



REPUBLIC OF KENYA



KENYA LAW
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**Gamma Villa Limited v Kenya Ports Authority (Civil Application
E068 of 2022) [2023] KECA 921 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 921 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E068 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

GAMMA VILLA LIMITED APPELLANT

AND

KENYA PORTS AUTHORITY RESPONDENT

(An application to deem as withdrawn the Notices of Appeal dated 8th June 2022 and Lodged in the High Court at Mombasa on 10th June 2022 in High Court Miscellaneous Civil Suit No 207 of 2021 and High Court Miscellaneous Civil Suit No E234 of 2021)

RULING

ARGUMENTS

1. Kenya Ports Authority, the applicant herein, has filed an application dated October 14, 2022, seeking an order that the two notices of appeal both dated June 8, 2022, and lodged by Gamma Villa Limited (the appellant and respondent herein) in the high court of Mombasa on June 10, 2022 in Mombasa high court Miscellaneous Suit No 207 of 2021 and Mombasa high court Miscellaneous Civil Suit No E234 of 2021, be deemed to have been withdrawn. The grounds upon which the application is based are detailed in the supporting affidavit sworn on September 28, 2022 by Stephen Kyandih, a senior legal officer in the applicant's dispute resolution department.
2. The applicant avers that a ruling was delivered on May 25, 2022 by Sewe J. which struck out the respondent's application dated September 29, 2021 filed in Mombasa high court Miscellaneous Suit No 207 of 2021, and allowed the applicant's application dated October 28, 2021 filed in Mombasa high court Miscellaneous Civil Suit No E234 of 2021. That the respondent thereupon lodged two notices of appeal on June 10, 2022 without an accompanying application for the proceedings of the high court, and has failed to institute the appeal within the required sixty (60) days of lodging the notice of appeal, namely by August 15, 2022. Therefore, the consequence of such failure was that the notice



of appeal stood withdrawn. Further, the respondent's delay was inexcusable and extremely prejudicial to the applicant and it was in the interest of expeditious administration of justice that the application is allowed. The applicant annexed copies of the notices of appeal.

3. The respondent in response filed a replying affidavit and further affidavit sworn on March 8, 2023 and March 15, 2023 respectively by Dr Francis Kiranga, its managing director. The respondent stated that its application dated September 29, 2021 filed in MSA HC MISC. Civil Application No E207 of 2021 that was struck out was an enforcement application of an arbitral award, while the applicant's application dated October 28, 2021 filed in MSA HC MISC Civil Suit No E234 of 2021 which was allowed was a setting aside application, and resulted in the setting aside of a final arbitral award. Being aggrieved by the rulings, the respondent filed notices of appeal in the said suits, and in light of the decision by the supreme court of Kenya in [*Nyutu Agrovet Limited v Airtel Networks Kenya limited & Chartered Institute of Arbitrators, Kenya*](#), sought leave to file an appeal against the rulings in an application filed in the high court on July 21, 2022 that is pending hearing, and whose existence has not been disclosed by the applicant in the application filed in this Court.
4. The respondent avers that where an appeal to this court lies subject to leave of the high court, an appellant can file a notice of appeal prior to the grant of such leave under rule 75 of the [*Court of Appeal Rules 2010*](#) but cannot file the record of appeal before the said leave is granted, since this court would not have jurisdiction. Therefore, that the notice of motion application dated October 14, 2022 was premature, since the failure by the Appellant to file its record of appeal within the 60 days was on account of a legal preclusion which would render such record a nullity, if it is filed before the grant of the leave to appeal. In addition, that the respondent herein cannot be deemed to have withdrawn its appeal, as its actions are demonstrative of a party who was keen to appeal and granting the orders sought in the notice of motion dated October 14, 2022, would be tantamount to driving the appellant away from the seat of justice, summary determination of its intended appeal and breach of its constitutional rights as protected by the guarantees under the provisions in article 47 of the [*Constitution*](#) on fair administrative action, article 48 on access to justice, and article 50 (1) on the right to a fair trial.
5. The respondent gave detailed reasons why its intended appeal was arguable with overwhelming chances of success, and therefore deserved an opportunity to have its grounds of appeal heard and determined before this court subject to granting of leave to appeal. Moreover, that the grant of leave would pave way for the filing an application for extension of time to file the record of appeal, and the respondent was in the process of filing the said application under rule 4 of the [*Court of Appeal Rules of 2022*](#).
6. During the virtual hearing of the application held on March 27, 2023, learned counsel Mrs Akwana appeared for the applicant, while learned counsel Ms Ongeso, holding brief for learned counsel Mr Karega, appeared for the respondent. Mrs Akwana highlighted written submissions dated March 16, 2023 in which the averments reproduced hereinabove by the applicant were reiterated, and reliance was placed on rule 82 of the [*Court of Appeal Rules of 2010*](#) and various judicial decisions if this Court including [*Mae Properties Ltd v Joseph Kibe and another*](#) [2017] eKLR, [*John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 others*](#) [2016] eKLR and [*Charles Wanjohi Wathuku v Gitbinji Ngure and Another*](#) [2016] eKLR to submit that a notice of appeal dies a natural death after the expiry of 60 days, the respondent did not deny that it did not make nor serve the applicant with an application for the proceedings as required under the proviso to rule 82 of the [*2010 Rules*](#), and that timelines are not technicalities of procedure which may be accommodated under article 159 of the [*Constitution*](#) or sections 3A and 3B of the [*Appellate Jurisdiction Act*](#).
7. Ms Ongeso on her part informed the Court that the respondent had since filed an application dated March 14, 2023 for extension of time to file the record of appeal namely Civil Application No 22 of 2023, and sought to have the said application heard with the instant one. The court in declining the



