



**Mahinda (Suing as the administrator of the Estate of the Late  
Godfrey Wanjohi Mahinda) v Kihoto Farmers Ltd (Civil Application  
E002 of 2021) [2023] KECA 178 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 178 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E002 OF 2021  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**MUGURE MAHINDA ..... APPLICANT  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE GODFREY  
WANJOHI MAHINDA**

**AND**

**KIHOTO FARMERS LTD ..... RESPONDENT**

*(An application to be deemed as withdrawn; the Notice of Appeal against the decision of the High Court at Nakuru (M. J. Anyara Emukule, J.) dated 15th June, 2012 in HCCC No. 163 of 1998)*

**RULING**

1. The applicant is before us *vide* a notice of motion dated January 25, 2021 seeking two main reliefs, namely, that the appeal be marked as withdrawn, and that the cost of this application be provided for. The application is brought under rule 83 of the *Court of Appeal Rules*, 2010. The application is premised on the grounds on the face of it as well as those deponed upon by the applicant in his supporting affidavit sworn on even date.
2. In summary, the application is grounded as follows, that the judgment of the High Court was delivered on June 15, 2012 after which the respondent lodged a notice of appeal on June 21, 2012. The parties also entered a consent with respect to an application for stay by the respondent on February 20, 2014. Since lodging the notice of appeal, the respondent has not filed or served the applicant with the record of appeal and the delay in filing the record of appeal has prejudiced the applicant who has been in court for over 32 years. That over 7 years have lapsed since the notice of appeal was lodged.
3. The application is opposed *vide* a replying affidavit of Kahiga Waitindi, advocate, dated March 24, 2021. In his response counsel stated that the application is incompetent as an appeal had already been



filed on March 5, 2021. He also stated that under rule 83(1) of the [Court of Appeal Rules](#), 2010, the notice could only be marked as withdrawn if the appeal was not instituted within the stipulated time. Counsel pointed out that there was a delay occasioned in securing the record of Nakuru HCCC No 163 of 1988 and the registrar issued a certificate of delay to that effect. He drew attention to the fact that the proceedings were not ready until February 23, 2021 hence a delay of 3145 days was occasioned and that the same number of days should not be taken into account when computing time for filing the record of appeal. Counsel therefore urged us to find that the record of appeal has been properly filed. In the final analysis, he asked us to dismiss this application with costs.

4. Both parties to this appeal filed written submissions. Submissions for the applicant are dated October 19, 2022. In his submissions, counsel argued that the respondent failed to comply with rule 81(1) of the [Court of Appeal Rules](#), 2010 which stipulates that the record of appeal be filed within 60 days after lodging the notice of appeal. It was his view that the respondent, upon securing stay of execution proceeded to slumber and has only been awakened by the application for withdrawal of the notice of appeal. Counsel therefore invites us to hold that there was a violation of mandatory provisions, as the record was filed out of time.
5. Counsel for the applicant further submits that there has been an unexplained delay on the part of the respondent in filing the record of appeal. Counsel maintains that even though counsel requested for the proceedings in 2012, there is no indication of the steps taken by counsel during the period between June 2012 and February 2021. Further, counsel is of the view that it is not possible for the file to have gone missing during the whole of that period. She further takes issue with the fact that the certificate of delay was issued within a month after the application for withdrawal of the notice was lodged. Counsel reasoned that the issue of a missing file is only within the knowledge of the respondent who should therefore be required to prove that it was factually correct. The applicant told us that she is an old sickly lady who would wish to see the finality of this case while she is still alive. Counsel therefore urged us to allow the application in its entirety.
6. Counsel for the respondent filed submissions dated October 21, 2022. Counsel maintains that from the evidence tendered in their replying affidavit, the respondent acted and adhered to the relevant mandatory provisions. Counsel adds that the alleged delay has been certified by the Deputy Registrar and therefore the same ought to be discounted when computing time. In that regard, the respondent sought to rely on the decision of this court in [Mistry Premji Ganji \(Investments\) Ltd vs Kenya National Highways Authority](#) [2019] eKLR. He pointed out that he had requested for the proceedings *vide* a letter which he filed in court and served upon the applicant. In his view, the respondent's case meets all the qualifications for discounting the period set out in the certificate of delay. Therefore, he believes that this application should be dismissed with costs, and that the notice of appeal and the record of appeal both be held to be properly on record.
7. We have given due consideration to the application, the affidavits and submissions by both parties. It is not in dispute that under rule 82 of the [Court of Appeal Rules](#), 2010 (as they were), an appeal shall be instituted by lodging a memorandum of appeal and record of appeal in the appropriate registry within 60 days of the date when the notice of appeal was lodged.

