



**Geteria v Embu County Government & 3 others (Civil Application
176 of 2019) [2023] KECA 1593 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1593 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 176 OF 2019
W KARANJA, J MOHAMMED & LK KIMARU, JJA
OCTOBER 27, 2023**

BETWEEN

MUNDIA NJERU GETERIA APPLICANT

AND

EMBU COUNTY GOVERNMENT 1ST RESPONDENT

HON. MARTIN NYAGAH WAMBORA 2ND RESPONDENT

RUTH NJOKI MOSES 3RD RESPONDENT

SECILY WANJA NAMU 4TH RESPONDENT

*(Being an application seeking to strike out the Notice of Appeal filed on 30th
November, 2015 against the decree and judgment of the ELRC Court at Nyeri
(B.Ongaya, J.) dated 20th November 2015 in Nyeri ELRC Petition No. 5 of 2015)*

RULING

1. Before us is a Notice of Motion application dated 22nd November 2019, brought under sections 3,3A & 3B of the [Appellate Jurisdiction Act](#), Rule 82(1) and (2) and Rule 84 of the [Court of Appeal Rules 2010](#) (the court rules). The applicant entreats this Court to strike out the notice of appeal dated 30th November, 2015 and filed on the same day. The intended appeal is from the judgment and decree of the Employment and Labour Relations Court (ELRC) at Nyeri delivered by B. Ongaya. J. on 20th November, 2015.
2. The application is premised on grounds that vide the said judgment the applicant was reinstated to his position as the Chairman-Embu County Public Service Board and he awarded damages to the tune of Kshs 5,000,000 which was to be paid by the 1st January, 2016. Aggrieved by this decision the respondents filed the notice of appeal within time, but it was not until 5th of May, 2016 that they requested for typed proceedings and a certified copy of the judgment to enable them file the record of



appeal. The Notice of Appeal was served upon the applicant on the 31st May, 2017, over 5 months out of time and without leave of the Court. On the other hand, the record of appeal ought to have been filed within sixty days of the date when the Notice of Appeal was lodged as provided under rule 82(1) of the *Court of Appeal Rules*, but the same has not been filed to date.

3. According to the applicant, the respondents are yet to follow up on the typed proceedings from the Deputy Registrar, three years later, thus showing their lack of interest to pursue the appeal. In addition, the respondents' conduct in the manner they have handled their timeously initiated appellate process amounts to unreasonably preventing the applicant from enjoying the fruits of the judgment delivered in his favour; and lastly that it is in the interest of justice that the notice of appeal dated 30th November, 2015 is struck out.
4. The application is supported by the affidavit of Mundia Njeru Geteria, which affidavit merely reiterates the grounds in support of the motion as adverted above.
5. The respondents did not file a replying affidavit to the motion and neither did they file any submissions. The applicant filed his written submissions as directed by the Court. When the matter came up for plenary hearing on the 20th February, 2023, neither the parties nor their counsel appeared in Court despite service of the hearing notice.
6. As the applicant had filed his submissions, his absence from Court was not fatal and the application would be considered on the basis of the said submissions. The applicant submits that the respondents have failed to comply with rule 82(1) of the *Court of Appeal Rules 2010*, which obligated them to file the record of appeal within sixty days of the date of the lodging of the impugned notice of appeal. The respondents also failed to serve the said notice upon them within the timelines set out in the Court rules. The letter bespeaking proceedings was not served on them until 5th May, 2016. The applicant reiterates that for the foregoing reasons, the respondents cannot seek solace in rule 82(1) of the *Court Rules*, and the notice of appeal is for striking out
7. Furthermore, having failed to institute an appeal after the filing of the notice of appeal, it was deemed withdrawn pursuant to rule 83 of the *Court Rules*. The applicant has placed reliance in the decision *Kenya Industrial Estates Limited v Anne Chepsiror & 4 others* [2018] eKLR in support of his argument and urges us to allow the application.
8. We have considered the application before us along with the said submissions and the relevant law. We note that the application is not opposed, and given the blatant disregard of the court rules, we are not surprised. The rules are crystal clear on the procedure and timelines to be observed in the filing of an appeal before this Court. Other than filing the notice of appeal on time, the respondents did not comply with any other applicable rules.
9. Under rule 82(1) of the *Court of Appeal Rules 2010*, an appeal is required to be instituted within sixty days from the filing of the notice of appeal. However, by the proviso to that rule, the time certified by the Deputy Registrar as having been required to prepare and certify the typed proceedings is excluded from the computation of time if an appellant applies in writing for a copy of proceedings within 30 days of the judgment and the letter is copied and served on the other party within the same timelines. This Court has already pronounced itself on consequences for non-compliance with the pre-requisites in Rule 82(1) and (2) of the *Rules*. For instance, in *Mae Properties Limited v Joseph Kibe & another* [2017]eKLR the Court expressed itself as follows:

“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 by an order extending the 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 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”

10. Further, rule 83 provides that the notice of appeal is deemed withdrawn if the appeal is not instituted within the prescribed time. In the case of *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* (2016) eKLR, this Court expressed itself as follows on the intent and purport of rule 83.

“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. In this case, as stated earlier, other than filing the notice of appeal on time, the appellants did not comply with any of the other rules. This they do not deny, and so we do not have to belabour the issue. In absence of extension of time as provided for under rule 4 of the Court rules, the intended appeal is dead and buried and our duty at this point is to pronounce it as such.
12. We find this application meritorious and allow it with the result that the notice of appeal filed on 30th November, 2015 is hereby deemed as withdrawn with costs to the applicant.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF OCTOBER, 2023.

W. KARANJA

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JUDGE OF APPEAL



JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

