



**South Coast Holdings Limited v Alibhai t/a Diani Gallery (Civil Appeal
(Application) E067 of 2021) [2023] KECA 504 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 504 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E067 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
MAY 12, 2023**

BETWEEN

SOUTH COAST HOLDINGS LIMITED APPELLANT

AND

MUNAVER N ALIBHAI T/A DIANI GALLERY RESPONDENT

(Being an application for the notice of Appeal dated 6th June 2020 to be deemed to have been withdrawn for failure to institute an appeal within the requisite time frame)

RULING

1. The Respondent has by a Notice of Motion dated September 22, 2021, brought pursuant to Rules 82, 83 and 84 of the *Court of Appeal Rules 2010*, (now Rules 84, 85 and 86 of the 2022 Rules, hereinafter the Rules) sought to have the appellant’s Notice of Appeal dated June 6, 2020 to be deemed as withdrawn, on the grounds that the appellant did not institute the appeal within 60 days prescribed under Rule 84 of the Rules.

The respondent further contends that since no step has been undertaken more than one year later to lodge the Record of Appeal, then under Rule 85, the appeal stands withdrawn. The application is supported by the affidavit sworn on September 22, 2021 by Munaver Alibhai, the Respondent herein, where he reiterated the grounds on the face of the Motion.

2. The application is opposed through the replying affidavit sworn on May 31, 2022 by Sultan Khimji, a Director of the Appellant. The deponent contends that pursuant to Rule 86 of the Rules, the application is incompetent, as it was brought over 30 days from the date the notice of appeal was served upon the respondent’s advocate on record. It is contended that the advocate was served with the notice of appeal as well as the letter to the Deputy Registrar requesting proceedings on the June 11, 2020. The deponent attached a letter, ‘SK 1’, which was an email from Respondent’s advocate acknowledging receipt of the notice of appeal and the letter be-speaking proceedings.



3. The deponent annexed a certificate of delay from the Deputy Registrar date March 10, 2020, certifying that the period between June 4, 2020 and March 10, 2022 was necessary for the typing, certifying and delivery of the proceedings. The deponent further averred that the Record of Appeal had since been filed and the appeal was coming up for case management conference on the June 6, 2022 before the Deputy Registrar.
4. The application was heard through the virtual platform on the November 7, 2022. Learned counsel Ms. Tasneem Moolraj was present for the Respondent. There was no appearance for the appellant despite service of the hearing notice upon the advocate on record on the October 19, 2022. Ms. Moolraj relied on her written submissions, list, and bundle of authorities, and the supporting affidavits filed by the respondent. Ms. Moolraj urged that the letter served upon them by the appellant's advocate requested for judgment of the trial court, and not the proceedings. That further they are applying under Rule 85 of the Rules to have the appeal be deemed as withdrawn, and that in the circumstances the application is not incompetent. Counsel relied on the case of *Tharaka Nithi County Government & another v Gaichu & 120 others* [2022] KECA 585 and *Muzaffer Musafee Essajee & another v Anne Njeria Mwangi* [2021] eKLR for the proposition that a certificate of delay could not assist the appellant to circumvent compliance with the rule where there was no letter seeking proceedings.
5. We have considered the application together with the submissions by both the respondent and the appellant. The only issue in this matter is whether the appeal should be deemed as withdrawn as provided under Rule 85 of the Rules. The respondent's contention is that since the appellant applied for typed judgment of the trial Court, but did not request for the proceedings it cannot rely on Rule 85 of the Rules. Reliance was placed on two authorities *Tharaka Nithi County Government & another v Gaichu & 120 others* [2022] KECA 585 and *Muzaffer Musafee Essajee & another v Anne Njeria Mwangi* [2021] eKLR. We read the two rulings. The case of *Tharaka Nithi County Government, supra*, is distinguishable from the instant one as the appellant did not serve upon the Respondent the letter to the Deputy Registrar (DR) re-speaking of the proceedings despite having written to the DR, and in *Muzaffer Musafee Essajee & another*, the intended appellant only filed and served a notice of appeal.
6. The application has been brought under Rules 84, 85 and 86 of the Rules. Rule 84 gives the time within which an appeal should be lodged, while Rule 85 is the deeming Rule, which provides that where no appeal is filed within the prescribed time, an intended appellant 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. Rule 86 gives a Respondent in the intended appeal the leeway to apply to the court to strike out the notice 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 is a proviso to this Rule that the application should itself be brought within 30 days from date of service with the notice of appeal.

7. The Respondent beat a retreat urging that they were not relying on Rule 86, but on Rule 85. Having cited both provisions as the basis of its application, it cannot be heard to abandon the basis of its application mid-stream. This Court has held that the timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us in numerous decisions and that the Rules are expressed in clear and unambiguous terms and they command obedience. In *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others* (2016) eKLR this Court explained as follows in this regard:

“This court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima*



Nyaboke Nyamweya & another [2016] eKLR, this court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this court's Rules.

An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the *Joyce Bochere case (supra)*, stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court's Rules. Similarly, in *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* [2014] eKLR, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo v Board of Trustees of National Social Security Fund* [2014] eKLR." The instant application is therefore clearly incompetent, as it is filed out of time in violation of the proviso to Rule 84, having been lodged on April 14, 2021, after almost two years since the Applicant was served with the Notice of Appeal on June 6, 2019. The Applicant did not bring any evidence of having been granted extension of time to file the said application, and it is therefore amenable for striking out."

8. 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 to strike out the Notice of Appeal. The court in that case reasoned as follows on the application of Rule 83;

"We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses. Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged *ex abundanti cautella* by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences."

9. It is our view that the provisions of Rule 85 are predicated on the existence of circumstances from which this court can deem that the notice of appeal has been withdrawn, and if there are circumstances to the contrary, then the court cannot so deem.

The term "deem" is defined in the *Black's Law Dictionary* Tenth Edition as "to treat something as if (1) it were really something else, or (2) it has qualities it does not have" and proceeds to offer the following explanation: "Deem has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by deeming something to be what it is not, or negatively by deeming something not to be what it is ...".

10. The appellant has already instituted the substantive appeal, as the Director of the appellant averred in the replying affidavit. The respondent has not challenged this. The appellant has not only taken steps towards the appeal being lodged but has taken steps to institute the same. We are of the view that



the institution of the substantive appeal removes it from the deeming purview of Rule 85, and that therefore the respondent cannot rely on that Rule. See *Esther Anyango Ochieng v Transmara Sugar Company* [2020] eKLR.

11. Having considered the application dated September 22, 2021, we find that it has no merit and do proceed to dismiss it with costs to the appellant. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

