Moses (Administratrix of the Estate of Moses Kioi Muturi) v Kinyanjui & 2 others (Civil Application 62 of 2019) [2023] KECA 796 (KLR) (30 June 2023) (Ruling)

Neutral citation: [2023] KECA 796 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION 62 OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JUNE 30, 2023

BETWEEN

JANE KIRIGO MOSES (ADMINISTRATRIX OF THE ESTATE OF MOSES KIOI MUTURI) ..... APPLICANT

AND

OLIVE WAMUHU KINYANJUI ..... 1ST RESPONDENT

LUCY WANJIRU NYAGA (ADMINISTRATRIX OF THE ESTATE OF JOSEPH NYAGA WAMBITI) ..... 2ND RESPONDENT

CYRUS NGUGI MUGONYA ..... 3RD RESPONDENT

(An application to withdraw the Notice of Appeal from the Judgment of the Environment and Land Court of Kenya at Nakuru (S. Munyao, J.) dated 1st October, 2019 in ELC Case No. 248 of 2013)

RULING

1. The application before us is dated December 19, 2019 under Rules 1(2), 82(1) & (2) and 83 of the *Court of Appeal Rules, 2010* and Sections 3(1) & (2), 3A and 3B of the *Appellate Jurisdiction Act*

2. The application seeks orders that; the Notice of Appeal dated October 1, 2019 and filed on October 11, 2019 be deemed to have been withdrawn by the 2nd and 3rd respondents; and for costs of the application to be borne by the 2nd and 3rd respondents.

3. The application is supported by the applicant's affidavit and on the grounds on the face of the application that: on October 1, 2019 judgment was delivered in favour of the applicant and the 1st respondent; aggrieved, the 2nd and 3rd respondents lodged the impugned Notice of Appeal, but they have never filed and served any letter bespeaking proceedings; the 2nd and 3rd respondents have not instituted an appeal within the time prescribed by Rule 82(1); due to the non-compliance with the

mandatory requirements of Rule 82(1), the 2nd and 3rd respondents are barred by Rule 82(2) from invoking the proviso to Rule 82(1), and therefore they cannot institute a competent appeal; the applicant is desirous to have the dispute over land parcel no LR No 1144/325, hereinafter "the suit land" come to an end, and for the impugned judgment executed to the effect that the suit land is registered in the 1st respondent's name; and that it is necessary for the Notice of Appeal to be deemed as withdrawn as the proceedings by the 2nd and 3rd respondents are comatose.

4. The 2nd respondent in her replying affidavit stated that: the application was bad in law and an abuse of the court process; her advocates filed and served the letter requesting for certified copies of proceedings and judgment as per annexure LWN1; her advocates paid for the proceedings and they were issued with a receipt; there was full compliance with Rule 82(2); once the proceedings are ready for collection, her advocates will be advised by the Deputy Registrar in writing; the Deputy Registrar is also required to prepare a certificate of delay pursuant to Rule 82; the certificate of delay will form part of the record of appeal; the process of preparing certified proceedings is beyond her control; she is keen on having the appeal heard and determined; and that the application lacks merit and should be dismissed with costs.

5. In his replying affidavit, the 3rd respondent reiterated the contents of the 2nd respondent's affidavit.

6. Counsel for the applicant in his supplementary affidavit stated that: he has a register in his office in which documents served are recorded and given serial numbers; on November 1, 2019 a Notice of Appeal dated October 1, 2019 was served upon his firm and was given serial number 52; on January 29, 2020 when he was served with the replying affidavits, he was surprised to learn that a letter dated October 1, 2019 had purportedly been received by his firm on November 1, 2019; no letter bespeaking proceedings was served upon his firm, had it been served, it would have been given a serial number and registered; he then wrote to the accountant, Nakuru Law Courts to verify the authenticity of the receipt, and to the Deputy Registrar requesting to be furnished with a letter bespeaking the proceedings; on March 12, 2021 he wrote a reminder to the Deputy Registrar; he also wrote to the 2nd and 3rd respondents' advocates and copied the letter to the 1st respondent's advocates, requesting to inspect the original letter dated October 1, 2019; on March 17, 2021 he received a letter from the 1st respondent's counsel who raised the same concerns he was raising; on March 24, 2021 he wrote to the 2nd and 3rd respondents' counsel informing them that failure to respond to his letter was an indication that, the original letter did not exist; nothing has stopped the 2nd and 3rd respondents from providing the original letter for inspection, and safaricom records to verify the transaction made; the receipt for the decree dated October 29, 2019 appears to have an earlier serial number than the receipt for the proceedings; had his firm been served with the letter bespeaking proceedings, he would not have had a reason to file an application to deem the Notice of Appeal as withdrawn; it is within his knowledge that proceedings in the ELC are typed at the end of each day, and are available almost immediately upon request, and that the 2nd and 3rd respondents are not keen on following up on the same; a certificate of delay was ready for collection on October 13, 2022; the 2nd and 3rd respondents have never filed their appeal since then; the last day for filing the appeal after obtaining the certificate of delay was December 13, 2022; and the issues in the supplementary affidavits have not been controverted.