However, in the instances where an application for a copy of the proceedings has been made to the trial court, and a certificate of delay issued by the Registrar of the said court indicating the period for preparation and delivery of the proceedings, the said period is then excluded from the computation of time.



8. Under Rule 83 of the *Court of Appeal Rules*, 2010, this court possesses discretion to strike out a notice of appeal. The exercise of this discretion will always depend on the circumstances prevailing in the particular case.
9. In the present application, it is evident that the judgment of the trial court was delivered on June 15, 2012 and that on June 21, 2012, a notice of appeal was lodged. It is also evident that the respondent filed a letter with the registry of the trial court requesting for typed proceedings. However, the proceedings were not made available timeously. On February 23, 2021 the respondent filed a certificate of delay to that effect.
10. Since the registrar of the trial court has issued a certificate of delay, the same confirms the fact that the said typed proceedings were not made available timeously. We however note that the said typed proceedings have not been available for a period of about 8 and a half years. The explanation offered by the respondent is that the said file was missing from the court registry. However, the respondent has not adduced any further evidence to support this averment or in a bid to establish the source of this information. Furthermore, there is no evidence placed before us of any serious attempt to follow up and obtain the said proceedings or to otherwise pursue the lodgment of the substantive appeal.
11. The Supreme Court in the case of *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR while acknowledging that the issue of delay of typed proceedings, which is beyond a party's control, warned that:
  - “(26) However, we hasten to add that a ground of delay of getting typed proceedings is not a *prima facie* panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.”
12. In our view, we find disturbing, the uncorroborated assertion by the respondent that the lower court's file went missing for over 8 years, yet no follow up was done with the respective registry to try and trace the file. Further, the record of the proceedings became available on February 23, 2021, immediately the application to deem the notice of appeal marked as withdrawn was lodged and served. Without a satisfactory explanation, a period of 8 years is inordinately long.
13. We wish to reiterate the well-established principle that informs the need for fast and efficient dispensation of justice, that; justice delayed is justice denied. All actors within the justice system, including the Judiciary, the parties and counsel in general, are required to ensure expeditious disposition of cases. A prudent litigant ought to demonstrate through evidence, the efforts he or she put in place to expedite the disposition of the case. However, we are alive to the fact that whenever a certificate of delay has been issued by the Registrar of the court appealed from, the import of that deposition is that the court acknowledges its role in occasioning that delay. We are therefore unable to disregard the certificate of delay which was issued by the Registrar of the court.
14. This is a matter falling within this court's discretion. In *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR where there was a delay of 455 days, this court allowed the application for marking a notice of appeal as withdrawn. The court specifically pointed out that:
  - “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...

...Viewed from that perspective, we think that the arguments proffered by the respondents herein about having been delayed by non availability of proceedings do not lie. We think, moreover, there has been no evidence placed before us of any serious attempt to follow up and obtain the said proceedings or to otherwise pursue the lodgment of the substantive appeal... At any rate, as the matter is one in our discretion, we are unmoved by anything said by the respondents to stand in the way of the express legal consequence of their default.”

15. The decision of this court in *Mae Properties Limited v Joseph Kibe & Another* (op cit) might be a convenient way to dispense with this matter. However, even if we were to adopt that line of thought, we would still be faced with the fate of this application under rule 83 of the *Court of Appeal Rules*, 2010 (as they were); which rule requires such an application as is before us to be lodged within 30 days. Even so, we would reach one inevitable conclusion, that the application is time barred.
16. Going by our reasoning above, the motion dated January 25, 2021 faces one inevitable fate, dismissal.
17. On the issue of costs, we rule that the costs shall abide the outcome of the appeal.
18. Consequently, the final orders are that the notice of motion dated January 25, 2021 is without merit and is hereby dismissed. The costs of the application shall abide the outcome of the main appeal.

**Dated and delivered at Nakuru this 17<sup>th</sup> day of February, 2023.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

