



**Mwanzaka & another (Suing on Behalf of the Estate of Mwanzaka Tindi D-Zengo - Deceased)
v Dandasi (Civil Application E080 of 2023) [2024] KECA 796 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 796 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E080 OF 2023
SG KAIRU, AK MURGOR & KI LAIBUTA, JJA
JULY 12, 2024**

BETWEEN

JOSEPH MWAMBAJI MWANZAKA 1ST APPLICANT

CHIRIDO MWANZA TINDI 2ND APPLICANT

**SUING ON BEHALF OF THE ESTATE OF MWANZAKA TINDI D-ZENGO -
DECEASED**

AND

JUNGO VINDI DANDASI RESPONDENT

(An application seeking orders that the notice of appeal dated 3rd October 2022 in an appeal from the judgment of the Environment and Land Court at Mombasa (Naikuni, J.) delivered on 27th September 2022 in ELC Case No. 40 of 2014 be deemed as withdrawn)

RULING

1. In a judgment delivered on 27th September 2022, the Environment and Land Court at Mombasa (Naikuni, J.) entered judgement in favour of the applicants by declaring that the property known as LR No. Kilifi/Changome/24 is owned by Mwanzaka Tindi Dzenzo, and directed the Land Registrar, Kilifi, to register the same in the names of the duly appointed legal administrators of the estate of Mwanzaka Tindi Dzenzo. The ELC also ordered the eviction of the respondent from the said property within 90 days from the date of the judgment. In addition, the respondent was ordered to bear the costs of the suit.
2. The respondent was dissatisfied with the judgment and, immediately upon delivery thereof of, his advocates wrote a letter to the Deputy Registrar of the ELC dated 27th September 2022 applying for “certified copies of the proceedings and a certified copy of the judgment” for purposes of preparing a record of appeal. In accordance with rule 84(2) of the *Court of Appeal Rules*, that letter was copied to the advocates for the applicants. By a notice of appeal dated 3rd October 2022, the respondent filed a



notice of appeal within the fourteen days of delivery of the judgment as prescribed in rule 77(2) of the Court of Appeal Rules.

3. On 7th September 2023, the advocates for the applicant filed the present application dated 6th September 2023 in which they seek orders that the Notice of Appeal dated 3rd October 2022 be deemed as withdrawn on the grounds that “the typed proceedings were never paid for and as such no certificate of delay was ever issued by the Deputy Registrar”; that the sixty days for institution of the appeal in accordance with rule 84 of the *Court of Appeal Rules* have since lapsed; and that the respondent has not shown any effort or interest in pursuing the appeal while the applicants are keen to realize the fruits of their judgment.
4. In his replying affidavit in opposition to the application, the respondent, Jungo Vindi Dandasi set out in some detail the basis of his claim to the property and the procedural history of the dispute. He deponed that, despite his advocates having duly filed a Notice of appeal and applied for copies of proceedings and judgment, the ELC is yet to supply the same; and that a certificate of delay can only be issued by the Registrar of the ELC after delivery to the respondent of the copies of proceedings and judgment.
5. Urging the application before us, learned counsel for the applicants, Miss. Waithera Kimani, decried in her submissions failure by the respondent to prosecute the appeal, reiterating that no fees were paid to the ELC by the respondent for the typed proceedings he applied for; that the respondent “defaulted on filing the record of appeal even after certified typed proceedings were supplied by the court to the applicant herein”; and that the Notice of appeal should be deemed as withdrawn having died “a natural death after the expiry of 60 days”. In that regard, the case of *Maina v. Macharia & Others*, Application E035 of 2023, [2023] KESC 97 (KLR) was also cited in support of her submissions. Also cited was the English decision in *Ketterman & Others v. Hansel Properties Ltd* [1988] 1 ALL ER 38 for the argument that legal business should be conducted efficiently.
6. On the other hand, Mr. Gitonga, learned counsel holding brief for Mr. Asike for the respondent, urged in his submissions that the application has no merit; that the applicants are not entitled to the prayers sought; that there is no basis for the Court to exercise its discretion in favour of the applicants; that the respondent complied with the time lines for filing of the Notice of appeal and for bespeaking a copy of the proceedings and judgment and, having acted in accordance with the rules, the time required for the preparation and delivery of the copy of proceedings is to be excluded in computing the 60 days; that in any event, the present application was filed outside the 30 days window under rule 84 and should be dismissed.
7. We have considered the application, the affidavits and the submissions. Rule 85(1) of the *Court of Appeal Rules*, 2022 (previously Rule 83) 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.”
8. Expounding on that provision, the Court in the case of *John Mutai Mwangi & 26 Others v. Mwenja Ngure & 4 Others* [2016] eKLR stated that:

“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”.

9. Similarly, in *Mae Properties Ltd v. Joseph Kibe & Another* [2017] eKLR, the Court expounded further:

“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. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo motu, on its own motion and at its sole discretion, presumably with neither notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure.

Under the same Rule 83, and assuming that the Court will not have sooner made the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been lodged. Once those two facts are established, we do not see why the Court should not, unless persuaded by some compelling reason in the interests of justice, simply made the order deeming the notice of appeal as withdrawn.”

10. In the present case, there is no dispute that the respondent filed a Notice of appeal within the period prescribed under Rule 77 of the *Court of Appeal Rules*. There is also no dispute that the respondent, the intended appellant, applied for a copy of the proceedings within 30 days of the decision of the ELC in accordance with Rule 84 of the *Court of Appeal Rules*. Although counsel for the applicants has submitted that the respondent “defaulted on filing the record of appeal even after certified typed proceedings were supplied by the court to the applicant herein”, there is no evidence before us to demonstrate that the ELC supplied the copy of the proceedings, or that it communicated to the parties that the copy of the proceedings was ready for collection.

11. The foregoing notwithstanding, we note that a period of close to two years has lapsed since the respondent applied for a copy of the proceedings. He does not appear to have been proactive in efforts to follow up on the matter with the ELC to expedite the preparation of a copy of the proceedings and judgment. To ameliorate the applicants’ legitimate concerns over delays in the conclusion of the matter having regard to the lapse of time since the delivery of the judgment of the ELC, we hereby order that, if the respondent has not already done so, he has 45 days from the date of delivery of this ruling to file and serve a compliant record of appeal failing which, without further ado, the respondent will be



deemed to have withdrawn the Notice of Appeal dated 3rd October 2022 in accordance with rule 85(1) of the *Court of Appeal Rules, 2022*.

12. We make no orders as to costs.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

