



Salim v Bafadhil (Civil Application 105 of 2019) [2022] KECA 775 (KLR) (10 June 2022) (Ruling)

Neutral citation: [2022] KECA 775 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 105 OF 2019
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JUNE 10, 2022

BETWEEN

RASHID MOHAMED SALIM APPELLANT

AND

AHMED ABDALLA BAFADHIL RESPONDENT

(An application to strike out the notice of appeal dated 9th November 2018 and lodged in the superior court on 13th November 2018 against the judgement and decree of the Environment & Land Court at Malindi (Olola, J.) delivered on the 31st October 2018 in ELC Case No. 155 of 2014)

RULING

1. In his application dated July 22, 2019 presented under Rules 42(1), 82, 83 and 84 of the *Court of Appeal Rules, 2010*, the applicant, Ahmed Abdalla Bafadhil, seeks an order that the notice of appeal dated 9th November 2018 and lodged on November 13, 2018 by the respondent, Rashid Mohamed Salim, be struck out with costs.
2. The context in which the application is made is that the respondent being dissatisfied with the judgment of the Environment and Land Court (ELC) delivered on 31st October 2018 filed the said notice of appeal dated 9th November 2018. In that judgment, the ELC dismissed the respondent's suit seeking the eviction of the applicant from a property known as Plot No. 1513/384 CR 12739/1 Takaungu. In the same judgment, the ELC upheld the applicant's claim to the said property on basis of adverse possession.
3. It is the applicant's case, as set out in the grounds on the face of the application and in his supporting affidavit sworn on 22nd July 2019 as amplified in the written submissions dated May 7, 2021 made and orally highlighted on his behalf before us by learned counsel Mr. Muhuni: that since filing the notice of appeal, no further steps have been taken to file the memorandum and record of appeal as required under Rule 82 of the *Court of Appeal Rules* which requires the same to be filed within 60 days



- which have long since lapsed; that the respondent failed to make the necessary application for a copy of proceedings from the ELC and the respondent cannot therefore rely on the proviso to Rule 82.
4. Counsel urged us to either strike out the notice of appeal under Rule 84 of the Court of Appeal Rules 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. Alternatively, relying on the decision of this Court in *Charles Wanjobi Wabuku v Githinji Ngure & another* [2016] eKLR, counsel urged the Court to mark the notice of appeal as withdrawn under Rule 83 so as to achieve the overriding objective of civil litigation by bringing finality to proceedings.
 5. Appearing for the respondent, learned counsel Mr. Amadi stated that the respondent had not filed a response to the application, either by way of a replying affidavit or written submissions. In his very brief oral rejoinder, Mr. Amadi simply stated that the application is not capable of being granted as it does not contain any prayers.
 6. We have considered the application, the supporting affidavit and the submissions. During the virtual hearing of the application, Mr. Muhuni, counsel for the applicant readily conceded that the application was filed outside the time period provided for under Rule 84. He urged the Court to consider the application under Rule 83 and deem the notice of appeal as withdrawn.
 7. The proviso to Rule 84 of the Court of Appeal Rules provides that 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 or record of appeal as the case may be. The complaint by the applicant in the present case is that, having filed the notice of appeal on November 9, 2018, under Rule 82 of the Rules, the respondent had sixty days from that date within which to file his record of appeal which he has failed to do. It is also the applicant's case that the respondent failed to take the step of applying for proceedings and cannot therefore rely on the proviso to Rule 82. In effect, excluding the intervening Christmas Vacation of 2018, the record of appeal should have been filed by February 4, 2019. Therefore, the applicant would have had up to March 5, 2019 to apply to strike out the notice of appeal on account of default by the respondent to file the record of appeal.
 8. Based on the foregoing, the present application, as counsel for the applicant readily conceded, was made outside the time frame provided in Rule 84. There are many authorities of this Court to the effect that an application to strike out a notice of appeal that is brought outside of the time frame provided under Rule 84 is incompetent. See for instance *Joyce Bochere Nyamweya v Jemimah Nyaboke Nyamweya & another* [2016] eKLR; and *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others* [2016] eKLR.
 9. Counsel for the applicant urged us to consider that the application is also made under Rule 83 of the Court of Appeal Rules and urged us to invoke the same and deem the appeal as withdrawn given the long period of inactivity by the respondent since filing the notice of appeal. In *Borderless Tracking Limited v Thigah*, Civil Application No. E035 of 2021[2022] KECA38 (KLR)(4th February 2022) (Ruling), this Court stated that Rule 83 of the *Court of Appeal Rules* is not a substitute for Rule 84 or an avenue to circumvent the time limits under the proviso to Rule 84 and 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.”
 10. However, where circumstances warrant, it is within the power of the Court under Rule 83 of the *Court of Appeal Rules*, on its own motion, to deem a notice of appeal as withdrawn. See *Mae Properties Ltd v Joseph Kibe & another* [2017] eKLR, and also *Tropicana Hotels limited v SBM Bank (Kenya)Limited*



(formerly known as Fidelity Commercial Bank Ltd) [2020] eKLR. The rationale behind Rule 83 had earlier been articulated by the Court in the case of *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR 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”.

11. In the present case, the respondent, as already stated, did not file a replying affidavit to contest the assertion by the applicant that he went to sleep after filing the notice of appeal on November 9, 2018. The claim that the respondent did not even apply for copies of proceedings from the lower court for purposes of the intended appeal was also not contested. Neither did the respondent file submissions in respect of the present application. The oral submissions by counsel for the respondent during the hearing of the application were, with respect, no more than pro forma. We echo the words of the Court in the case of *Nakuru Water & Sanitation Company Ltd v Asanyo & 2 others* (Civil Appeal (Application) 116 of 2018) [2022] KECA 139 (KLR) (18 February 2022)(Ruling) where the Court in invoking Rule 83 stated as follows:

“This Court must therefore balance scales of justice between the parties by weighing the applicant’s right to enjoy the fruits of its judgement against the 1st respondent’s right to pursue his right of appeal which to date he has failed to pursue timeously as provided for by this Court’s Rules. As the instant application falls squarely within the operation of Rule 83 of this Court’s Rules, we find no reason to apply the Rule.”

12. We therefore invoke Rule 83 of the *Court of Appeal Rules* and deem the notice of appeal dated November 9, 2018 as withdrawn with costs to the applicant.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR

