



REPUBLIC OF KENYA



KENYA LAW
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**Mukhwana v Sweden (Civil Application 015 of 2022)
[2023] KECA 416 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 416 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 015 OF 2022
HM OKWENGU, MA WARSAME & JM MATIVO, JJA
APRIL 14, 2023**

BETWEEN

ISAAC OPICHO MUKHWANA APPLICANT

AND

DIAKONIA SWEDEN RESPONDENT

*(Being an application to have a notice of appeal dated 14th January, 2019
against the judgment of the Employment and Labour Relations Court at Nairobi
(Lady Justice Ndolo) deemed as withdrawn in ELRC Cause No. 1266 of 2012)*

RULING

1. By the notice of motion dated August 26, 2021, the applicant Isaac Opicho Mukwana seeks to have deemed as withdrawn the respondent's notice of appeal dated 14th January, 2019 in the Employment and Labour Relations Court registry. The said notice was lodged with an intention to appeal against a ruling delivered by Lady Justice Ndolo in Nairobi ELRC Cause 1266 of 2012 on 20th December, 2018 in favour of the applicant.
2. The motion is brought under Rules 83 and 84 of the [Court of Appeal Rules 2010](#), among other provisions of the law. The grounds on the face of the application are as follows;
 - a. The respondent lodged its notice of appeal timeously on 14th January, 2019
 - b. The respondent was required to have instituted their appeal within sixty (60) days of lodging their notice of appeal. Which time started to run on 1st November 2019 and ended on 30th January 2020.
 - c. The typed proceedings were ready for collection on 30th October 2019



- d. The period between 15th January, 2019 to 30th October 2019 were excluded from computation of time to file the Memorandum of Appeal and Record of Appeal for purposes of preparing the proceedings.
 - e. The applicant's advocates informed the respondent that the proceedings were ready via emails dated 28th July, 2020, 16th September 2020 and 13th May 2022 and urged them to lodge their appeal
 - f. The respondent has not instituted its Appeal within the stipulated time nor has it sought for extension of time to file the Appeal out of time.
 - g. No explanation has been offered for the delay
 - h. The applicant is prejudiced and has been denied the fruits of his judgment for over 5 years
3. In support of the motion is an affidavit sworn by the applicant which essentially reiterates the grounds aforesaid and adds evidentiary muscle. On its part, the respondent filed a replying affidavit sworn by Knatacha Vorholter, a regional director of the respondent dismissing the application as an abuse of the court process as follows:
- a. The respondent filed a notice of appeal on 19th January 2019 and a Notice of motion seeking stay of execution which was settled by consent and the respondent deposited the decretal sum in a joint account in the name of their advocates
 - b. They severally requested the proceedings from the court registry via their email dated 16th September 2020 and their letter dated 3rd October 2022 but they have never received any notification or reminder from the court that they were ready
 - c. The annexures by the applicant purporting to invite the respondent's advocates to collect the proceedings have never been served on them no does it bear their stamp of receipt. Further, their representatives have often gone to the registry to follow up on the typed proceedings but none have been supplied
 - d. That the 60-day period has not run out as they have never received an invitation to collect the proceedings. The non-supply of the said proceedings has frustrated the Respondent's ability to file its Memorandum of Appeal and record thereof.
 - e. If the typed proceedings were ready as alleged, then the applicant would have applied for supply of the same and attached them as proof.
 - f. The applicant stands to suffer no prejudice as the decretal sum, notably granted in United States Dollars, was deposited in an interest earning account. Moreover, the value of the dollar has shot up.
4. In a further affidavit dated 12th October, 2022 the applicant explained that the Court notified the respondent on 30th October 2019 that the proceedings were ready and the respondent was required to pay court fees to be allowed to collect them. The same notice was copied to the applicant's advocates. The applicant's advocate further wrote to the respondent's advocates questioning the delay and forwarding the above mentioned notice from the court dated 30th October, 2019. It is alleged that the letters failed to elicit a single response from the respondent's Advocate and the matter has been lying inactive for close to four (4) years since the judgment was delivered by the superior court on 20th December 2018.



