



REPUBLIC OF KENYA



**Pandya & another v Baya & 3 others (Civil Application E057 of 2022)
[2023] KECA 1550 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1550 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E057 OF 2022
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
DECEMBER 15, 2023**

BETWEEN

LALITCHANDRA DURGASHANKER PANDYA 1ST APPLICANT

PRAVINA RAMESHANDRA PANDYA 2ND APPLICANT

AND

EK BAYA 1ST RESPONDENT

AMINA S MWINYI 2ND RESPONDENT

FRANCIS K NZAI 3RD RESPONDENT

MARK OWANGO 4TH RESPONDENT

(An application to strike out the notice of appeal dated 10th June 2021 and filed on 18th June 2021 against the judgment of the Environment and Land Court at Mombasa (S. Munyao, J.) delivered on 9th June 2021 in ELC Case No. 404 of 2017 (formerly HCC Case No. 74 of 2006 & ELC Petition No. 170 of 2008))

RULING

1. In a judgment delivered on 9th June 2021, the Environment and Land Court at Mombasa (Sila Munyao, J.) (ELC), dismissed the respondents' suit for adverse possession against the present applicants. In the same judgment the court ordered the respondents to vacate the suit property known as Plot No. 258 Section I MN within 90 days and in default the applicants would be at liberty to apply for their eviction.
2. Intending to challenge that judgment before this Court, the respondents filed a notice of appeal dated the 10th of June 2021 which was served upon the present applicants. The applicants in turn filed and served a notice of address for service.



3. On 23rd June 2022, the ELC in a ruling of that date allowed an application by the present respondents staying execution of the judgment pending the conclusion of their intended appeal. In the same ruling, the ELC barred the applicants from selling, leasing or otherwise dealing with the suit property pending the determination of the appeal.
4. The applicants are now before us with a Motion dated 25th August 2022 presented under Rules 82 and 83 of the [Court of Appeal Rules](#) and Section 42 of the [Appellate Jurisdiction Act](#). They seek an order for the notice of appeal dated 10th June 2021 to be struck out on the grounds that the respondents who are the intended appellants have never filed or served their appeal on the applicants.
5. In support of the application it is deposed in the supporting affidavit of Harshit Mulvantrai Rawal, the holder of a power of attorney from the surviving applicant, that since filing and serving the notice of address for service upon the respondents advocates on 24th June 2021, the respondents have not taken further steps in the matter by way of filing and serving its appeal; that the respondents are enjoying stay orders issued by the ELC on 23rd June 2022 and are not keen to prosecute the appeal; that by letters dated the 4th July 2022 and 25th July 2022 the advocates for the applicants sent reminders to the advocates for the respondents calling on them to serve the appeal to no avail.
6. During the hearing of the application before us on 6th June 2023, learned counsel for the applicants Mr. Achoka relied on the grounds on the face of the application, the supporting affidavit and the written submissions dated 18th April 2023 and reiterated that the respondents lost all interest in the appeal after obtaining stay orders; that the notice of appeal should be deemed as withdrawn under Rule 83 of the [Court of Appeal Rules](#). In that regard the decision in [John Mutai Mwangi & 26 others vs. Mwanja Ngure & 4 others](#) [2016] eKLR was cited.
7. Ameli Inyangu & Partners Advocates for the respondents, though not appearing during the hearing of the application despite service of a hearing notice, urged in their written submissions dated 15th May 2023 in opposition that absence of a replying affidavit to the application does not discharge the applicant's burden to establish their claim; that the present application was filed on 30th August 2022 in violation of Rule 86 of the Court of Appeal Rules as the notice of appeal had been served on 22nd June 2021 thereby rendering the application fatally defective. The case of [Salama Beach Hotel Limited & 4 others vs. Kenyariri & Associates Advocates & 4 others](#) [2016] eKLR was cited. It was submitted that the application is incompetent on that basis.
8. Rule 83 of the [Court of Appeal Rules](#) under which the present application is brought provides:

“Effect of default in instituting appeal:

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 of any persons on whom the notice of appeal was served.”
9. In [Kenya Ports Authority vs. Maur Abdalla Bwanamaka](#) [2018] eKLR, this Court expressed that for that provision to apply, “it has to be apparent that appellant failed to institute the appeal within the appointed time set under Rule 82” and that “Rule 83 only provides for withdrawal of the Notice of Appeal, where the appellant has failed to lodge the appeal within the appointed time...”



10. In *Mae Properties Limited vs Joseph Kibe & another* [2017] eKLR, the Court referring to Rule 83 had this to say:

“We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.”

11. And recently in *Mombasa Water Products Limited vs NIC Bank Limited & 2 others*, Civil Application No. E051 of 2021 [2022] KECA 523 (KLR) the Court stated that it possesses discretion to strike out a notice of appeal by using the deeming provisions of Rule 83 (now Rule 85(1) of 2022 *Rules*).

12. In the present case, there is no contest that the respondents’ notice of appeal dated 10th June 2021 and lodged on 18th June 2021 was served on the applicants on 22nd June 2021 who in turn duly filed and served a notice of address of service. The respondents have not since, as required under Rule 84 of the *Court of Appeal Rules*, 2022 filed the memorandum and record of appeal despite reminders and pleas by the applicants advocates to do so and the time for doing so has since long lapsed.

13. This, in our view, is a proper case for invoking, which we hereby do, Rule 85(1) of the *Court of Appeal Rules*, 2022. Consequently, the application dated 25th August 2022 is allowed with the result that the notice of appeal dated 10th June 2021 is hereby deemed as withdrawn.

14. The applicants will have the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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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

