



**Awadh & 3 others v Abubakar (Civil Application 34 of 2018)  
[2023] KECA 497 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 497 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION 34 OF 2018  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
MAY 12, 2023**

**BETWEEN**

**ATHMAN HASSAN AWADH ..... 1<sup>ST</sup> APPELLANT  
SAWLEH ATHMAN HASSAN ..... 2<sup>ND</sup> APPELLANT  
SAID ATHMAN HASSAN ..... 3<sup>RD</sup> APPELLANT  
HASSAN ATHMAN HASSAN ..... 4<sup>TH</sup> APPELLANT**

**AND**

**FAUZIYA TARIQ ABUBAKAR ..... RESPONDENT**

*(An application to strike out Notice of Appeal dated October 24, 2016 in respect of the judgment of the Environment and Land Court at Malindi (Angote J) delivered on October 24, 2016 in ELC Civil Case No 159 of 2014))*

**RULING**

1. Fauziya Tariq Abubakar, the Applicant herein and respondent in the substantive appeal, filed a Notice of motion application dated March 20, 2018, in which orders are sought that the Notice of Appeal filed herein by the Appellants dated October 24, 2016 be struck out. The main grounds for the application are that after judgment was delivered by the Environment and Land Court at Malindi (Angote J) on October 14, 2016, the Appellants lodged a Notice of Appeal on October 24, 2016, and the same was served on October 31, 2016. However, that the Appellants are out of time in filing their Record of Appeal which was required to be filed within 60 days of filing of the Notice of Appeal as provided under Rule 82 of the *Court of Appeal Rules of 2010*, which period has lapsed.
2. The application is not opposed, and there was also no appearance for the Appellants during a virtual hearing of the application held on December 7, 2022, despite their advocates having been duly served with the hearing notice. Learned counsel Mr Tukero Ole Kina appeared for the Applicant, and relied



on the decision in *Justus Aloo Ogeka & 6 Others vs Kenya Union Of Commercial Food And Allied Workers & 2 Others* [2018] eKLR for the position that having also failed to serve the letter bespeaking the issue of proceedings, there could be no reference for the exclusion of time taken in the preparation of proceedings and the Appellants were thereby precluded from relying on Rule 82(1). That the Appellants were therefore required to have filed their record of appeal within 60 days from the date the notice of appeal was filed, and that the notice of appeal was also deemed to have been withdrawn pursuant to Rule 83 of the *Court of Appeal Rules*. Also cited in this respect was the decision in *Bivac International vs Chieni Enterprises Limited & Another* (2015) eKLR.

3. Under the then applicable Rule 82 of the Court of Appeal Rules of 2010, an appeal was instituted by lodging a memorandum of appeal and record of appeal in the appropriate registry, within sixty days of the date when the notice of appeal was lodged. The proviso to Rule 82(1) excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of the copy proceedings, where an application for the proceedings was made within thirty days of the date of the decision intended to be appealed against. Rule 82 (2) in addition provided that an appellant shall not be entitled to rely on the proviso unless the application for the copy of proceedings was in writing and a copy of it was served upon the Respondent. Similar provisions are now found in Rule 84 of the *Court of Appeal Rules* of 2022.
4. In addition, under Rule 84 of the 2010 Rules, any person affected by an appeal may apply to strike out notice of appeal or appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. There was however a proviso to Rule 84 that such an application shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be. Similar provisions are now found in Rule 86 of the 2022 Rules.
5. The Applicant has in this regard brought evidence of the impugned judgment delivered on October 14, 2016 sought to be appealed against by the Appellants, and the Notice of Appeal lodged on October 24, 2016. The Appellants have not contested the Applicant's averments that no steps have since been taken by the Appellants in the appeal. It is however notable that the Applicant's application for striking out the notice of appeal was lodged on March 22, 2018 outside the 30-day window provided for filing the application in the Rule 84 proviso. This finding notwithstanding, this Court has the discretion to deem the subject Notice of Appeal withdrawn under Rule 83 of the Court of Appeal Rules 2010 which is now found in Rule 85 of the Court of Appeal Rules 2022, and provides as follows:

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.

6. It is thus properly within the purview of this Court's powers to deem withdrawn a Notice of Appeal on its own motion, as held in *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR. The Court in that case heard an application to strike out a notice of appeal which, as is the case herein, was filed outside the 30-day limit in the Rule 84 proviso, but nevertheless resorted to the deeming provision Rule 83 of the Court of Appeal Rules of 2010 to strike out the Notice of Appeal. This Court also noted in *Hamisi Omar Juma, Mwamuyee Dau Ngala, Mwalumbi Mwangata & 150 Others vs Sheileen Chandra Narottam Shah 2 Others*, Mombasa Civil Application 1 of 2018, that the provisions



of Rule 83 of the Court of Appeal Rules 2010 and similarly of Rule 85 of the Court of Appeal Rules 2022 are predicated on the existence of circumstances from which this Court can deem that a notice of appeal has been withdrawn.

7. We are of the view that the circumstances in this application justify such an intervention, arising from the inaction on the part of the Appellants since the lodging of the Notice of Appeal on October 24, 2016. We therefore find that the Applicants' Notice of Motion dated March 20, 2018 is merited to the extent that the Notice of Appeal dated and lodged on October 24, 2016 is hereby deemed and marked as withdrawn. We shall make no order as to costs.
8. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> DAY OF MAY, 2023**

**P NYAMWEYA**

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**JUDGE OF APPEAL**

**J LESIIT**

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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**

