



**Kibowen v Waweru & 7 others (Civil Application 21 of 2019)
[2024] KECA 734 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KECA 734 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 21 OF 2019
MK KOOME, PO KIAGE & AK MURGOR, JJA
JUNE 14, 2024**

BETWEEN

STEPHEN KIBOWEN APPLICANT

AND

RUTH NJOKI WAWERU 1ST RESPONDENT

CATHERINE WANGARI WAWERU 2ND RESPONDENT

EUNICE WAIRIMU WAWERU 3RD RESPONDENT

DAVID KIMANI WAWERU 4TH RESPONDENT

MARJORIE WANJIKU MURIUKI 5TH RESPONDENT

AMOS KUGWA MWANGI 6TH RESPONDENT

NICHOLAS THEURI KAMAMIA 7TH RESPONDENT

EVANS OMBONGI NYAKANG'O 8TH RESPONDENT

*(An application to deem as withdrawn the Notice of Appeal against the
Judgment of the Environment and Land Court at Nakuru (Munyao
Sila, J.) lodged on 5th December, 2019 in ELC NO. 416 OF 2017)*

RULING

1. The motion dated 27th February, 2020, filed by Stephen Kibowen (the applicant), seeks an order that the undated notice of appeal lodged in the Environment and Land Court on 5th December 2019 be deemed to have been withdrawn by the respondents pursuant to Rules 82 and 83 of the [Court of Appeal Rules](#), 2010, now Rules 84 and 85.



2. The grounds on which the motion is premised appear on its face and in a supporting affidavit sworn by the applicant on 27th February 2020. The grounds are that on 3rd December 2019, the High Court delivered judgment in favour of the applicant in Nakuru ELC No. 416 of 2017: *Stephen Kibowen vs. Ruth Njoki Waweru & 7 Others*; being aggrieved by that decision, the respondents lodged a notice of appeal on 5th December 2019 but went to sleep and did not file any appeal; the time within which they are expected to institute an appeal in accordance with Rule 84(1) lapsed on 26th February 2020, and they cannot benefit from the proviso to Rule 84(1) since they have not served the applicant with the letter bespeaking proceedings. It was further pleaded that the applicant is an old member of the society aged 72 years and he wishes to exercise his rights over his property but cannot do so as long as the notice of appeal subsists on record.
3. In written submissions dated 1st October 2020, drawn by Konosi & Company Advocates, for the applicant, this Court's decision in *Mae Properties Limited Vs. Joseph Kibe & Another* [2017] eKLR is cited for the submission that the notice of appeal lodged by the respondents should be deemed as withdrawn. In that decision, the Court was emphatic that a notice of appeal dies a natural death after the expiry of 60 days unless its life is extended by virtue of the proviso to Rule 84(1). It provides that, such time as may be certified by the Registrar of the court appealed from as having been required for the preparation and delivery of a copy of the proceedings shall be excluded in the computation of time, provided that such copy was requested in writing within 30 days of the impugned decision; and copied to the respondent. The Court further observed that the notice can be resuscitated by an order extending time for lodging of appeal upon an application being made under Rule 4 of the *Rules of the Court*.
4. Citing the Supreme Court decision in *Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others* [2014] eKLR, and Rule 85(2), which stipulate that the party in default should pay costs, the applicant claims costs against the respondents. We note that despite service being effected on the respondents, there is no response on record from them.
5. We have carefully considered the application before us, the supporting affidavit and submissions by the applicant, the Rules of this Court and the law. There is no dispute that by dint of Rule 84(1) of our Rules, a person who has filed a notice of appeal is required to institute the appeal by lodging within 60 days;
 - “(a) a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal.”
6. Under Rule 85, where there is default in instituting the appeal within the specified time, the party who lodged the notice of appeal shall be deemed to have withdrawn it and the Court may on its own motion or on application make such order.
7. In the absence of any form of reply from the respondents, it seems quite clear that the stipulated time for institution of an appeal lapsed long ago. Rule 85 being unequivocal on the consequences of failure to institute an appeal within the prescribed time, this application is obviously for allowing.
8. In the result, the notice of motion is allowed, and the notice of appeal lodged on 5th December 2019, be and is hereby deemed as withdrawn with costs. The applicant shall have the costs of this motion.



9. This ruling is delivered pursuant to Rule 34(4) Koome, JA having ceased being a judge of the Court upon assuming Office of Chief Justice. The delay in its delivery was due to an inadvertent error in our record keeping that it had already been delivered. The same is regretted.

DATED AND DELIVERED AT NAIROBI THIS 14TH OF JUNE, 2024.

P. O. KIAGE

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

