



**Borderless Tracking Limited v Thigah (Civil Application
E035 of 2021) [2022] KECA 38 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 38 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E035 OF 2021
SG KAIRU, P NYAMWEYA & A MBOGHOLI-MSAGHA, JJA
FEBRUARY 4, 2022**

BETWEEN

BORDERLESS TRACKING LIMITED APPLICANT

AND

GIDRAF NJOROGE THIGAH RESPONDENT

(Being an application to strike out the Notice of Appeal dated 31st May 2019 and filed on 4th June 2019 under Rule 82(1) and Rule 84 of the Court of Appeal Rules.)

RULING

1. The Notice of Motion before this Court is dated 14th April 2021, and is brought by the Applicant herein (who is the Respondent in the main appeal) under Rule 82 (1) and Rule 84 of the *Court of Appeal Rules, 2010*. The Applicant seeks orders that the Notice of Appeal dated 31st May 2019 and filed on 4th June 2019 be struck out with costs. The application is supported by an affidavit sworn on 14th April 2021 by Fredrick E. O. Okanga, the Applicant's Advocate, to which a copy of the said Notice of Appeal was annexed. Mr. Okanga, the learned counsel for the Applicant, and Mr. Wamanga, the learned counsel for the Appellant (who is the Respondent in this application), canvassed the application at a hearing held on 3rd November 2021.
2. The facts giving rise to the application are that the Respondent was an employee of the Appellant, and brought a claim in the Employment and Labour Relations Court (ELRC) following the termination of his employment, which he claimed was unlawful and unfair. The Respondent while denying that the termination was unfair, alleged that it was occasioned by the Respondent's complicity in fraud within the Appellant company. The ELRC found that the Appellant had failed to establish a valid reason for terminating the Respondent's employment and the termination was procedurally unfair. The Court accordingly awarded the Respondent six month's pay in compensation, one month's salary in lieu of notice, and full pay for the period the Respondent was on compulsory leave. The Appellant



being aggrieved appealed to this Court by filing the Notice of Appeal that is the subject of the instant application.

3. The Applicant's case for striking out the said Notice of Appeal is that the Appellant had not taken any action from the time the Notice of Appeal was lodged well over a year and 10 months ago, in compliance with Rule 82 (1) of the Court's rules. He added that the proceedings in the trial Court had been typed and certified as a true copy of the original. He concluded that the Appellant had no interest in prosecuting the Appeal rather were only delaying to frustrate the Applicant from enjoying the fruits of his judgment delivered on 23rd May 2019, therefore it was only fair and just for the Notice of Appeal dated 31st May 2019 to be struck out with costs.
4. Mr. Okanga further submitted that the Appellant, having failed to prepare the Record of Appeal within 60 days as required under section 82 (1) of the Court of Appeal Rules, and the Notice of Appeal therefore stands withdrawn under Rule 83 of the said Rules. They also submitted that the Appellant had lost interest in the Appeal as the Appellant's advocate despite having knowledge that the proceedings in the trial court were typed and certified, did not take any tangible steps to comply with the provisions of Rule 82 (1) and the said Notice of Appeal should therefore be struck out. The Applicant placed reliance on the ruling in *Cosmos Limited v Kenya Revenue Authority*, Civil Appeal No. 382 of 2017, where the Court held that the compliance with the Court's rules must be obeyed not meant for cosmetic value.
5. The Appellant did not file a response to the application, and instead urged the application by way of written submissions. Mr. Wamanga made reference to the cases of *Total Kenya Limited v Reuben Mulwa Kioko [2018] eKLR* and *Joyce Bochere Nyamweya vs Jemima Nyaboke Nyamweya Another [2016] eKLR*, for the propositions that under the proviso to Rule 84, 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, and parties are bound by the mandatory nature of the proviso and the failure to comply with the same renders an application filed thereunder defective.
6. He thus submitted that the instant application is incompetent and should be struck out with costs because it was brought over two years after service of the Notice of Appeal was effected on the Applicant on 6th June 2019. He also submitted that he received instructions from the Appellant on 29th October 2021, and that the mistakes, reluctance and failure of the previous advocates on record to take steps to file the appeal should not be placed on the Appellant.
7. It is not in dispute that under Rule 82 of the Court of Appeal Rules, an appeal shall be instituted by lodging a memorandum of appeal and record of appeal in the appropriate registry, within sixty days of the date when the notice of appeal was lodged, unless an application for a copy of the proceedings in the trial Court has been made within time, and the period for preparation and delivery of the proceedings, as indicated in a certificate of delay from the Registrar of the said Court, which period is excluded from the computation of time. Under Rule 84, any person affected by an appeal may apply to strike out notice of appeal or appeal 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. There is a proviso to Rule 84 that such an application 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.
8. This Court has in this regard held that the timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us in numerous decisions, including those cited by the Appellant herein, and that the Rules are expressed in clear and unambiguous terms and they command obedience. In *Salama Beach Hotel Limited & 4 Others*



