



**Nobel Tyres Ltd v Kioni (Civil Application E081 of 2021)
[2023] KECA 507 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 507 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E081 OF 2021
FA OCHIENG, LA ACHODE & WK KORIR, JJA
MAY 12, 2023**

BETWEEN

NOBEL TYRES LTD APPLICANT

AND

JOHN KINGORI KIONI RESPONDENT

(Being an application to deem as withdrawn a Notice of Appeal against the ruling of the High Court sitting at Nakuru (H.K. Chemitei, J.) dated 22nd July 2021 In HCCA No. E006 of 2020)

RULING

1. Before us is a Notice of Motion brought under sections 3(1) and (2), 3A and 3B of the [Appellate Jurisdiction Act](#) and Rules 1(2), 82(1) and (2) and 83 of the [Court of Appeal Rules](#), 2010 (the Rules). The applicant, Nobel Tyres Limited, seeks two prayers, namely, that the Notice of Appeal dated August 4, 2021 and filed on August 6, 2021 be marked as withdrawn; and that the costs of this application be borne by the respondent.
2. The application is anchored on the grounds contained on the face of the application as well as the supporting affidavit which adds the requisite flesh and evidentiary averments and exhibits to support the application. In a nutshell, the applicant states that on July 22, 2021, the High Court rendered its ruling dismissing the respondent's application for review. The respondent then filed a notice of appeal on August 6, 2021 but failed to serve the same on the applicant. The applicant also deposes that the respondent never filed and/or served a letter bespeaking proceedings in the High Court. The applicant asserts that the time prescribed under Rule 82(1) of the Rules for lodging the Record of Appeal has lapsed and that because the letter bespeaking the proceedings was neither filed nor served, the applicant is barred by Rule 82(2) from seeking refuge under the proviso to Rule 82(1).
3. The application is opposed vide a replying affidavit sworn by the respondent, John Kingori Kioni, on January 21, 2023. The respondent contends that the application is misguided and is an affront



to his right to a fair hearing. He also contends that he filed the Notice of Appeal within time and served it on the applicant. He states that he complied with Rule 82(1) of the Rules by writing to the Deputy Registrar of the High Court seeking the proceedings but he is yet to be provided with the same. He asserts that the delay is one which is beyond his control as it is occasioned by the superior court's registry. The respondent thereby terms the application as a wild goose chase unsupported by any evidence. He consequently seeks that we dismiss the application with costs.

4. When this matter came up for hearing on February 8, 2023, Mr. Magata appeared for the applicant whereas the respondent appeared in person. Both parties had filed their written submissions and sought to entirely rely on them.
5. Mr. Magata for the applicant identified two issues for determination, namely, whether the Notice of Appeal lodged on August 6, 2021 should be marked as withdrawn and who should bear the costs of this application. Counsel relied on Rule 83 of the Rules and *Mae Properties Limited v Joseph Kibe & another* [2017] eLKR to submit that the consequence of non-compliance with Rule 82 is that the Notice of Appeal is marked as withdrawn. Counsel also submitted that the respondent did not serve the Notice of Appeal upon the applicant thereby violating Rule 77(1) of the Rules. According to counsel, the applicant only came to know of the existence of the Notice of Appeal when collecting a copy of the High Court ruling from the registry. Counsel urged that because no letter bespeaking certified proceedings was served upon the applicant, the respondent was required by Rule 82 (1) of the Rules to institute an appeal within 60 days of lodging the Notice of Appeal but he had failed to do so. Counsel submitted that by virtue of Rule 82(2) of the Rules the respondent could no longer institute a competent appeal. It was therefore counsel's position that the failure to comply with the rules should lead to the marking of the Notice of Appeal as withdrawn.
6. On the issue of costs, counsel for the applicant pointed out that under Rule 83 of the Rules, a party in default is liable to pay the costs arising from the withdrawn notice of appeal. To buttress this point, counsel relied on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eLKR and argued that apart from the principle that "costs follow the event", courts also consider factors such as a successful suit, and, motivation and conduct of the parties in the whole process of litigation when exercising judicial discretion in awarding costs. In a nutshell, counsel urged us to award the costs to his client.
7. In reply, the respondent through submissions dated January 21, 2023 stated that he duly filed and served the Notice of Appeal on the applicant's advocates through email within the stipulated timelines. He also asserts that he wrote a letter to the Deputy Registrar of the High Court requesting for typed proceedings in accordance with Rule 82 of the Rules. He stated that the court's registry assessed the costs and he made the payment and therefore the delay occasioned is not one which is within his control but is occasioned by the slow pace of action at the court's registry. He further submitted that his inability to prosecute his matter before the High Court was as a result of an accident that left him bedridden for over a year. Further, that he was unable to raise Kshs. 600,000 which was the condition set by the trial court to warrant a review. It was the respondent's case that his impecuniosity should not deny him justice. He consequently urged us to dismiss the application and hear his appeal on merit.
8. We have given due consideration to the notice of motion, the affidavits and the submissions by the parties. The discretion of this court that this application seeks to invoke is premised on Rule 83 of the Rules relating to striking out a Notice of Appeal. The exercise of this discretion will always depend on



