



**Dahman & another (As Administrators of the Estate of Mariam Binti Said) v Sudi
(Civil Application E026 of 2023) [2024] KECA 1911 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 1911 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E026 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JULY 12, 2024**

BETWEEN

MUTAHAR AHMED DAHMAN 1ST APPLICANT

AL AMIN DAHMAN 2ND APPLICANT

AS ADMINISTRATORS OF THE ESTATE OF MARIAM BINTI SAID

AND

ATHUMAN SUDI RESPONDENT

*(Being an application to strike out the appeal from the judgment of
the Environment and Land Court at Malindi (Olola, J.) delivered
on 8th October 2019 in Malindi ELC Case Number 24 of 2012)*

RULING

1. By a Notice of Motion dated 26th June 2023 brought pursuant to rules 85 and 86 of the Court of Appeal Rules, 2022 the applicants seek orders to strike out the respondent's Notice of appeal dated 22nd October 2019 and lodged on 23rd 1 October 2019 on the grounds that the respondent has:
 - (i) failed to file an appeal 2. for over three years;
 - (ii) failed to take any necessary steps in the timely institution and prosecution of the intended appeal as prescribed by the Rules of this Court;
 - iii. not demonstrated any real intention to appeal against the decision of the Environment and Land Court; (iv) lodged the Notice of appeal for the spurious reason of buying time in this dispute while retaining possession of the site on which his house stands to the prejudice of the applicants and the estate which they represent.



2. In the alternative, the applicants seek orders that this Court declares as withdrawn the Notice of appeal dated 22nd October 2019 and lodged on 23rd October 2019 for reasons: i) of inordinate delay; ii) of utter failure on the part of the respondent to institute the appeal within the prescribed time; iii) lack of interest in the intended appeal, and iv) that such inordinate delay should move the Court to deem the Notice of Appeal as withdrawn.
3. The motion is made on the grounds set out on the face of the motion and supported by an affidavit sworn by the 2nd applicant, Al Amin Dahman, who deposed, inter alia, that after the judgment of the Environment and Land Court was delivered on 8th October 2019, the intended appellant lodged a Notice of appeal on 23rd October 2019 and served it on the applicants' counsel on 31st October 2019; and that the respondent obtained a stay of execution of the decree from the trial court on 2nd October 2020 and, thereafter, has done nothing to lodge the record of appeal for over three years. Yet, he continues to enjoy an order of stay of execution granted by the Environment and Land Court.
4. It was further deposed that, after applying for proceedings, the respondent has failed to take any steps to prosecute the intended appeal in that he has declined to approve a draft decree and refused to bestir the court registry to type the proceedings by paying the requisite deposit, which inaction is inexcusable and amplifies the respondent's disinterest in the intended appeal; that a delay of over 3 years is inordinate and this Court should declare the Notice of appeal to be deemed as having been withdrawn with costs in both this Court and in the trial court.
5. During the hearing on a virtual platform, Mr. Mwambunya, learned counsel for the applicant, reiterated the averments of the motion and the applicants' affidavit in support and submitted that, in view of the circumstances of the case, this Court should enforce rule 85 (1) of the Court's rules and declare the impugned Notice of Appeal as withdrawn with costs to the applicants.
6. There was no appearance by the respondent or his counsel despite having been served with the hearing notice.
7. It is now a settled principle that the power of this Court to strike out an appeal is discretionary, and is exercised based on the peculiar circumstances of each case. See *Standard Ltd & another vs. Onchieku (Civil Application 134 of 2019)* [2023] KECA 1275 (KLR).
8. Having regard to the orders sought in the instant application, rule 86 of the Court's rules donates power to this Court to strike out a Notice of appeal or an appeal, as the case may be. The rule provides:

“A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

 - a. That no appeal lies; or
 - b. That some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.”
9. Needless to say, the proviso to rule 86 is categorical that an application to strike out a Notice of appeal ought to be brought within 30 days after the date of service of the Notice of appeal. In this case, the applicants concede that they were served with the Notice of appeal on 31st October 2019, and that this



application was filed on 26th June 2023. Hence, it was brought outside the 30- 5. day period specified by the proviso to rule 86. This would therefore render rule 86 inapplicable to the circumstances of this case.

10. However, there is the applicants' alternative prayer that this Court deems the Notice of appeal as withdrawn under rule 85 of the Courts' rules.

Rule 85 (i) provides:

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”.

11. With regard to the prayer to declare the Notice of appeal as withdrawn pursuant to rule 85 of this Court's Rules when faced with a similar situation in the case of Mae Properties Limited vs. Joseph Kibe & Another [2017] eKLR, this Court rendered itself thus:

12. 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.'

13. 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.”

14. It is evident from the motion that, after filing the Notice of appeal, the respondent failed to file the Record of appeal within the 60 days' period prescribed by the rules. Furthermore, no other steps were taken to file the record more than 3 years later. In addition, the respondent has not bothered to respond to the application or sought to explain the inordinate delay. This Court has variously stated that the rules exist to enforce the orderly administration of justice. The timelines prescribed for filing the appeal have not been complied with. No explanation for the delay has been presented. We are satisfied that the circumstances set out in this application justify the intervention of this Court under rule 85 to deem the Notice of appeal dated 22nd October 2019 and lodged on 23rd October 2019 as withdrawn.

15. In view of the above, the Notice of Motion dated 26th June 2023 is merited and is hereby allowed and, therefore, by dint of rule 85 of this Court's Rules, the respondent's Notice of appeal dated 22nd October 2019 and lodged on 23rd October 2019 be and is hereby deemed as withdrawn with costs to the applicants.

It is so ordered.



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

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

