



See Bound Company Limited v London Distillers (K) Limited (Civil Application E205 of 2021) [2022] KECA 476 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 476 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E205 OF 2021
W KARANJA, F SICHALE & A MBOGHOLI-MSAGHA, JJA
MARCH 18, 2022**

BETWEEN

SEE BOUND COMPANY LIMITED APPLICANT

AND

LONDON DISTILLERS (K) LIMITED RESPONDENT

(An application to strike out the respondent's notice of appeal in an intended appeal against the judgment/decree of the High Court of Kenya at Nairobi (Kimaru, J.) delivered on 30th May, 2008 in H.C.C. Suit No. 184 of 2001)

RULING

1. By a Notice of Motion dated 14th of June, 2021 filed under certificate of urgency, and brought under Rules 3A, 3B of the *Appellate Jurisdiction Act*, Rule 31, 42, 43, 53 and 84 of the *Court of Appeal Rules, 2010* and all other enabling provisions and procedures of the law, the applicant asks the Court to strike out the respondent's Notice of Appeal dated 10th June, 2008 filed on 13th June, 2008; that the Court gives an order for the discharge of orders granted in favour of the respondent vide the Ruling of the High Court dated 11th June, 2010 and that the applicant be at liberty to proceed with the execution against the respondent. The applicant also prays for costs of this application. From what we can gather from the grounds on the body of the application and the affidavit sworn by one Zeyun Yang, a director of the applicant on 14th June, 2021, the High Court entered judgment in favour of the applicant herein in the sum of Ksh. 2,183,700 plus costs and interest thereon at court rates vide its judgment dated 30th May, 2008; seven (7) years after the filing of the suit.
2. The respondent moved the High Court for orders of stay of execution pending filing of the appeal herein, which the High Court granted, but on condition that the respondent furnishes security in the value of Ksh 2,000,000. After obtaining the order, the respondent with expedition filed a Notice of Appeal on 13th June, 2008 but thereafter, went to slumber. As at the time of filing the instant application, almost 13 years after the Notice of Appeal was filed, the record of appeal has not been



filed, hence this application seeking to either strike out the appeal or deem the Notice of Appeal as having been withdrawn pursuant to Rule 83 of the Court of Appeal Rules. The applicant deposes that this indefinite inertia on the part of the respondent has caused the applicant grave miscarriage and subversion of justice and amounts to a violation of the applicant's constitutional right to fair hearing.

3. According to the applicant, at some point, the court file was said to have gone missing from the registry prompting the respondent to file an application dated 19th May, 2017 requesting the Deputy registrar of the High Court to certify the proceedings they had attached to their application. The application was allowed on 13th March, 2019 and the respondent was directed to collect the certified copy of the proceedings upon payment of the requisite fees, but this was not done. The applicant states that this delay is inordinate and the orders sought should therefore be allowed.
4. The respondent has opposed the application through the affidavit sworn by Mohan Galot, the principal shareholder and chairman of the Board of Directors of the respondent. Mr. Galot deposes that after the Deputy registrar gave them the orders that the proceedings be certified, the court file is said to have disappeared once again and they have not been told whether the same has been found. The respondent blames the court for the disappearance and urges that the respondent should not be made to bear a cross that should rest on another's shoulders.
5. Both parties filed written submissions in support of their rival positions following directions from the Deputy registrar of this Court. When the matter came up for virtual plenary hearing, there was no appearance for the respondent but learned counsel, Ms. Omire appeared for the applicant. The Court having confirmed that the hearing notice was duly served on learned counsel for the respondent on 8th November, 2021 at 4.36 pm decided to proceed with the application. Ms. Omire, in a brief highlight of her submissions reiterated that the respondents had failed to comply with Rule 82 of the Court of Appeal Rules; that the delay had not been sufficiently explained and that the respondent is enjoying the stay orders granted by the High Court over ten (10) years ago and the Notice of appeal ought to be deemed as withdrawn and the appeal dismissed with costs.
6. We have considered the application, the rival affidavits and submissions by both parties and the relevant law, particularly as espoused in the authorities filed by both parties herein. The history of the matter as related by both parties is not contested. Indeed, we agree that at some point (2016) as stated by the applicant, the court file appears to have grown legs or developed some magical powers that caused it to be invisible to the human eye. From the material placed before us, we make the following observations. First, that although judgment was delivered on 30th March, 2008 the first time the applicant requested for certified copies of the proceedings was on 26th July, 2013, five (5) years after the judgment. The first reminder was sent to the Deputy registrar on 11th September, 2014, over one (1) year later; all this is in the letter annexed to the respondent's replying affidavit. Secondly, even if the lethargy displayed then can be excused, we note that after the Deputy registrar gave orders for certification of the proceedings in 2019 nothing was done to have the proceedings certified. From March 2019 when the order was granted, we see the first reminder on 25th March, 2021; two years later. No explanation has been given as to why no action was taken. The Court would, may be, take a different view if the respondent was not enjoying stay orders, to the prejudice of the applicant herein. This Court can deem an appeal as withdrawn under Rule 83 of the Rules in circumstances where a party moves to court, packs its Notice of appeal and then goes to slumber. That is meant to stem abuse of the court process.

Rules 83 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.”

7. Taking into consideration all the circumstances surrounding this matter, we have no doubt that the respondent has been indolent in pursuing the proceedings. No plausible reason has been given for the existence of the circumstances outlined above. We are persuaded that the respondent should not be allowed to continue enjoying the stay orders granted many years ago in the face of the attitude it has displayed in this matter. Even as the respondent claims that the court file has disappeared again, no such evidence has been placed before us. In any event, no explanation was given as to why the respondent did not act immediately after being given the orders for certification of its proceedings.
8. This Court has pronounced itself on application of Rule 83 of the Rules of this Court on many occasions. For instance, in *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR, this Court expressed as follows:-

“It is not in dispute that the notice of appeal was lodged at the High Court registry on 26th May, 2015. It is also not in dispute that by dint of Rule 82(1) of the Court of Appeal Rules 2010, the appeal should have been instituted within sixty days thereafter, but was not. It in fact had not been instituted as at the date of the filing of the motion some 15 months later. As at the hearing of the motion, more than two years had elapsed. We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. 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. The Rules are expressed in clear and unambiguous terms and they command obedience.

Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus; ...

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. [Emphasis Ours]

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.”

9. The respondent’s conduct in this matter leaves us with no doubt that it has no desire to file its appeal because it continues to enjoy the stay orders given by the High Court so many years ago. In the meantime, it’s intended appeal continues to burden our register and swell our numbers of backlog, and the Court gets blamed for the “backlog”. On the other hand, the applicant cannot move on as it cannot write off the matter as the same is still pending in its books. We find no reason whatsoever to retain the Notice of appeal herein any longer. The application before us is merited and allowed with the result that the Notice of appeal dated 10th June, 2008 is deemed as having been withdrawn pursuant to Rule



83 of the Rules of this Court with costs to the applicant. As no appeal is pending before this Court, the stay orders granted by the High Court on 11th June, 2010 are hereby discharged. Orders accordingly.

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

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

