



**Kenya Hotels and Allied Workers Union v Praying Mantis Limited (Civil Application E034 of 2022) [2024] KECA 788 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 788 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E034 OF 2022  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JULY 5, 2024**

**BETWEEN**

**KENYA HOTELS AND ALLIED WORKERS UNION ..... APPLICANT**

**AND**

**PRAYING MANTIS LIMITED ..... RESPONDENT**

*(Being an application to deem as withdrawn the Notice of Appeal and to strike out the record of appeal from the ruling of the Employment and Labour Relations Court at Kisumu (M. Onyango, J) dated 13th November, 2020 in ELRC No 38 of 2021)*

**RULING**

1. Kenya Hotels and Allied Workers Union, the applicant herein, has brought a Notice of Motion dated 24th March, 2022 pursuant to Sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 82, 83 and 84 of the *Court of Appeal Rules* 2010, (now Rules 84, 85 and 86 of the *Court of Appeal Rules* 2022). The applicant is seeking orders that the Notice of Appeal dated 22<sup>nd</sup> February 2021 and the Record of Appeal dated 14<sup>th</sup> February, 2022 filed by Praying Mantis Limited, the respondent herein, be deemed as withdrawn or struck out, on the ground, that the respondent failed to lodge an appeal within the prescribed time of 60 days, from 13th November 2020, the date on which the judgment of the High Court was delivered. In addition, the applicant contends that the respondent failed to serve it with the letter it wrote to the Deputy Registrar requesting for the typed proceedings and the judgment of the High Court. The respondent has not filed any replying affidavit or written submissions.
2. At the plenary hearing, Mr. Simiyu the Secretary of the applicant Union, appeared for the applicant. Although the respondent was served with a hearing notice, there was no appearance for it during the hearing. The hearing, therefore, proceeded ex parte, and Mr. Simiyu, relied entirely on the written submissions that had been filed on behalf of the applicant.



3. The appeal stems from a judgment in a suit commenced by the applicant in the Employment and Labour Relations Court (ELRC) through a Memorandum of Claim dated 10<sup>th</sup> May 2013. The applicant filed the claim against Praying Mantis Limited, who is the manager of Octopus Club (herein the Club), on behalf of its members Willis Owiti Oswago, Nicholas Okeyo Kitoto, Francis Owino Ouma, Job Kapelo Elim and Alex Eboy Bulimo (herein the grievants).
4. The claim was that the grievants who were employed at the Club in various capacities, including cooks, barman, and waiter, and were engaged by the respondent on various dates between 1997 and 2013, had their employment terminated unfairly on various dates between June and July 2012 on grounds which the applicant suspected to be their trade union affiliation/activities.
5. The applicant alleged that the grievants were underpaid, NSSF deducted from their salaries but not remitted, and they were not allowed to take annual leave contrary to the Regulation of Wages (Hotel and Catering Trades) Order provisions. Efforts at conciliation before Joel Omweno of Kisumu Labour Office, were unsuccessful, hence the suit in which the applicant prayed for reinstatement of the grievants or in the alternative payment of their terminal dues.
6. In its response, the respondent admitted engaging the grievants, but denied underpaying them, failing to give them annual leave, or failing to remit their NSSF deduction. The respondent denied terminating the services of the grievants without assigning reason or that the grievants were terminated due to the Union affiliation activities. It contended that the grievants left work on their own volition without giving notice of resignation, after the Club discovered theft of stock and overcharging of its customers by the employees.
7. In its judgment delivered on 13<sup>th</sup> November, 2020 the ELRC found the termination of the employment of all the grievants unfair and awarded the 5 grievants terminal dues, interest and costs. This aggrieved the respondent who by an application dated 12<sup>th</sup> March, 2021, moved the ELRC seeking stay of execution pending the hearing and determination of an intended appeal to this Court. On 16<sup>th</sup> March 2021 the ELRC granted a conditional order of stay requiring the respondent to deposit a sum of Kshs. 2,019,068/= in court within 7 days.
8. Being dissatisfied with the condition, the respondent, on 22<sup>nd</sup> March, 2021, filed an application in the ELRC seeking review of the conditional order of stay, by permitting it to deposit a logbook as a substitute for depositing the required amount. The application was opposed by the Union and dismissed by the ELRC on 30<sup>th</sup> June 2021 for lack of merit. In the meantime, the respondent had moved to this Court on 29<sup>th</sup> March 2021 seeking an order of stay of execution pending the hearing of their appeal from the ELRC judgment.
9. On 18<sup>th</sup> June 2021, this Court, in Civil Application No 38 of 2021, delivered a Ruling in which it granted the respondent an unconditional order of stay of execution pending the hearing of its appeal. Surprisingly, on 21<sup>st</sup> July 2021, the respondent and the applicant recorded a consent order in the ELRC in which the respondent agreed to liquidate the decretal sum by paying the amount in 10 monthly instalments. The respondent paid Kshs 300,000 towards the 1<sup>st</sup> instalment, but since then has made no further payment. The applicant, therefore, argues that the appeal is an abuse of the court process.
10. In addition, the applicant contends that the notice of appeal dated 22<sup>nd</sup> February 2021 and the Record of Appeal dated 14<sup>th</sup> February, 2022 filed by Praying Mantis Limited, have been filed in contravention of Rules 84,85 and 86 of the [Court of Appeal Rules](#) as the notice was not served upon it within time, nor was the letter bespeaking typed proceedings served on the applicant or the record of appeal filed or served within time. The applicant, therefore, urges the Court, that the appeal be deemed as withdrawn



