



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

Neutral citation: [2022] KECA 139 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) 116 OF 2018
AK MURGOR, J MOHAMMED & KI LAIBUTA, JJA
FEBRUARY 18, 2022**

BETWEEN

NAKURU WATER & SANITATION COMPANY LTD APPLICANT

AND

GEOFFREY ASANYO 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

RIFT VALLEY WATER SERVICES BOARD 3RD RESPONDENT

(Being an application to strike out the notice of appeal dated 11th March, 2016 in the Employment and Labour Relations Court at Nakuru (Radido, J.) in ELRC Cause No. 398 of 2015)

RULING

1. By a Notice of Motion dated 9th November, 2017, Nakuru Water & Sanitation Company Limited (the applicant), seeks orders in the main that this Court be pleased to: strike out the notice of appeal dated 11th March, 2016 in Nakuru ELRC Cause Number 398 of 2015; strike out the notice of motion dated 14th March, 2016 in Nakuru Civil Appeal (Application) Number 57 of 2016; and that costs of this application be granted to the applicants.
2. The application is brought under Rules 47(1), 82 and 84 of the *Court of Appeal Rules* (this Court's Rules) and is supported by the affidavit of J. N. Gachathi on the grounds, inter alia: that there is blatant non-compliance with mandatory procedural rules by the 1st respondent; and that an appeal, by dint of Rule 82(1) of this Court's Rules, is instituted by lodging various documents thereunder within 60 days from the date when the notice of appeal was lodged.
3. The applicant avers that there is intentional default on the part of the 1st respondent to lodge the record of appeal as per Rule 82(1) within the stipulated timelines. Further, that the notice of motion dated



14th March, 2016 filed by the 1st respondent has been overtaken by events, and that the 1st respondent has lost interest in prosecuting the appeal. The applicant therefore seeks that the notice of appeal dated 11th March, 2016, and the ensuing notice of motion dated 14th March, 2016, be struck out.

4. The brief facts of the appeal are that the Employment & Labour Relations Court (ELRC) (Radido, J.), on 11th March, 2016 dismissed a notice of motion filed by the 1st respondent in which the 1st respondent sought an injunction to prevent the applicant from replacing him as the Director representing the Business Community. Dissatisfied with the ruling, the 1st respondent lodged a notice of appeal dated 11th March, 2016 and a notice of motion to this Court dated 14th March, 2016, seeking an order of injunction to restrain the applicant from interfering with the duties and authority of the 1st respondent as a director of the applicant. This application is based on the grounds inter alia that the respondents have failed to file the documents listed under Rule 82(2) of this Court's Rules within 60 days from the date the notice of appeal was filed. The notice of appeal was filed on 11th March, 2016 on the grounds that the applicant seeks to move this Court to strike out the notice of appeal and the ensuing notice of motion.

Submissions by counsel

5. The applicant submits that, although typed proceedings in respect of Nakuru ELRC 398 of 2015 have been available at the 1st respondent's request since the year 2016, the same have never been collected by the 1st respondent to enable filing of the record of appeal. The applicant further submits that the 1st respondent has made no attempt to regularize the situation by way of an application under Rule 4 of this Court's Rules to extend the time for filing the record of appeal; that the applicant made efforts to remind the 1st respondent vide a letter dated 27th July, 2017 requesting the 1st respondent to move with speed to fix the application for hearing, but he is yet to do so; that the orders sought in the said application have since been overtaken by events since new directors of the applicant have already taken office; and that the applicant therefore urges this Court to strike out the notice of appeal dated 11th March, 2016 and the notice of motion dated 14th March, 2016. The 1st respondent did not file written submissions to the application herein.

Determination

6. We have considered the application, the submissions, the authorities cited and the law. From the record, the learned Judge delivered the impugned ruling on 11th March, 2016. Dissatisfied with the decision, the 1st respondent timeously filed a notice of appeal dated 11th March, 2016 and served it on the applicant.
7. As correctly contended by the applicant, the respondent ought to have filed the record of appeal within the timelines provided for in Rule 82 of this Court's Rules.
8. In *Charles Wanjohi Wathuku vs. Gitinji Ngure & Another [2016] eKLR*, this Court reiterated the position taken in the case of *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others [2016] eKLR* on the intent and purport of Rule 82 of the Court's Rules as follows:

“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispute justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High



Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.”

9. In the instant application, the applicant has produced an exhibit being the typed proceedings in the ELRC, which the applicant contends have been in the court file since the year 2016. The 1st respondent has failed and/or neglected to take the necessary procedural steps provided for in Rule 82(1) of this Court’s Rules to progress his initiated appeal process.

10. Rule 84 of this Court’s Rules provides as follows:

“ A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.” [Emphasis supplied].

11. Having lodged the notice of appeal on 11th March, 2016, the 1st respondent ought to have filed and served his record of appeal within sixty (60) days as stipulated in Rule 82(1).

12. This Court in *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* (supra), held that the proviso under Rule 84 is couched in mandatory terms, and that such applications brought after 30 days of service of the notice of appeal or appeal are incompetent and liable for striking out. A party intending to bring an application under Rule 84 out of time ought to first file an application for extension of time under Rule 4 of this Court’s Rules. As was stated in *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others [2016] eKLR*:

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another [2016] eKLR*, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court’s Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out.

That failure to do so renders such an application fatally defective and liable to be struck out.

As was held in the *Joyce Bochere case (supra)*, stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court’s Rules. Similarly, in *William Mwangi Nguruki v Barclays Bank of Kenya Ltd [2014] eKLR*, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo v Board of Trustees of National Social Security Fund [2014] eKLR*.”

13. The instant application was filed on 9th November, 2017 while the notice of appeal was filed on 11th March, 2016. The instant application was therefore filed over eight (8) months after the notice of appeal was filed. The applicant did not seek an extension of time to file the application out of time as provided under Rule 4 of this Court’s Rules.



14. In *Gichuki King'ara & Co Advocates v Al Jalal Enterprises Ltd and Others*, Civil Appl. No. NAI 211 of 2012 (unreported) this Court in reference to Rule 84 succinctly stated as follows:

“The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”

15. By parity of reasoning, the instant application is incompetent for reason that it was filed outside the stipulated time in the proviso to Rule 84 of this Court's Rules. The applicant did not seek an extension of time within which to file the application and cannot therefore rely on the proviso to Rule 84 of this Court's Rules.

16. Rule 83 of this Court's Rules provides as follows:

“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 on its own motion or on an 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.”

17. This Court in *Quicklubes E. A. Limited vs. Kenya Railways Corporation [2014]eKLR*, while discussing the rationale and criteria for a notice of appeal being withdrawn under the aforementioned rule, succinctly stated in the following terms:

“Rule 83 gives this Court unfettered discretion to deem an appeal as withdrawn if a party files a Notice of Appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of Court but fail to inform the Court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the Court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allow the Court to invoke Rule 83 suo motu if the respondent in the intended appeal does not move the Court.”

18. In light of the exposition in the case of *Quicklubes E. A. Limited vs. Kenya Railways Corporation (supra)*, the respondent having lodged a notice of appeal on 11th March, 2016 was obligated to serve the notice of appeal within fourteen (14) days from the date of delivery of the impugned decision and to file the record of appeal within sixty (60) days of that date.

19. This Court must therefore balance the scales of justice between the parties by weighing the applicant's right to enjoy the fruits of its judgment against the 1st respondent's right to pursue his right of appeal which to date he has failed to pursue timeously as provided for by this Court's Rules. As the instant application falls squarely within the operation of Rule 83 of this Court's Rules, we find no reason not to apply the Rule.

20. We therefore invoke Rule 83 of this Court's Rules suo moto and deem the 1st respondent's notice of appeal dated 11th March, 2016 as withdrawn with costs to the applicant.



DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

A.K.MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