5. These rival positions were agitated by counsel appearing before us. Relying on his submissions, Mr. Masila for the applicant added that It is was bad faith and outright deceit for the respondent to feign lack of notice contrary to the evidence on record and that the timelines are strict and are meant to achieve the constitutional, statutory and rule-based objective of ensuring that Court Processes dispense justice in a timely, just, efficient and cost- effective manner.
6. Opposing the application, Miss. Khadija similarly relied on their submissions and emphasized that they had been diligent in all their dealings with the court in procuring the typed proceedings. It was further reiterated that the email from the court stating that the proceedings were ready was solely sent to the applicants advocates to their exclusion and they had never received the notice produced by the applicant.
7. We have given the application, the affidavits, submissions by the parties, as well as authorities cited due consideration. It is undisputed that the notice of appeal was lodged at the Employment & Labour Relations Court registry on 14th January, 2019 and that by dint of Rule 82(1) of the Court of Appeal Rules 2010, the appeal should have been instituted within sixty days thereafter, but was not. To the best of our knowledge the appeal still has not been filed. Rule 83, which this application is grounded on provides that:

“ 83. Effect of default in instituting appeal 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.”
8. The rationale and criteria for a notice of appeal being withdrawn under the aforementioned rule were succinctly discussed by this Court in *Quicklubes E. A. Limited vs. Kenya Railways Corporation* [2014] eKLR as follows:

“Rule 83 gives this court unfettered discretion to deem an appeal as withdrawn if a party files a notice of appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of court but fail to inform the court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allow the court to invoke Rule 83 suo motu if the respondent in the intended appeal does not move the court.”
9. The respondents' position is clear; that it could not mount an appeal without receiving certified proceedings from court and more importantly without a formal communication from the court notifying it that the proceedings they applied for were ready for collection. In addition, their advocates crafted explicit reminders to the registry requesting copies of the proceedings vide an email dated 16th September 2020 and a letters dated 3rd October 2022 and sent their representatives to make enquiries to no avail.
10. While the respondent does not paint a picture of relentless diligence in following up with the court registry on the position of the proceedings having only written a single letter almost two years after



requesting for typed proceedings and an email after the applicant had filed the application before us; It is trite that whereas reminders and visits to the court registry are necessary to keep the registry on its toes and to remind them of their duty to prepare the copies of proceedings expeditiously, the duty to prepare them and to supply them remains theirs within the set timelines (see *Rodgers Abisai T/A Abisai & Company Advocates vs. Wachira Waruru & Another* [2014] eKLR).

11. However, the fact that there is a judicial notice on record from the registry dated 30th October 2019 addressed to the respondent's advocates is a fact that cannot be wished away. Further still there is an email from the court dated 23rd October 2020 confirming that the proceedings were ready and available upon payment of the requisite fees. Although the email was only directed to the respondent's Advocates, the fact still remains that by the end of the year 2020 the proceedings were ready. Even if the notice, by some far of chance failed to reach the respondent's advocates, it does not erase the fact that the Applicant's Advocates vide a letter dated 29th July 2020 (which bears the Respondent's Advocate's stamp confirming receipt) duly informed the respondent that there was a notice from the registry indicating that the proceedings were ready and forwarded a copy of the notice from the court. Again, the respondent has not made a claim that the notice produced by the applicant is a sham and there is no affidavit by the representatives they sent to the registry alleging the same.
12. In the circumstance We are inclined to agree with the applicant that the respondent is not interested in pursuing the appeal and that Court ought to, under rule 83 of the *Court's Rules 2010*, deem the notice of appeal dated 14th January 2019 to have been withdrawn. There has been no application to file the record of appeal out of time and as such there can be no use in keeping the notice of appeal alive. Consequently, we allow the notice of motion dated 26th August 2021 with costs to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J.M MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

