Waweru & another v Kinuthia (Civil Application E017 of 2022)
[2023] KECA 476 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 476 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E017 OF 2022

FA OCHIENG, LA ACHODE & WK KORIR, JJA

MAY 12, 2023

BETWEEN

MICHAEL WAWERU ..... 1ST APPLICANT

PHILISIA NYAMBURA ..... 2ND APPLICANT

AND

GRACE NYOKABI KINUTHIA ..... RESPONDENT

(An application on an appeal from the Judgment of the Environment and Land Court of Kenya at Nakuru (S. Munyao, J.) dated 31st October, 2017 in ELC Case No. 40 of 2013)

RULING

1. The Notice of Motion application before us is dated 5th April, 2022 under Rule 83 of the Court of Appeal Rules, 2010.

2. The application seeks orders that; the notice of appeal dated 6th November, 2017 and filed on 8th November, 2017 be deemed to have been withdrawn, and an order that the costs of and incidental to this application be awarded to the respondent.

3. The application is premised on the grounds that: judgment was delivered on 31st October, 2017; the respondent filed a Notice of Appeal on 8th November, 2017; the respondent has not applied for copies of proceedings or a certified copy of the judgment to prepare the record of appeal; the respondent has not filed the record of appeal almost four years after filing the Notice of Appeal; and that it would be in the interest of justice that the orders sought be granted.

4. The application was further supported by the affidavit of Michael Waweru in which he reiterated the grounds on the face of the application.

5. The applicants relied on the provisions of Rule 83 of the *Appellate Jurisdiction Act* which is non-existent. We can only presume they intended to rely on Rule 83 of the Court of Appeal Rules, 2010. They maintained that the application is not opposed.

6. We have considered the application and the applicants' sole submissions. Rule 83 of the Court of Appeal Rules provides:

> " 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who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party, make such order.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 on any persons on whom the notice of appeal was served."

7. This being an application to deem the Notice of Appeal filed herein as withdrawn, Rule 83 has to be considered together with Rule 82 which provides:

> 82
>
> (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –
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> a. a memorandum of appeal, in quadruplicate;
>
> b. the record of appeal, in quadruplicate;
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> c. the prescribed fee; and
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> 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 of 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 his application for such copy was in writing and a copy of it was served upon the Respondent.
>
> 3. ...

8. This Court in the case of *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others* [2016] eKLR addressed itself on the intent and purport of Rule 82 of this Court's Rules as follows:

> " That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken

the proceedings within thirty days and served the letter upon the Respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days."

9. Similarly, in the case of *Mae Properties Limited v Joseph Kibe* [2017] eKLR the Court stated thus:

> " 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 lodgement 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. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo motu, on its own motion and at its sole discretion, presumably with neither notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure. 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 made the order deeming the notice of appeal as withdrawn."

10. The Court further addressed itself on the intent and purport of Rule 83 in the case of *John Mutai Mwangi & 26 Others* (supra), 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".

11. From the foregoing, we find that the respondent was obligated to process the filing and service of the record of appeal within sixty (60) days as stipulated in Rule 82(1) or alternatively within the time envisaged in the proviso to the said rule. No such efforts were made.

12. This prompted the applicants to file the present application seeking to have the notice of appeal deemed as withdrawn under Rule 83.

13. Guided by the decision in the case of *Martin Kabaya v David Mungania Kiambi*, Nyeri Civil Application No. 12 of 2015 in which the Court stated that:

> "The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog."

14. We find that the law has to take its own course. We allow the application dated 5th April, 2022 as prayed with costs.

Orders accordingly.

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

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR