



**Mombasa Water Products Limited v Nic Bank Limited & 2 others (Civil Application E051 of 2021) [2022] KECA 523 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECA 523 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E051 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MAY 6, 2022**

**BETWEEN**

**MOMBASA WATER PRODUCTS LIMITED ..... APPLICANT**

**AND**

**NIC BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**AUCKLAND AGENCIES ..... 2<sup>ND</sup> RESPONDENT**

**NDUTUMI AGENCIES ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Application to withdraw and/or deem the Notice of Appeal dated 29th April 2020 and filed on 4th May 2020 against the Judgment of the High Court at Mombasa (Hon. Justice P.J. Otieno) delivered on 23rd April 2020 in High Court Civil Appeal no 149 of 2019)*

**RULING**

1. The application before this Court is a Notice of Motion dated 6<sup>th</sup> July 2021, and is brought pursuant to Rule 82 and Rule 83 of the [Court of Appeal Rules, 2010](#). The Applicant herein is seeking to have the Notice of Appeal dated 29<sup>th</sup> April 2020 and lodged on 4<sup>th</sup> May 2020 against the judgment of the High Court at Mombasa (P. J. Otieno J.) delivered on 23<sup>rd</sup> April 2020 in NIC Bank Limited & 2 others v Mombasa Water Products Limited - HCCA No. 149 of 2019 deemed as withdrawn, and that the costs of the application be provided for.
2. The application is supported by an affidavit sworn on 6<sup>th</sup> July 2021 by Joseph Mbugua Gichanga, the Applicant's Managing Director, who deponed that the 1<sup>st</sup> Respondent herein being aggrieved by the subject judgment delivered on 23<sup>rd</sup> April 2020 filed the Notice of Appeal dated 29<sup>th</sup> April 2020, but the record of appeal is yet to be filed to date. Furthermore, that a certificate of delay was issued confirming that the certified copies of the proceedings were ready by 5<sup>th</sup> May 2020. Lastly, that the 1<sup>st</sup> Respondent having failed to file and serve the Record of Appeal within the mandatory time stipulated by the law



under rule 82 (1) of the [Court of Appeal Rules, 2010](#), any such record intended to be filed would be incompetent.

3. It is the Applicant's view that this is a proper case for the Court to deem the Notice of Appeal filed by the 1<sup>st</sup> Respondent as withdrawn, as the Respondents have been enjoying stay of execution orders from the High Court which is anchored on an alleged appeal to this Court and the Applicant is greatly prejudiced as it is unlawfully being denied a chance to enjoy the fruits of its judgment. The Applicant annexed copies of the judgment dated 13<sup>th</sup> April 2020 and delivered on 23<sup>rd</sup> April 2020, the Notice of Appeal dated 29<sup>th</sup> April 2020 and lodged on 5<sup>th</sup> May 2020, A Certificate of Delay dated 5<sup>th</sup> May 2020 and issued on 17<sup>th</sup> February 2021, and of the typed proceedings in High Court Civil Appeal No 149 of 2019.
4. The 1<sup>st</sup> Respondent in response filed a Replying Affidavit sworn on 9<sup>th</sup> September 2021 by Stephen Atenya, its Senior Legal Counsel, who detailed the proceedings leading to the impugned judgment delivered by the High Court. The 1<sup>st</sup> Respondent confirmed that being aggrieved and dissatisfied with the judgment, it lodged an appeal by filing a Notice of Appeal on 4<sup>th</sup> May 2020, and on 30<sup>th</sup> April 2020 requested for typed proceedings relating thereto in order to enable them lodge the record of Appeal. The 1<sup>st</sup> Respondent's case is that it followed up on the status of the typed proceedings and was informed that the same was not ready because of frequent movement of the file for the hearing of and rulings on five applications filed by the parties in the High Court after delivery of the judgment.
5. Further, that it was yet to be notified whether the typed proceedings are ready for collection as is the standard practice of the High Court and requirement under the rules. The 1<sup>st</sup> Respondent disputed the authenticity of the certificate of delay dated 17<sup>th</sup> February 2021 exhibited by the Applicant, and averred that the said certificate was issued under unclear circumstances without a formal request or payment of the requisite Court fees, and whilst the Court file was in the custody of the Deputy Registrar. The 1<sup>st</sup> Respondent also asserted that since there was no receipt confirming payment for the proceedings, and the Respondents advocates were yet to be notified by the Court that the typed proceedings are ready, the authenticity of the proceedings attached to the Applicant's application cannot be ascertained.
6. Additionally, that the Notice of Appeal was filed in Court on 4<sup>th</sup> May 2020 and endorsed by the Deputy Registrar of the Court on 5<sup>th</sup> May 2020, confirming that the Court file in respect of the matter was not at the Court's typing pool on 4<sup>th</sup> and 5<sup>th</sup> May 2020 as it would have been impossible to file the Notice of Appeal and have the same endorsed without the Court file. Further, that 1<sup>st</sup> May 2020 was a public holiday and 2<sup>nd</sup> and 3<sup>rd</sup> May 2020 fell on a weekend, and the Court file was therefore at the typing pool only for 1 day on 30<sup>th</sup> April 2020, which was the day the typed proceedings were requested for.
7. Further, that the 1<sup>st</sup> respondent's advocates vide a letter dated 26<sup>th</sup> July 2021 to the Deputy Registrar of the High Court enquired whether the proceedings were ready and the circumstances surrounding the issuance of the certificate of delay relied upon by the Applicant. The said Deputy Registrar on 7<sup>th</sup> September 2021, advised the 1<sup>st</sup> Respondent that no payment had been received by the Court for the Certificate of delay dated 17<sup>th</sup> February 2021 and did not recognized the same. The 1<sup>st</sup> Respondent's position is that the Applicant is determined to defeat the intended appeal using underhand means, and cited the incident when a ruling which was scheduled for 21<sup>st</sup> July 2020 was rescheduled to 9<sup>th</sup> July 2020 at the instance of the Applicant's Advocate and delivered without notice to the Respondents, resulting in dismissal of the 1<sup>st</sup> Respondent's stay application and release of the sum held as security of Kshs 9,112,000/- to the Applicant's Advocates.
8. The 1<sup>st</sup> Respondent concluded that it will suffer substantial loss and prejudice if the orders sought are granted, since the Applicant will be driven away from the seat of justice through no fault of their own.



Further, that there will be no prejudice or loss occasioned to the Applicant which has already been paid the decretal sum. Finally, that it will be in the interest of justice that the 1<sup>st</sup> Respondent be allowed to exercise its constitutional right without unnecessary fetter, and that the mistakes of the Court registry officials which are outside its control ought not to be visited upon it.

9. We heard the application on 16<sup>th</sup> February 2022, and learned counsel Mr. Peter Omwenga canvassed the application on behalf of the Applicant. While relying on written submissions dated 20<sup>th</sup> September 2021, Mr. Omwenga reiterated the grounds for the application, and submitted that the Deputy Registrar certified that the proceedings were ready by 5<sup>th</sup> May 2020. Reference was made to rule 82 and Rule 83 of the Court of Appeal Rules, 2010 and the decision in the case of *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR that the only facts required to be demonstrated are that the 60 days appointed have elapsed without an appeal having been lodged, and that this Court has this inherent power to make the formal order of the notice having been deemed as withdrawn under Rule 83.
10. Ms. Mburu, the learned counsel for the 1<sup>st</sup> Respondent, was also present at the hearing and asserted that it would be a miscarriage of justice if the appeal is deemed as withdrawn because the 1<sup>st</sup> Respondent had not refused to file the appeal. The counsel's argument was that the 60-day period for filing an appeal starts running when the parties are notified by the Court that the proceedings are ready for collection, and she maintained that they were yet to be informed that the typed proceedings were ready for collection.
11. In addition to the certificate of delay presented by the Applicant having been disputed, the counsel pointed out that if the proceedings had been ready as indicated therein, there would have been no need for a certificate of delay. Counsel relied on written submissions dated 9<sup>th</sup> September 2021 in which reference was made to the decision in *Maithya Lonzi vs Paul Mutuku & Kyama Paul Mutuku* [1984] eKLR where the Court found that the High Court was duty bound to inform the Applicant that certified copies were ready.
12. 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 has been made to the trial Court, and a certificate of delay issued by the Registrar of the said Court indicating the period for preparation and delivery of the proceedings, which period is excluded from the computation of time..
13. Mr Omwenga urged this Court to deem the 1<sup>st</sup> Respondent's Notice of Appeal withdrawn under Rule 83 of the Court of Appeal Rules of 2010. He relied on a copy of certificate of delay he annexed dated 5<sup>th</sup> May 2020 and issued on 17<sup>th</sup> February 2021 which indicates that the proceedings were ready for collection on 5<sup>th</sup> May 2020, and that the period excluded from computation of time was 30<sup>th</sup> April 2020 to 5<sup>th</sup> May 2020. Therefore, according to Mr. Omwenga, the sixty days to file an appeal began to run from 5<sup>th</sup> May 2020 and the 1<sup>st</sup> Respondent is out of time.
14. This Court indeed possesses discretion to strike out a Notice of Appeal by using the deeming provision in Rule 83, as held in *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR, where an application to strike out a notice of appeal was filed outside the 30-day limit, and this Court nevertheless applied the deeming provision under Rule 83 to strike out the said notice. 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.”

15. While we agree with the said reasoning, it is our view that the exercise of the discretion granted by Rule 83 is predicated on the existence of circumstances from which this Court can deem that the notice of appeal has been withdrawn. If there are circumstances to the contrary, then the Court cannot so deem. In the present application, the 1<sup>st</sup> Respondent has disputed the veracity of the certificate of delay annexed by the Applicant, and in this respect availed a copy of a letter requesting for typed proceedings dated 27<sup>th</sup> April 2020 and stamped as received on 30<sup>th</sup> April 2020 by the Deputy Registrar of the trial Court, and another letter dated 27<sup>th</sup> July 2021 inquiring about the typed proceedings and the veracity of the certificate of delay annexed by the Applicant’s advocate.
16. Rule 82 provides that the relevant documents for computing or excluding the time within which the appeal is to be instituted, are the application for a copy of the proceedings, and the certificate by the registrar indicating the time taken to prepare the proceedings. The 1<sup>st</sup> Respondent has provided a copy of the application for proceedings dated 27<sup>th</sup> April 2020, and made within time. We have also perused the copy of the certificate of delay provided by the Applicant, and note that the Applicant has not brought any evidence of the same having been availed by the Deputy Registrar of the trial Court, nor explained the circumstances under which it came to be in its possession.
17. It is our view that legitimate concerns regarding the authenticity of the certificate of delay provided by the Applicant have been raised by the 1<sup>st</sup> Respondent. In addition, the 1<sup>st</sup> Respondent has denied having received any response to its application, and provided evidence of its query to the Deputy Registrar as regards the said certificate of delay.
18. We are therefore constrained to exercise our discretion in favour of the 1<sup>st</sup> Respondent, and to decline the applicant’s application. The Applicant’s Notice of Motion application dated 6<sup>th</sup> July 2021 is accordingly dismissed with costs to the 1<sup>st</sup> respondent.
19. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY, 2022.**

**S. GATEMBU KAIRU (FCI Arb)**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**



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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