the circumstances prevailing in the particular case. In our view, this application turns on this court's interpretation of Rule 82(1) & (2) of the Rules which provides as follows:

- “(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
- a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be 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 such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent;”

9. From the documents laid before us, we find that contrary to the applicant's averment the Notice of Appeal was indeed filed within time. It is also evident that the 60 days' window prescribed under Rule 82(1) lapsed sometime in November 2021. The question then is whether the respondent complied with Rule 82(2) so as to breathe life to the Notice of Appeal. This court in *Mae Properties Limited v Joseph Kibe & another* [2017] eKLR rendered itself on the import of Rule 82 of the Rules as follows:

“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.”

10. Our inquiry under Rule 82(2) of the Rules will therefore take a two-pronged approach. The first step is to determine whether the appellant wrote a letter bespeaking the proceedings to the Registrar within 30 days of the decision against which he desired to appeal; and the second action is to determine whether the said letter was served on the respondent.
11. Is there a letter bespeaking proceedings written to the Deputy Registrar of the High Court? To answer this question a restatement of the facts is necessary. The Notice of Appeal which is the subject of this application is dated August 4, 2021 and was filed on August 6, 2021. It is with respect to the ruling delivered on July 22, 2021. The respondent produced as “JKK001” a letter to the Deputy Registrar requesting for proceedings in John Kingori vs. Nobel Tyres Ltd. The said letter is dated February 25, 2021 and was endorsed by the High Court on February 26, 2021. The letter was forwarded for assessment of the request on 3rd March 2021. The annexed receipt has a payment stamp of February 26, 2021. This is the letter that the respondent exhibits in support of his assertion that he complied with Rule 82(2) of the Rules. From the stated facts, it is difficult to conclude that the letter dated February 25, 2021 is in respect to the proceedings for the Notice of Appeal dated August 4, 2021 which document was lodged over five months after the letter bespeaking the proceedings was received in the



registry. Furthermore, this letter was written even before the trial court rendered the impugned ruling which is the subject of the applicant’s intended appeal. That being the case, we will not venture into the second limb of whether the necessary letter was written to the High Court and served upon the respondent because, as we have found, the letter relied upon by the respondent is not relevant to the Notice of Appeal which is the subject of the instant application.

12. In our view, the applicant’s failure to write to the High Court bespeaking the proceedings and copy the respondent on this request is not just a mere or trivial procedural technicality worth overlooking. There is no evidence placed before us to show that the respondent has since filed an appeal even though the time within which the appeal was to be filed lapsed sometime back. The applicant instead blames the High Court for failing to supply the proceedings but the High Court should not be made the scapegoat where it is very clear from the evidence placed before us that the applicant has never written to the Deputy Registrar requesting for the proceedings. The purpose of Rule 83 was aptly captured by this court in *Mae Properties Limited* (*supra*) as follows:

“Under the same Rule 83, and assuming that the court will not have sooner made the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been lodged. Once those two facts are established, we do not see why the court should not, unless persuaded by some compelling reason in the interests of justice, simply make the order deeming the notice of appeal as withdrawn.”

13. Based on what we have stated in this ruling, it follows that the application dated December 7, 2021 is for allowing. The application is allowed so that the notice of appeal dated August 4, 2021 and lodged in the superior court registry on August 6, 2021 is deemed to have been withdrawn by the respondent.

14. As regards the applicant’s prayer for costs, we find that the request is merited. The respondent vigorously opposed the application and there is therefore no good reason why the principle that costs follow the event should not apply in this matter. We therefore award the costs of the application to the applicant against the respondent.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2023

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

.....

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

