



**Obya v Handicap International (Civil Application E016 of 2023)
[2023] KECA 1251 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1251 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E016 OF 2023
F TUIYOTT, JA
OCTOBER 6, 2023**

BETWEEN

JARED INGLING OBYA APPLICANT

AND

HANDICAP INTERNATIONAL RESPONDENT

(An application under Rules 4, 83, and 84 of the Court of Appeal Rules and all other enabling provisions of the law seeking to deem the notice of motion dated 10th March 2021 as withdrawn, arising from the Judgment of the Employment and Labour Relations Court at Kisumu (Mathews N. Nduma, J) delivered on 4th March 2021 in ELRC Cause No. 296 of 2018)

RULING

1. One prayer in the notice of motion dated February 2, 2023 cannot be heard by a single judge, and in any event has been rendered redundant.
2. The prayer in which this court is asked to deem the notice of appeal dated March 10, 2021 as withdrawn is in the province of a full bench and I, sitting alone, is bereft of jurisdiction to entertain it (see the decision of K. M'noti JA in *Imperial Bank Limited (In Receivership) & another v Alnashir Popat & 18 others* [2018]. Even if I was properly seized of the matter, the prayer is not for granting because an appeal for which the notice of appeal was a foreshadow has since been filed on April 11, 2023. The decision of Kiage, J in *Esther Anyango Ochieng v Transmara Sugar Company* [2020] eKLR explains why the prayer would not be grantable;

“Where, however, as in the present case the appeal has in fact been instituted, can we in clear conscience, without a dalliance with the surreal, nevertheless pronounce that the appellant’s notice of appeal is deemed to be withdrawn” I respectfully do not think so. I cannot shut my eyes to the fact that the appeal, the future filing of which was signified by the notice of appeal, in fact exists in verity. I would be engaging in smoke and mirrors and allowing the



shadows to swallow the substance were I to essentially pretend that the respondent has no interest in filing an appeal that he has in fact filed. To so hold does not involve a validation of the said record of appeal and a cure for any defects it may have and which may well be the subject of attack. It only amounts to this: the existence of a record of appeal, which facially means that the appeal has been instituted, removes the said notice of appeal from the deeming purview of Rule 83. To deem, after all, is no more than to regard or consider something in a particular way that may not be the reality but only a legal fiction. And I cannot fictitiously consider the intent to appeal to be abandoned when the appeal itself has in fact and substance been instituted.”

3. The other prayer is for this court to grant the applicant leave to file an application to strike out the notice of appeal dated March 10, 2021 out of time. At the heart of the application is that the respondent failed to take any steps towards institution of an appeal notwithstanding that the Deputy Registrar of the superior court below informed counsel for the respondent that the typed proceedings were ready for collection through a letter of January 28, 2022. The leave is sought because rule 86 the *Court of Appeal Rules, 2022* (rule 84 of the previous Rules) requires that such an application be filed within 30 days from the date of service of the notice of appeal.
4. The gist of the application is that once judgment was delivered in Kisumu ELRC Cause No 296 of 2018 on March 4, 2021, the respondent lodged a notice of appeal at the Employment and Labour Relations Court evincing its intention to appeal against the whole decision of Nduma, J and similarly applied for proceedings *vide* letter dated March 12, 2021. The respondent also filed an application for stay of execution and also sought that the decretal sum be deposited in court.
5. The Deputy Registrar informed the parties that the typed proceedings were ready vide a letter dated January 28, 2022. The letter, however, was addressed to the respondent’s former counsel who were no longer on record. Vide a letter of March 14, 2022, the applicant’s advocates took it upon themselves to inform the current advocates for the respondent that the proceedings were ready. It is the applicant’s contention that regardless of his counsel’s gesture of good faith, the respondent’s current advocates retorted that it was the duty of the court to inform them that the proceedings were ready and not of the applicant’s counsel. The applicant contends that it has been close to a year since his counsel informed the respondent’s counsel on the readiness of the proceedings but the respondent has not taken any steps towards filing an appeal. The applicant laments the delay prejudices him as he suffered an occupational disease which is terminal and he is in dire need of the decretal sum deposited in court to finance his treatment expenses.
6. The application was opposed by the respondent via the replying affidavit of Caroline Aseto, the Regional Human Resource Manager of the respondent, sworn on May 25, 2023. She depones that by consent between the respondent’s current advocates on record Messrs. Simba & Simba Advocates and its former advocates, Messrs J.A Guserwa & Company Advocates, it was agreed that a notice of change of advocates be filed. This was done on May 31, 2021. That despite this document being on record, the respondent’s current counsel on record did not at any moment receive a letter from the Deputy Registrar informing them that the typed proceedings were ready so as to proceed with the appeal. Simba & Simba Advocates, the current advocates on record, wrote to the court on several occasions inquiring about the certified copies but did not receive any response. It is further deponed that whereas its counsel was informed of the deputy registrar’s letter by the applicant’s counsel, a letter which was mistakenly addressed to the respondent’s former advocates, the applicant’s counsel did not forward the same to the respondent’s counsel and instead filed the current application. Since the respondent was not properly informed that the certified proceedings were ready, its advocates continued to make follow- ups nonetheless and were eventually issued with a certificate of delay from the trial court which



indicated that the proceedings were availed to them on February 9, 2023. The respondent emphasizes that an appeal has now been filed rendering the application redundant.

7. Both parties filed submissions which regurgitate the positions set out in the preceding paragraphs.
8. The considerations upon which this court exercises its discretion to extend time under rule 4 are well settled. The court considers the length of the delay; the reason for the delay; (possibly) the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR. As has been stated before this is not a closed list.
9. From the applicant's own narration, typed proceedings were ready for collection on January 28, 2022. The applicant's advocates took the trouble of bringing this to the attention of respondent's current advocates through a letter of March 14, 2022 as follows;

“We have also perused the court file and noticed that the proceedings have been typed and thus we expect you to move with speed and complete the record of appeal to expedite the appeal process.

Note that if you fail to serve us with the record of appeal within 30 days from the date thereof then

we will be constrained to apply to court to strike out the notice of appeal.”

10. This short letter reveals something important in so far as the application for extension of time is concerned. I take it that in the mind of the applicant, time for instituting the appeal had already passed but on his own volition, granted the respondent indulgence for another 30 days to April 14, 2022. What has not been explained is the inaction of the applicant from that date to the date when the current application was filed on February 2, 2023, a delay of at least 9 months.
11. As this long delay has not been explained then I must decline the invitation to exercise my discretion in favour of the applicant. The notice of motion dated February 2, 2023 is hereby dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

