



REPUBLIC OF KENYA



KENYA LAW
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**Swaleh v Ndivo (Civil Appeal (Application) E080 of 2022)
[2023] KECA 1068 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1068 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E080 OF 2022
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
SEPTEMBER 22, 2023**

BETWEEN

NABHAN SWALEH APPLICANT

AND

RHODAH NDIVO RESPONDENT

(An application that the record of appeal be struck out and the notice of appeal against the judgment of the Environment and Land Court at Mombasa (Yano, J.) delivered on 25th September 2022 be deemed as withdrawn)

RULING

1. In his application dated September 30, 2022, the applicant, Nabhan Swaleh, seeks an order that the record of appeal served on him on September 8, 2022 be struck and that the notice of appeal dated September 9, 2018 be deemed as withdrawn by operation of the order of this court given on July 22, 2022.
2. The background, in brief, is that the Environment and Land Court (ELC) delivered judgment on September 25, 2018 allowing the applicant's suit for specific performance against the respondent, Rhoda Ndivo, who was ordered to transfer to the applicant a property known as title number Mombasa/Block XI/613 Mombasa Island. An award of general damages in favour of the applicant was also granted. Dissatisfied, the respondent filed a notice of appeal dated September 9, 2018 which was lodged before the ELC.
3. Disturbed by the delay of over 20 months in filing of the record of appeal, the applicant moved this court by his application dated June 8, 2020 to have the said notice of appeal be deemed as withdrawn or alternatively struck out. In its ruling delivered on July 22, 2022 in respect of that application, this court ordered that the respondent's notice of appeal would be deemed withdrawn in the event of failure by



- the respondent to file and serve a competent record of appeal within 45 days from the date of that ruling.
4. It is on account of non-compliance with that order by the respondent, that the applicant is now before us with the present application dated September 30, 2022, seeking, as already indicated, an order that the notice of appeal is deemed as withdrawn by operation of that court order and for the record of appeal herein served on the applicant on September 8, 2022 be struck out.
 5. We heard the application on March 28, 2023. Mr S. M Kimani learned counsel appeared for the applicant. Mr Otieno learned counsel, appeared for the respondent. Learned counsel Mr S. Khagram indicated to court that he was appearing for Kenya Ports Authority, an interested party whom he stated was the head lessor of the suit land.
 6. It was submitted that the the respondent failed to serve the impugned memorandum and record of appeal within 45 in accordance with the orders of this court made on July 22, 2022 and consequently, by operation of the court order, the notice of appeal is withdrawn and that without the notice of appeal, the record of appeal cannot stand.
 7. Other grounds on which the application is based include complaints that the record does not contain a certified decree or a competent decree and a statement showing the address for service of the appellant. The court was invited to consider the case of *Ketteman v Hansel Properties Ltd* (1988) 1 All E.R 38.
 8. In a replying affidavit sworn on March 22, 2023 in reply to the application, William O. Wameyo, advocate for the respondent, concedes that pursuant to the orders of the court given on July 22, 2022, the appeal should have been filed and served within 45 days from July 22, 2022 but that “by inadvertent mistake” there was failure to note that the order required service to be effected within the period of 45 days and that there was a delay of two days to do so and that “we moved the court to extend time and deem the record of appeal as duly served.” That latter claim was however unsubstantiated during the hearing of the application with Mr Kimani pointing out that no such application had been served.
 9. Counsel for the respondent submitted that the circumstances do not warrant the striking out of the appeal. Citing the case of *Esther Anyango Ochieng v Transmara Sugar Company* (2020) eKLR, it was urged that a notice of appeal cannot be deemed as withdrawn where, as here, there is already a record of appeal filed.
 10. We have considered the application, the affidavits, and the submissions. As already indicated, in its ruling of July 22, 2022, the court in declining to strike out the respondent’s notice of appeal ordered the respondent to file and serve her record of appeal within 45 days. In doing so, the court expressed as follows:

“Given the long period of inactivity on the part of the respondent as indicated above, the order that commends itself to us is to order, which we hereby do, that unless the respondent files and serves a competent record of appeal within 45 days from the date of delivery of this ruling, the notice of appeal shall, without further ado, be deemed to have been withdrawn.”
 11. The respondent has conceded that there is noncompliance with that order and that she defaulted in serving the record of appeal within the period provided. By the self- executing terms of the order of this court of July 22, 2022, the notice of appeal stood withdrawn upon default without further ado.
 12. Timelines prescribed by the rules of the court and by orders of the court are indispensable to the proper adjudication of appeals. See for instance the decisions of this Court in *Borderless Tracking Limited v Thigah* (Civil Application E035 of 2021) [2022] KECA 38 (KLR) (4 February 2022) (Ruling) and



Nakuru Water & Sanitation Company Ltd v Asanyo & 2 others (Civil Appeal (Application) 116 of 2018) [2022] KECA 139 (KLR) (18 February 2022) (Ruling).

13. Although the respondent asserts, an assertion contested by the applicant, that it moved the court with an application for extension of time, no such application is exhibited. Counsel for the respondent was unable provide details of such application when tasked to do so at the hearing of this application. There appears to be lack of candor on the part of the respondent in that respect. Nonetheless, no extension of time was demonstrated to have been granted regarding the service of the record of appeal out of the time prescribed by the court.
14. In the result, the applicant's application dated September 30, 2022 succeeds. The respondent's notice of appeal is by operation of the court order given on July 22, 2022 withdrawn and the record of appeal served outside the prescribed period is hereby struck out. The applicant will have the costs of the application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