7. At the hearing of the application, counsel for the parties relied on their written submissions.

8. Counsel for the applicant submitted that, Rule 82 stipulates that an appeal should be instituted within 60 days of the date when the Notice of Appeal was lodged while Rule 83 stipulates that where a party fails to lodge 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.

9. Counsel contested the alleged service of the letter bespeaking proceedings. He relied on his supplementary affidavit dated March 25, 2021 on the issue. Counsel relied on the decision in the case

of *Republic vs Chief of General Staff & Another* [2017] eKLR on the effect of failing to rebut the averments in an affidavit.

10. Citing the case of *Mae Properties Ltd vs Joseph Kibe & Another* [2017] eKLR, counsel submitted that, the 2nd and 3rd respondents lodged a Notice of Appeal on October 11, 2019 and served the same upon the applicant and the 1st respondent in contravention of Rule 77(1). The letter bespeaking proceedings was not served yet the 2nd and 3rd respondents were obliged to strictly comply with the mandatory requirements of Rule 82(1) to institute their appeal within 60 days of lodging the Notice of Appeal being on or before December 10, 2019.

11. Counsel maintained that the 2nd and 3rd respondents were supplied with typed proceedings on September 22, 2022. They applied for a certificate of delay and the same was issued on October 13, 2022. They were to institute an appeal within 60 days of receipt of the certificate of delay. The time for instituting the appeal lapsed on December 13, 2022. The 2nd and 3rd respondents are barred by Rule 82(2) from instituting a competent appeal. The Notice of Appeal should be deemed to have been withdrawn, and he prayed for costs pursuant to Rule 83.

12. Counsel for the 1st respondent relied on the submissions by counsel for the applicant in support of the application. The 2nd and 3rd respondents did not submit.

13. We have considered the application, affidavits, submissions, authorities cited and the law. The issue for determination is whether this application is meritorious.

14. Rule 83 of the Court of Appeal Rules provides that:

> " 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."

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

> " 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 –

a. a memorandum of appeal, in quadruplicate;

b. the record of appeal, in quadruplicate;

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-rule1

(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. ..."

16. This Court in the case of *John Mutai Mwangi & 26 Others vs Mwenja Ngure & 4 Others* [2016] eKLR addressed itself on the intent and purport of Rule 82 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."

17. Similarly, in the case of Mae Properties Limited vs Joseph Kibe (*supra*), 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 moto, 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 make the order deeming the notice of appeal as withdrawn."

18. 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... 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."

19. In the present application, the 2nd and 3rd respondents lodged their Notice of Appeal dated October 1, 2019 on October 11, 2019. They annexed a letter bespeaking proceedings dated October 1, 2019 bearing the stamps of the applicant's and the 1st respondent's counsel as proof of service. The said service is disputed by the applicant and the 1st respondent. The applicant's efforts to obtain the original letter have been in vain. The allegations surrounding the authenticity of the said letter remain uncontested. The applicant further noted that even after proceedings and a certificate of delay were provided, the 2nd and 3rd respondents have still not filed their appeal.

20. From the foregoing, we find that the 2nd and 3rd respondents were 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.

21. This prompted the applicant to file the present application seeking to have the notice of appeal to be deemed as withdrawn under Rule 83.

22. We are 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."

23. We hold that the law has to take its own course. We allow the application dated December 19, 2019 as prayed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF JUNE, 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