



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Power & Lighting Company Limited v Associated Warehousing Company Limited  
(Civil Application E008 of 2024) [2024] KECA 1158 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1158 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E008 OF 2024  
SG KAIRU, KI LAIBUTA & GV ODUNGA, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... APPLICANT**

**AND**

**ASSOCIATED WAREHOUSING COMPANY LIMITED ..... RESPONDENT**

*(Being an application to strike out the Notice of Appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (D. Chepkwony, J.) dated 11th February 2021 in HCCA No. 75 of 2016)*

**RULING**

1. Aggrieved by the judgment of D. Chepkwony, J. dated 11<sup>th</sup> February 2021 in determination of its appeal in the High Court of Kenya at Mombasa HCCA No. 75 of 2016, the respondent moved to this Court on appeal and lodged its notice of appeal on 23<sup>rd</sup> February 2021, but took no positive steps to file the record of appeal.
2. The respondent's apparent inaction prompted the applicant's Notice of Motion dated 19<sup>th</sup> February 2024 pursuant to rules 82, 83 and 84 of the Court of Appeal Rules, 2010 (now rules 84, 85 and 86 of the [2022 Rules](#)) seeking orders to strike out the respondent's notice of appeal with costs to the applicant.
3. The applicant's Motion was supported by the annexed affidavit of Anne Mulela, the applicant's Legal Officer, sworn on 19<sup>th</sup> February 2024 essentially deposing to the grounds on which the application was made, namely: that, since the respondent lodged its notice of appeal on 23<sup>rd</sup> February 2021, it has failed to file and serve the memorandum and record of appeal within the prescribed period of 60 days; that it is more than two years and eight months since the notice of appeal was filed and served; that the delay in filing the memorandum of appeal and the record of appeal is inordinate; that the delay in lodging the record of appeal is prejudicial to the applicant; and that justice delayed is justice denied.



4. Learned counsel for the applicant filed written submissions, list of authorities and case digest dated 9<sup>th</sup> April 2024 citing the cases of *Mae Properties Limited v. Joseph Kibe & Another* [2017] eKLR, highlighting this Court's holding that failure to comply with statutory timelines invites consequences; and *Martin Kabaya v. David Mungania Kiambi Nyeri Civil Application* No. 12 of 2015 (Unreported) where this Court observed that the need for judicial proceedings to be concluded in a timely fashion is too plain for argument; that justice delayed is justice denied; and that litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summon them hence go to sleep, and yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket.
5. In response, the respondent filed a replying affidavit of Nitichandra Pandya, the respondent's director, sworn on 12<sup>th</sup> April 2024. The deponent urged us to dismiss the Motion on the grounds that counsel for the respondent have been "actively preparing the record, only that they have never been served with the court file ever since the judgment was entered by the court;" that the respondent's advocates "have written requests for typed proceedings which have never been answered;" that the memorandum of appeal cannot be filed separately from the record of appeal; that the record of appeal cannot be filed in the absence of crucial mandatory documents to wit the typed proceedings, judgment and decree, which are not available to them; that the appeal raises several triable issues; and that no prejudice has been occasioned to the applicant as the respondent continues to pay its electricity bills.
6. Learned counsel made oral submissions essentially reiterating the contents of Mr. Pandya's deposition, but cited no judicial or other authorities in support of the respondent's position.
7. From the record as put to us, it is clear that almost three years have lapsed since the respondent lodged its notice of appeal; that the delay in lodging its record of appeal is inordinate; that, in our considered view, no sufficient explanation has been given for such delay; and that the respondent has failed to comply with the mandatory requirements of rule 84 of this *Court's Rules*.
8. We take to mind the provisions of rule 85 of the *Court of Appeal Rules, 2022* which reads:
  1. 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.
  2. The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.
9. This Court's unfettered discretion to strike out a Notice of Appeal in proper cases, or to deem it as having been withdrawn pursuant to rule 85(1) in such circumstances as demonstrate unexplained delay in taking such steps as are necessary to lodge an appeal, is predicated on the constitutional duty to ensure expedition in the administration of appellate justice. In *Mae Properties Limited v. Joseph Kibe & Another* [2017] eKLR, this Court applied the deeming provision under Rule 85 to strike out the notice of appeal notwithstanding the fact that the Motion to strike out the notice was also incompetent having been filed outside the 30-day limit allowed under the *Rules*.
10. In its decision, the Court in *Mae Properties Limited* (*ibid*) observed that –

“... 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.”

11. After considering the applicant’s Motion, the affidavits in support and in reply, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion that the respondent’s notice of appeal dated 23<sup>rd</sup> February 2021 is deemed as having been withdrawn pursuant to rule 85 of this Court’s Rules; and that the costs of the applicant’s Motion be borne by the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**S. GATEMBU KAIRU, FCI Arb**

..... **JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCI Arb.**

..... **JUDGE OF APPEAL**

**G. V. ODUNGA**

..... **JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

