



KCB Bank Kenya Limited v Said (Suing as the administrator of the Estate of Tahir Sheikh Said Ahmed (Deceased) (Civil Application E060 of 2021) [2023] KECA 688 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 688 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E060 OF 2021
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
MAY 26, 2023**

BETWEEN

KCB BANK KENYA LIMITED APPLICANT

AND

FATMA TAHIR SHEIKH SAID (SUING AS THE ADMINISTRATOR OF THE ESTATE OF TAHIR SHEIKH SAID AHMED (DECEASED) RESPONDENT

(Being an application for the court to issue an order to deem the respondent's notice of appeal dated 8th March 2021 and lodged on 10th March 2021 as withdrawn)

RULING

1. The respondent's application dated February 19, 2020 filed before the High Court at Malindi seeking an order for injunction to restrain the present applicant from selling, disposing or in any manner dealing with the property known as portion 10801 Malindi Title CR 34037 and portion No 11215 Malindi Title CR 46603 in purported exercise of its statutory power of sale was rejected and struck out by that court in a ruling delivered by Nyakundi, J on February 26, 2021 on the grounds that there was already a pending suit before the Environment and Land Court over the same subject matter. Dissatisfied, and intending to appeal that decision, the respondent filed a notice of appeal dated March 8, 2021 and lodged before the High Court on March 10, 2021.
2. That notice of appeal dated March 8, 2021 is the subject of the present application dated November 22, 2021 by the applicant in which an order is sought, principally under rule 83 of the [Court of Appeal Rules, 2010](#), (Rule 85 of [Court of Appeal Rules, 2022](#)) to deem that notice of appeal as withdrawn on the grounds that the respondent has failed to institute an appeal within 60 days from the date when the typed and certified proceedings were ready and available and that the delay in prosecuting the intended appeal is extremely prejudicial to the applicant because it has been kept away from exercising its statutory power of sale since 2016.



3. During the virtual hearing of the application before us on November 30, 2022 the parties were represented by learned counsel. Mr Paul Munyao and Mr Henry Kariuki appeared for the applicant while Mr Gikandi Ngibuini appeared for the respondent.
4. In highlighting the applicant’s written submissions dated November 15, 2021, counsel for the applicant Mr Munyao submitted that whilst the notice of appeal was filed within time, the record of appeal was not filed within the stipulated sixty days; that the applicant has followed up the matter with the court below and obtained typed proceedings and a certificate of delay which was issued on July 28, 2021 despite which the respondent never filed the appeal or sought an extension of time to do so. It was submitted this is a perfect case to invoke Rule 83 of the *Court of Appeal Rules, 2010* and deem the notice of appeal as withdrawn. In support, counsel cited decisions in *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR as well as *Muzaffer Musafee Essajee & another v Anne Njeri Mwangi* [2021] eKLR.
5. In opposing the application, Mr Gikandi referred to his replying affidavit sworn on November 29, 2022 in which, in addition to the circumstances that prevented him from responding to the present application earlier, deposed that despite having applied for the typed proceedings from the lower court, the respondent did not get notification from that court that the same were ready. In addition, Mr Gikandi in his replying affidavit urged the Court to exercise its overriding objective jurisdiction, dismiss the application, and grant the respondent

“a period of twenty-one (21) days to file and serve the record of appeal”.

6. In his oral and written submissions, Mr Gikandi stated that the record of appeal, being Civil Appeal No E045 of 2022, has since been filed and on the strength of the decision in the case of *Esther Anyango Ochieng v Transmara Sugar Company* [2020] eKLR submitted that Rule 83 can no longer apply.
7. We have considered the application, the affidavits, and the submissions. Counsel for the respondent in his written submissions addressed the court at length on principles for extension of time in support of the prayer, in the replying affidavit, for extension of time. We are, however, not presently dealing with an application for extension of time under Rule 4 of the Court of Appeal Rules and are unable to entertain the prayer in the replying affidavit in that regard. What is before us is an application under Rule 83 of the *Court of Appeal Rules* to deem the notice of appeal as withdrawn.
8. In *Quicklubes EA Limited v Kenya Railways Corporation* [2014] eKLR this Court expressed in reference to Rule 83 of the *Court of Appeal Rules*, 2010 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. In the same vein, in the case of *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR the Court expounded on Rule 83 as follows:

“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”.

10. See also *Mae Properties Ltd v Joseph Kibe & another* [2017] eKLR. In the present case, and as already stated, the impugned decision of the High Court was delivered on February 26, 2021 and the notice of appeal dated March 8, 2021 lodged on March 10, 2021 within the period stipulated under Rule 72 (now Rule 77) of the Court of Appeal Rules. The respondent was then required, under Rule 82 (now Rule 84) to lodge the memorandum and record of appeal within 60 days excluding any period certified as having been necessary for the preparation of typed proceedings of the lower court. Clearly, by the time the present application dated November 22, 2021 was filed, the 60 days had long lapsed, and the notice of appeal therefore became a proper candidate for the deeming provisions of Rule 83.
11. However, in a bid to redeem the situation, on the eve of hearing the present application, the respondent filed the memorandum and record of appeal in Civil Appeal No E045 of 2022. Although counsel for the applicant initially disputed that the same had been filed on the judiciary e-filing portal, he subsequently accepted that the same was indeed filed.
12. In the circumstances, we do not think, that we can overlook that the record of appeal is filed. We echo the words of the Court in *Esther Anyango Ochieng v Transmara Sugar Company* [2020] eKLR where, faced with a similar situation, the Court, in the words of Kiage, JA stated:

“My thinking is that, given our reasoning in the Mae Properties case (*supra*), at the point considering whether or not to exercise our powers under Rule 83, a crucial point is whether or not a record of appeal may at that time have been filed. Where none has been filed, then the Court ought, without much ado, to deem the notice of appeal as having been withdrawn.

Where, however, as in the present case the appeal has in fact been instituted, can we in clear conscience, without a dalliance with the surreal, nevertheless pronounce that the appellant’s notice of appeal is deemed to be withdrawn? I respectfully do not think so.”

13. Being of the same view, we decline to allow the application to deem the respondent notice of appeal as withdrawn. The application dated November 22, 2021 is dismissed. Given that the respondent filed



the memorandum and record of appeal in Civil Appeal No E045 of 2022 on the eve of hearing the present application, the applicant will have the costs of the application.

14. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