request noted that the said application was a single Judge application and was not listed for hearing before the bench. The counsel thereupon relied on submissions dated March 24, 2023 in which the decisions in *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* (2016) eKLR and *Esther Anyango Ochieng v Transmara Sugar Company* [2020] eKLR were cited on the rationale of "the deeming provision" under rule 83 of the *Court of Appeal Rules, 2010* and submission that the intent to appeal cannot be deemed abandoned when the appeal itself has in fact and substance been instituted, and that the appellant clearly does not fall within the category of litigants described in *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* (*supra*), who file notices of appeal with no real intention of actually pursuing an appeal. That the Appellant's actions, to the contrary, are of a litigant who is keen to pursue an appeal but is precluded from filing a record of appeal because it must first obtain leave of court.

8. Reliance was in this respect placed on the decision by the supreme court of Kenya in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited and Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* (2019) eKLR, that an appeal may lie from the high court to the court of appeal on a determination made under section 35 of the *Arbitration Act* where the high court in setting aside an arbitral award, has stepped outside the grounds set out in the said section and that this jurisdiction was circumscribed and narrow and should be sparingly exercised and only in the clearest of cases should the court of appeal assume jurisdiction by way of a leave mechanism. The counsel submitted that while there is no "leave mechanism" in the *Arbitration Act* as relates to appeals from decisions on setting aside arbitral awards, section 75(1) of the *Civil Procedure Act* provides that where leave is required, it shall be sought from the court making such order in the first instance, and that it is not in dispute an application seeking leave to appeal to this court is pending before the high court. We were urged to consider this reason for the delay in filing a record of appeal, and to rise to the occasion as a court of equity under article 10(2)(b) of the *Constitution* and apply the overriding objective in section 3A of the *Appellate Jurisdiction Act* by providing an equitable determination and delivering substantive justice as opposed to a technical application of the rules. The decisions in *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR and *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* (2014) eKLR were cited in this regard.
9. It is not in dispute that 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 (60) days of the date when the notice of appeal was lodged. The provision 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 of the proceedings, where an application for the proceedings was made within thirty (30) 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 the proceedings was in writing and a copy of it served on the respondent. Similar provisions are now found in rule 84 of the *Court of Appeal Rules, 2022*.
10. This court has the power and discretion, either on application or on its own motion as was held in the case of *Mae Properties Limited v Joseph Kibe & another* [*supra*], 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.

11. The provisions of rule 83 of the [Court of Appeal Rules, 2010](#) and rule 85 of the [Court of Appeal Rules 2022](#) are predicated on the existence of circumstances from which the court can deem that a notice of appeal had been withdrawn. It is our view that such circumstances do exist in the instant application, for two reasons, Firstly the steps that are required to be taken in instituting an appeal are those required by this [Court's Rules](#), and the [Civil Procedure Act](#) and [Rules](#) do not apply in this regard. Secondly, no such steps namely, those of seeking typed proceedings, issuance of a certificate of delay, and filing of the record of appeal have been demonstrated by the respondent, and the reasons for the delay proffered are only relevant in its application for extension of time, which is not before this court for determination. Since the relevant facts in this application have not been demonstrated, the notices of appeal filed by the respondent can be deemed to have been withdrawn.
12. We need to emphasise in this respect, as has been done many times before by this court that the timelines for the taking of certain steps are indispensable to the proper adjudication of the appeals that come before us, and that the [Rules](#) are expressed in clear and unambiguous terms and command obedience. See the decisions in [Salama Beach Hotel Limited & 4 Others v Kenyariri & Associated Advocates & 4 others](#) (2016) eKLR and [Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another](#) [2016] eKLR.
13. We therefore find that the applicant's notice of motion application dated October 14, 2022 is merited, and we accordingly deem as withdrawn the two notices of appeal both dated June 8, 2022, lodged by Gamma Villa in the high court of Mombasa on June 10, 2022 in Mombasa high court Miscellaneous Suit No 207 of 2021 and Mombasa high court Miscellaneous Civil Suit No E234 of 2021. The applicant is awarded the costs of the application dated October 14, 2022.
14. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I Certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

