with personal representatives. But what is presently before us is an application dated 14<sup>th</sup> July 2018, in which the applicants, Julius Kabui Mwangi and Teresia Njeri Mwangi (suing as heirs and Legal Representatives of the Estate of



Mwangi Gichukia (Deceased), seek an order “that the Notice of Appeal dated 19<sup>th</sup> May 2015 and lodged on 20<sup>th</sup> May 2015 by the respondents be deemed to have been withdrawn.” In the alternative, the applicants seek an order that the said notice of appeal be struck out.

2. The Notice of Appeal in question relates to a ruling of the High Court at Nairobi (Onyancha, J.) which was delivered on 6<sup>th</sup> May 2015 dismissing the respondents’ application dated 4<sup>th</sup> September 2013 in which they had sought leave to file or amend their defences in the suit. In dismissing the application, the learned judge expressed that there had been undue delay in bringing the application; that the proposed amendments would introduce new issues inconsistent with the pleadings; and that there was indolence which militated against the court exercising its discretion in favour of the respondents. That is the decision that aggrieved the respondents and hence the notice of appeal dated 19<sup>th</sup> May 2015, served on the applicants on 21<sup>st</sup> May 2015, and the subject of the present application.
3. Based on the grounds cited on the face of the application, the supporting affidavit sworn by Julius Kabui Mwangi, and the written and oral submissions canvassed before us by learned counsel Mr. Amuga, the applicants’ case is that the respondents have lost interest in the intended appeal; that typed proceedings of the High Court were ready as far back as 7<sup>th</sup> April 2016, yet as at the date of hearing the application the record of appeal was yet to be filed; that in any case, the respondents participated fully in the proceedings before the High Court subsequent to the delivery of the impugned ruling and the matter before the High Court is finalized.
4. In opposition, learned counsel Mr. C.N. Kihara for the respondents referred to the replying affidavit sworn by John Mwangi Maina, a beneficiary of the 5<sup>th</sup> defendant before the High Court, in which it is deposed that although the Deputy Registrar of the High Court notified the parties by a letter dated 23<sup>rd</sup> March 2016 that typed proceedings were ready, upon collection of the same on 13<sup>th</sup> July 2016, the same were “inherently (sic) typed and also not certified” and could not be used for preparation of the record of appeal; that efforts by the advocate for the respondent to have the typed proceedings certified faced challenges due to the fact that “the High Court had been proceeding to hearing and judgment was pending and has pending applications for stay...”; that in any event the application by the applicant is filed outside the 30 days window permitted under Rule 84 (now Rule 86) of the Court of Appeal Rules; that moreover, the matter before the High Court is finalized and an appeal against the final judgment has already been filed before this Court, being Civil Appeal No. E76 of 2021.
5. We have considered the application, the affidavits, and the rival submissions. The application is two pronged. As already indicated, it seeks an order that the notice of appeal be deemed as withdrawn. Alternatively, that the notice of appeal be struck out. In relation to the alternative prayer, the application for striking out should have been made within the thirty days window provided in Rule 86 of the Court of Appeal Rules, 2022 (previously Rule 84). That was not done. We are unable to entertain that prayer. An application to strike out made outside the stipulated period is incompetent. As stated in *Salama Beach Hotel Limited & 4 Others v Kenyariri & Associated Advocates & 4 Others* [2016] eKLR:

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court’s Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out.”



6. As regards the main prayer in the application to deem the notice of appeal as withdrawn, Rule 85(1) of the Court of Appeal Rules, 2022 provides that 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. See *Borderless Tracking Limited v Thigah* (Civil Application E035 of 2021) [2022] KECA 38 (KLR) (4 February 2022) (Ruling) as well as *Nakuru Water & Sanitation Company Ltd v Asanyo & 2 others* (Civil Appeal (Application) 116 of 2018) [2022] KECA 139 (KLR) (18 February 2022) (Ruling).
7. In this case, the respondents concede that as early as March 2016, they were notified by the Deputy Registrar that the typed proceedings were ready; that they paid for them on 11<sup>th</sup> July 2016 and collected them on 13<sup>th</sup> July 2016 although counsel says the proceedings required corrections and were not certified. However, as pointed out by Mr. Amuga, there is no requirement under Rule 89 of the Court of Appeal Rules, for the typed proceedings to be certified. What requires to be certified is the decree or order. As for the corrections, the period between between July 2016 and October 2023 when John Mwangi Maina swore his replying affidavit, is approximately seven years. It is difficult to fathom how, with diligent efforts, corrections in the typed proceedings would not have been effected over that duration of time. There is no evidence before us of the efforts made over the years to have the corrections made. Least of all, there are no letters to the Deputy Registrar in that endeavour that have been exhibited.
8. Moreover, as counsel for the respondent indicated during the hearing of the application, the suit before the High Court has since been concluded, judgment rendered, and an appeal therefrom mounted before this Court. No useful purpose, in our view, will be served in keeping alive the notice of appeal dated 19<sup>th</sup> May 2015.
9. Consequently, prayer 1 of the application dated 14<sup>th</sup> July 2018 succeeds. The notice of appeal dated 19<sup>th</sup> May 2015 is hereby deemed as withdrawn. The applicants shall have the costs of this application.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY 2024.**

**D.K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

