



REPUBLIC OF KENYA



**John Omollo Nyakongo t/a HR Ganijee & Sons v County Government of Kwale & another
(Civil Application E047 of 2021) [2022] KECA 591 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 591 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E047 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 27, 2022**

BETWEEN

JOHN OMOLLO NYAKONGO T/A HR GANIJEE & SONS APPLICANT

AND

COUNTY GOVERNMENT OF KWALE 1ST RESPONDENT

**INTER-GOVERNMENTAL RELATIONS TECHNICAL COMMITTEE 2ND
RESPONDENT**

(An application to withdraw and/or deem the Notice of Appeal dated 24th October 2018 and filed on 25th October 2018 against the ruling of the High Court of Kenya at Mombasa (P.J. Otieno, J.) delivered on 22nd October 2018 in High Court Civil Case No. 96 of 2015 as withdrawn)

RULING

1. In a ruling delivered on 22nd October 2018, the High Court at Mombasa (P.J.O. Otieno, J.) allowed an application by the applicant to reinstate his suit for hearing on merits, having set aside an order that had struck out his suit. Aggrieved by that decision, the 1st respondent duly filed and served a notice of appeal dated October 24, 2018 lodged in the lower court on October 25, 2018.
2. Before us now is the applicant's application dated June 10, 2021 seeking to have the said notice of appeal to be deemed as withdrawn under Rule 83 of the *Court of Appeal Rules*. Urging the application before us on February 28, 2022, learned counsel for the applicant Ms. Murage referred to the grounds in support of the application and the affidavit in support sworn by the applicant on June 7, 2021, to which a certificate of delay issued by the lower court on June 2, 2021 is exhibited. It was submitted that based on that certificate of delay, the proceedings were ready for collection on March 3, 2021; that the 1st respondent should therefore have filed the record of appeal on or before May 3, 2021 in accordance with the requirement under Rule 82(1) of the Court of Appeal Rules, 2010; that not having done so, the notice of appeal should be deemed to be withdrawn. It was pointed out that the 1st respondent



obtained an order of stay of proceedings in the lower court based on the notice of appeal and it is in the interest of justice that the present application be allowed.

3. In opposition, learned counsel Ms. Oruta holding brief for Mr. Kibaara for the 1st respondent referred to the replying affidavit filed on February 22, 2022, and pointed out that the 1st respondent is not aware of the certificate of delay exhibited by the applicant even though it bears the name of the 1st respondent's advocates and that it is a mystery how the applicant procured that certificate of delay; that the certificate of delay on which the 1st respondent relies was issued on July 1, 2021 and endorsed on July 2, 2021; that the 1st respondent lodged the appeal immediately the 1st respondent received the proceedings without any delay; that in the circumstances the application has no merit and should be dismissed with costs.
4. We have considered the application, the affidavits and the submissions. Recently in *Borderless Tracking Limited vs. Thigab*, Civil Application No. E035 of 2021[2022] KECA38 (KLR)(4th February 2022) (Ruling), this Court stated 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.”
5. In this matter, the 1st respondent has already filed the memorandum and record of appeal having obtained from the court below a certificate of delay. Although the applicant has also exhibited a different certificate of delay which suggests that the typed proceedings and the ruling under challenge were ready much earlier, we have no basis for disregarding the certificate exhibited by the 1st respondent.
6. It is rather puzzling, and a matter that requires the attention of the High Court in what is becoming common practice, that disparate certificates of delay exist in respect of the same matter.
7. That said, we do not think that Rule 83 of the Court of Appeal Rules is a substitute for Rule 84 or an avenue to circumvent the time limits under the proviso to Rule 84. As this Court stated in *Tropicana Hotels limited vs. SBM Bank (Kenya) Limited (formerly known as Fidelity Commercial Bank Ltd)* [2020] eKLR, Rule 83 of the Court's Rules applies where the Court has moved suo motu to strike out the notice of appeal.
8. Earlier in *John Mutai Mwangi & 26 others vs Mwenja Ngure & 4 others* [2016] eKLR the Court explained at length the rationale behind Rule 83 as follows:

“This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals.

The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal



notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice”.

9. Similarly in *Mae Properties Ltd vs. Joseph Kibe & another* [2017] eKLR, the Court summed up Rule 83 as provision empowering the Court:

“...to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure.”

10. As already stated, the 1st respondent’s memorandum and record of appeal is already filed and the deeming provision does not, in the circumstances apply.

11. The application fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF MAY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

