



Mwangi & another (Suing as the Legal Representative of the Estate of Joseph Wangai Muraya – Deceased) v Alfarah Wholesalers Limited (Civil Application 78 of 2019) [2022] KECA 410 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 410 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 78 OF 2019
DK MUSINGA & AK MURGOR, JJA
MARCH 4, 2022**

BETWEEN

RUTH WAMBUI MWANGI 1ST APPELLANT

AGNES NYAMBURU WANGAI 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH
WANGAI MURAYA – DECEASED**

AND

ALFARAH WHOLESALERS LIMITED RESPONDENT

(An application to have the notice of appeal filed in Nakuru ELRC deemed as withdrawn on account of default to institute the intended appeal within the appointed time against the ruling of (Radido, J.) dated 1st December, 2017 in Nakuru Misc. Application NO. 21 of 2017)

RULING

1. By a Notice of Motion dated 20th May, 2019, and brought pursuant to sections 3 and 3A of the Appellate Jurisdictions Act and rule 83 of the Court of Appeal Rules, Ruth Wambui Mwangi and Agnes Nyamburu Wangai (the applicants) have sought for orders that; (i) the Notice of Appeal dated 1st December, 2017 and lodged by the respondent on 4th December, 2017 be deemed to have been withdrawn; (ii) the security deposited in court in Nakuru Employment and Labour Relations Court Misc. Application number 21 of 2017 be released to the applicants; (iii) the applicants be at liberty to execute for the balance due in decretal amount in Nakuru Employment and Labour Relations Court Misc. Application No. 21 of 2017; (iv) the costs of this application be borne by the respondent.
2. The application is supported by an affidavit sworn by the applicant of even date and on written submissions. The grounds on which the application is brought are that; in an application dated 19th April, 2017, the applicants sought to enforce before the Nakuru Employment and Labour Relations



Court Misc. Application No. 21 of 2017 an award of Kshs.1,920,000.00 made by the Directorate of Occupation Health and Safety in favour of the applicants against the respondent on 19th August, 2015; that the award was in respect of the death of the respondent's employee while in the course of his employment; that the applicants who are the dependants of the deceased employee had sought to enforce the award; that in a ruling dated 31st July, 2017, the Nakuru Employment and Labour Relations Court issued enforcement orders in respect of the award which the respondent sought to set aside; that in a ruling dated 1st December, 2017, the court dismissed the respondent's application.

3. As a consequence, the respondent through its advocates, Okong'o, Wandago and Company, filed a notice of appeal on 4th December, 2017 and simultaneously with the filing of notice of appeal, the respondent filed an application for stay of execution pending an appeal; that from the time of filing of the notice of appeal, the respondent has failed to file a memorandum of appeal or a record of appeal, and has not taken any steps to obtain the typed proceedings; that the continued pendency of the suit is highly prejudicial to the applicants, as they are unable to access a lawful award by the Directorate of Occupation Health and Safety.
4. By the time the application came for hearing on 30th March, 2021, the respondent had not filed a replying affidavit or any written submissions despite their advocates, Okong'o, Wandago & Company, having been served with the applicant's written submissions and list of authorities on 15th March, 2021. Proof of service was evidenced by the return of service sworn by Kennedy Wasonga Ngesa on 26th March 2021.
5. We have considered the application, the submissions and the authorities cited and the law. The record shows that the ruling of the Employment and Labour Relations Court was delivered on 1st December, 2017.
6. Dissatisfied by the decision, the respondent filed a notice of appeal on 1st December, 2017 and served it on the applicants. The applicants' case is that thereafter the respondent did not take any further steps to lodge the memorandum or record of appeal within the timeframe stipulated by the Rules of this Court; that it did not request to be supplied with the typed proceedings.
7. It is for this reason that the applicant has brought this motion pursuant to rule 83 seeking to have the respondent's notice of appeal dated 1st December 2017 to be deemed as withdrawn.

Rule 83 provides that;

"It 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 an application of any party make such order. The party in default shall be liable to pay such costs arising therefrom of any persons on whom the notice of appeal was served."

See also the case of *Julia Wanjiru & 4 others vs Jacinta Wairimu Njoroge* [2013] eKLR.

8. The record shows that a notice of appeal dated 1st December 2017 was lodged on the same date, and that this application is dated 20th May, 2019. It is clear that a period of one year and five months has lapsed since the notice of appeal was filed. There is nothing on the record that denotes that the respondent has taken any further steps or has any intention of pursuing its appeal.
9. Given this state of affairs, in the interest of justice and in all fairness to the applicants, having regard to the requirements of rule 83 of this Court's Rules, the notice of appeal filed on 1st December 2017 is deemed to have been withdrawn, with costs to the applicant.



10. The Ruling is signed under rule 32(3) of the [Court of Appeal Rules](#) (CAR), since the Hon. Mr. Justice W. Ouko, J.A. ceased to hold office of Judge of Appeal upon his appointment as Judge of the Supreme Court of Kenya.

It is so ordered.

DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF MARCH 2022.

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