or struck out as the respondent failed to lodge the appeal within the prescribed time of 60 days, from 13th November 2020.

11. Having considered the application, the grounds in support of the application, the supporting affidavit, the authorities, the submissions and the law, the main issue for determination is whether the applicant has satisfied the requirements for deeming the notice of appeal withdrawn and striking out the record of appeal.
12. The application is pegged on the former Rules 82,83 and 84 of the *Court of Appeal Rules*. Rule 83 and 84 of the *Court's Rules*, provided as follows:

“ 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.

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- (1) 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. 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.
- (2). An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the Respondent.
- (3) .....

13. In *Mae Properties Limited vs. Joseph Kibe* [2017] eKLR, this Court stated as follows regarding non-compliance with the prerequisites in Rule 84(1) and (2) of the *Court of Appeal Rules*.

“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.

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.”

14. In *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [2016] eKLR this Court expressed itself on the intent and purport of Rule 85 thus:

“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.”

15. In the instant matter, the respondent was obligated to process the filing and service of the record of appeal within sixty (60) days as stipulated in Rule 84(1) of the *Court's Rules* or within the time envisaged in the proviso to the said rule. No such efforts were made, prompting the applicant to seek to have the notice of appeal deemed as withdrawn under Rules 85 of the *Court's Rules*. The respondent has not offered any explanation for the delay nor has it filed any replying affidavit to rebut the applicant's averments.

16. Rule 86 of the *Court's Rules* provides that:

“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 that no appeal lies or 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 from the date of service of the notice of appeal or record of appeal as the case may be.”

17. Based on the above provision, the applicant could seek an order striking out the respondent's appeal on the ground that firstly, either no appeal lies or secondly an essential step in the proceedings has not been taken, or thirdly that the essential step has not been taken within the prescribed time. The applicant is



seeking to strike out the record of appeal and to have the notice of appeal deemed as withdrawn on the ground that the notice of appeal was filed out of time and without the leave of the Court.

18. The record indicates that the notice of appeal was lodged on 25<sup>th</sup> February, 2021 and the record of appeal was filed on 14<sup>th</sup> February, 2022 one year after lodging the notice of appeal. The applicant filed the instant application on 24<sup>th</sup> March, 2022. Pursuant to the proviso to rule 86, the application to strike out should be filed within 30 days from the date of filing of the record of appeal. The instant application is, therefore, brought within the prescribed time. As no letter bespeaking the written proceedings has either been filed nor served upon the applicant, nor has a certificate of delay been produced from the Registrar of the Court, the application dated 24<sup>th</sup> March, 2022 is merited. Moreover, apart from the respondent obtaining an order of stay of execution and sitting on it without taking any action on the appeal, there is also the consent signed by the respondent in which it committed to paying the decretal amount, and which consent has not been complied with. Clearly the appeal is an abuse of the court process.
19. Accordingly, this application is granted, record of appeal dated 14<sup>th</sup> February, 2022 is struck out and the notice of appeal dated 22<sup>nd</sup> February, 2021 deemed as withdrawn with costs to the applicant.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF JULY, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