vs Kenyariri & Associated Advocates & 4 Others (2016) eKLR this Court explained as follows in this regard:

“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.”

9. The instant application is therefore clearly incompetent, as it is filed out of time in violation of the proviso to Rule 84, having been lodged on 14th April 2021, after almost two years since the Applicant was served with the Notice of Appeal on 6th June 2019. The Applicant did not bring any evidence of having been granted extension of time to file the said application, and it is therefore amenable for striking out.

10. Mr Okanga urged this Court to deem the Notice of Appeal withdrawn under Rule 83 of the Court of Appeal Rules, which 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 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.”

11. We find that we are not able to do so for two reasons. Firstly, the Applicant did not cite the Rule as one of those under which its application was brought, nor seek this specific remedy in the said application. The Appellant therefore had no opportunity to respond appropriately, as different principles apply to the exercise of this Court’s powers under Rule 83.

12. Secondly, the circumstances in this application do not justify such an action on the part of the Court. We however need at the outset, to clarify that this Court can indeed proceed and withdraw a Notice of Appeal on its own motion, as held by this Court in *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR. The Court in that case heard an application to strike out a notice of appeal which, as is the case herein, was filed outside the 30-day limit in the Rule 84 proviso, but nevertheless resorted to the deeming provision Rule 83 to strike out the Notice of Appeal. The Court in that case reasoned as follows on the application of Rule 83;

“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.

Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged ex abundanti cautella by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences.”

13. It is our view that the provisions of Rule 83 are predicated on the existence of circumstances from which this Court can deem that the notice of appeal has been withdrawn, and if there are circumstances to the contrary, then the Court cannot so deem. The term “deem” is defined in the *Black’s Law Dictionary Tenth Edition* as “to treat something as if (1) it were really something else, or (2) it has qualities it does not have” and proceeds to offer the following explanation: “Deem has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by deeming something to be what it is not, or negatively by deeming something not to be what it is ...”. This was also the holding by this Court in *Esther Anyango Ochieng vs Transmara Sugar Company* [2020] e KLR, where it was held that the institution of the substantive appeal therein removed the Notice of Appeal from the deeming purview of Rule 83.
14. In the present application, Mr. Wamanga informed us that he had just come on record the previous day and served Mr. Okanga with his Notice of Appointment dated 2nd November 2021, which fact was not disputed, and there is indeed a Notice of Change of Advocates on record filed by him dated 1st November 2021. He further pleaded that the mistakes of the previous advocate on record of not pursuing the appeal should not be visited on his client. We are of the view that these circumstances preclude us from deeming the Notice of Appeal dated 31st May 2019 and lodged by the Appellant on 4th June 2019 as withdrawn at this stage.
15. The Applicant’s Notice of Motion dated 14th April 2021 is struck out with costs to the Appellant/ Respondent.
16. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF FEBRUARY 2022.

S. GATEMBU KAIRU (FCI Arb)

.....

JUDGE OF APPEAL

A. MSAGHA MBOGHOLI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

