



**Juma & 152 others v Shah & 2 others (Civil Application
1 of 2018) [2022] KECA 673 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 673 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 1 OF 2018
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 8, 2022**

BETWEEN

**HAMISI OMAR JUMA 1ST APPLICANT
MWAMUYEE DAU NGALA 2ND APPLICANT
MWALUMBI MWANGATA & 150 OTHERS 3RD APPLICANT**

AND

**SHEILEEN CHANDRA NAROTTAM SHAH 1ST RESPONDENT
AMRALAL J. RASHI SHAH 2ND RESPONDENT
A. PEDRO JOSE CONSTANCIO CLODROMO 3RD RESPONDENT**

*(An application to strike out the Notice of Appeal dated 8th July 2015 and filed on
14th July 2015 against the Ruling of the High Court at Mombasa (A. Omollo J.)
delivered on 12th June 2015 in Mombasa High Court Civil Suit No. 631 of 2011)*

RULING

1. The Applicants herein, by way of a Notice of Motion dated 14th December 2017 as amended on 19th October 2018, seek orders that the Respondents' Notice of Appeal dated 8th July 2015 be struck out with for failure to file it within time, and for the reason that there has been inordinate and unexplained delay by the 1st Respondent in filing the Memorandum of Appeal and Record of Appeal. The application was brought under Rules 75, 82, 83 and Rule 84 of the *Court of Appeal Rules* of 2010, and supported by affidavits sworn on 14th December 2017 and 19th October 2018 respectively by Kipkurui Ngéno Birir, the Applicants' Advocate. The Applicants attached a copy of the subject Notice of Appeal, as well as the ruling intended to be appealed against dated 26th June 2015 delivered by A. Omollo J. in Mombasa High Court Civil Suit No. 631 of 2011.



2. When the application came up for hearing on 21st March 2022, both the learned counsel for the Applicants and the Respondents, though served with the hearing notice, were not present. This ruling is thus based on the submissions dated 28th February 2022 that were filed by the Applicants' counsel. The Respondents did not file any response to, or submissions on the application.
3. The facts giving rise to the application are that the 1st Respondent filed an application dated 1st December 2014 in Mombasa High Court Civil Suit No. 631 of 2011, seeking to set aside the judgement delivered therein on 18th September 2014 and leave to defend the suit. The said application was dismissed by the impugned ruling made by A. Omollo J. on 26th June 2015, whereupon the 1st Respondent through its advocates filed the notice of appeal dated 8th July 2015 on 14th July 2015.
4. The Applicant's case for striking out the said Notice of Appeal is that the 1st Respondent failed to lodge the notice of appeal within 14 days of the date of the impugned ruling in accordance with Rule 75 (2) of the *Court of Appeal Rules* of 2010, and had neither lodged the memorandum of appeal nor the record of appeal within the prescribed time in compliance with Rule 82 (1) of the said rules. Therefore, that having failed to take essential steps on the proceedings, the Notice of Appeal dated 8th July 2015 should be struck out.
5. It is not in dispute that under the then Rule 82 of the *Court of Appeal Rules* of 2010, an appeal was 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. Under Rule 84 of the said Rules, any person affected by an appeal may apply to strike out notice of appeal or appeal 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. There was however a proviso to Rule 84 that such an application 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.
6. This Court has in this regard held that 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. In *Salama Beach Hotel Limited & 4 Others vs Kenyariri & Associated Advocates & 4 Others* (2016) eKLR this Court explained as follows in this regard:

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court's Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out.

That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the *Joyce Bochere* case (supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court's Rules. Similarly, in *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* [2014] eKLR, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo v Board of Trustees of National Social Security Fund* [2014] eKLR.”



7. The instant application was first filed on 14th December 2017, and was therefore out of time and incompetently filed. This finding notwithstanding, this Court has the discretion to deem the subject Notice of Appeal withdrawn under Rule 83 of the *Court of Appeal Rules* 2010 and also under the current Rule 85 of the *Court of Appeal Rules* 2022, which provides as follows:

85.

- (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.
- (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

8. It is thus properly within the purview of this Court's powers to deem withdrawn a Notice of Appeal on its own motion, as held in *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR. The Court in that case heard an application to strike out a notice of appeal which, as is the case herein, was filed outside the 30-day limit in the Rule 84 proviso, but nevertheless resorted to the deeming provision Rule 83 of the *Court of Appeal Rules* of 2010 to strike out the Notice of Appeal. The Court reasoned as follows;

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.”

9. The provisions of Rule 83 of the *Court of Appeal Rules* 2010 and similarly of Rule 85 of the *Court of Appeal Rules* 2022 are predicated on the existence of circumstances from which this Court can deem that a notice of appeal has been withdrawn. We are of the view that the circumstances in this application justify such an intervention, arising from the inaction on the part of the Respondents since the lodging of the Notice of Appeal dated 8th July 2015.

10. We therefore find that the Applicants' Notice of Motion dated 14th December 2017 as amended on 19th October 2018 is accordingly merited to

the extent that the Notice of Appeal dated 8th July 2015 is hereby deemed and marked as withdrawn. We shall make no order as to costs.

11. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JULY, 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

