



Obara & another v Ministry of Interior & Co-ordination of National Government & 2 others (Civil Application E353 of 2021) [2023] KECA 461 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KECA 461 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E353 OF 2021
DK MUSINGA, KI LAIBUTA & A ALI-ARONI, JJA
APRIL 20, 2023**

BETWEEN

MARGARET ADHIAMBO OBARA 1ST APPLICANT

JACINTA WANJIKU KERU 2ND APPLICANT

AND

**MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 1ST RESPONDENT**

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

(Being an application to strike out the Notice of Appeal from the Judgment and Decree of the Employment & Labour Relations Court of Kenya at Nairobi (M. Onyango, J.) delivered on 24th July 2020 in E.L.R.C Cause Nos. 575 & 577 of 2017 (Consolidated))

RULING

1. On July 24, 2020, the Employment and Labour Relations Court (Maureen Onyango, J.) delivered its judgment in ELRC Cause Numbers 575 and 577 of 2017 (Consolidated) in which it dismissed the applicants' claim for reinstatement, but awarded the 1st applicant the sum of KShs 1,149,800 and the 2nd applicant KShs 1,278,540 (as compensation for summary dismissal, salary withheld during interdiction, and pay in lieu of notice); pension in accordance with the [Pensions Act](#); Costs; and interest at court rates from the date of judgment.
2. Dissatisfied with the judgment of M Onyango, J, the respondents moved to this Court and filed a notice of appeal dated August 6, 2020. By a Notice of Motion dated October 6, 2021 made under rule 83 of the [Court of Appeal Rules](#), 2010 the applicants pray that the respondents' notice of appeal be struck out or, in the alternative, the notice be deemed as having been withdrawn. Their Motion is anchored



on the grounds, inter alia, that the period of lodging of an appeal has expired and that no action has been taken by the respondents in pursuance of the trial court proceedings; that the notice of appeal was filed merely to delay and deny the applicants the fruits of their judgment; that the respondents have lost interest in filing any appeal; and that no appeal lies on the basis of the said notice in view of the fact that more than sixty (60) days have lapsed since they filed the notice of appeal.

3. The applicants' Motion is supported by the annexed affidavit of the 1st applicant, Margaret Adhiambo Obara, sworn on October 6, 2021. According to her, the respondents requested for the proceedings in the trial court on August 6, 2020, but have taken no steps to file the record of appeal within the prescribed period of 60 days.
4. In response to the applicants' Motion, the respondents filed a replying affidavit of Alexander Muteshi sworn on November 15, 2021 in which he depones that the applicants' Motion was time barred by virtue of rule 84 of the Court of Appeal Rules, 2010 (Now rule 86 of the 2022 Rules); that the respondents had requested for certified copies of the proceedings in good time, but that the same were yet to be supplied; that the application is baseless and an abuse of the Court process; and that it should be dismissed with costs. They did not file any submissions in opposition to the applicants' Motion, but learned counsel, Ms Chesiyana, made oral submissions stating that the applicants' Motion was time barred; and that the respondents had already filed their record of appeal sometime in September 2022 and served the same on the applicants on September 14, 2022.
5. In response to the respondents' replying affidavit, the applicants filed a supplementary affidavit of the 1st applicant sworn on December 14, 2021 in which she states, *inter alia*, that the respondents have not annexed any evidence of the steps (if any) taken to follow up the proceedings. They filed written submission dated December 2, 2021 and the 1st Applicant addressed the Court when their Motion came for hearing on the GoTo Meeting virtual platform.
6. It is noteworthy that the respondents opposition to the applicants' Motion, which is anchored on rule 84 (now rule 86) of this Court's Rules, is founded on the proviso to Rule 86 of the Court of Appeal Rules, 2022 which requires that an application to strike out a notice of appeal be made within thirty (30) days of the date of service of the notice.
7. Be that as it may, the provisions of rule 83 (Now rule 85 of the 2022 Rules) cannot be wished away. We take to mind the provision of rule 85 of the Court of Appeal Rules, 2022 which reads:

“ 85.

- (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.”

8. It is common ground that the respondents' notice of appeal was admittedly served way back on August 6, 2020. The applicants' Motion was filed on October 13, 2021, the applicants having waited for over one year and two months after service upon them of the respondents' notice of appeal, all the while in expectation of the substantive appeal being filed. To date, we find no evidence that the record in the respondents' intended appeal has been filed over two years down the line, save for Ms Chesiyana's



statement from the bar to the effect that the respondents' record of appeal was filed in September 2022 and served on the applicants on September 14, 2022 more than two (2) years from the date of service of the notice of appeal.

9. It is also noteworthy that the respondents have failed to satisfy this Court that they took any positive steps to secure extension of time to file and serve the record of appeal out of time. Their failure is compounded by the absence in the record as put to us of the requisite certificate of delay. This Court in *Kenya Ports Authority vs Maur Abdalla Bwanamaka* [2018] eKLR underscored the effect of the repealed rule 83 (now rule 85), which empowers the Court, of its own motion, to adjudge the notice of appeal as having been withdrawn where a party has lodged a notice of appeal, but fails to institute an appeal within the appointed time. That was the case here.
10. Having considered the applicants' Motion, the affidavits in support thereof and in reply, the rival submissions of the parties, we hereby order and direct that the respondents' notice of appeal dated August 6, 2020 be deemed as having been withdrawn pursuant to rule 85 of this *Court's Rules* with costs to the applicants.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

