



**Tharaka Nithi County Government & another v Gaichu & 129 others  
(Civil Appeal 107 of 2021) [2022] KECA 585 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 585 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 107 OF 2021  
W KARANJA, HM OKWENGU & KI LAIBUTA, JJA  
JULY 8, 2022**

**BETWEEN**

**THARAKA NITHI COUNTY GOVERNMENT ..... 1<sup>ST</sup> APPLICANT**

**THARAKA NITHI PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DAVID KITHAKA GAICHU & 129 OTHERS ..... RESPONDENT**

*(An application to strike out the record of appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Meru (Nzioka wa Makau, J.) delivered on 2nd December, 2019 in ELRC Cause No. 30 of 2018)*

**RULING**

1. All one hundred and thirty (130) respondents herein were employed by the Tharaka Nithi County Government (1<sup>st</sup> applicant) as Village Administrators sometime in February, 2017. They were issued with employment letters by Tharaka Nithi Public Service Board (2<sup>nd</sup> applicant), and they started performing their duties. For reasons we do not wish to delve into for purposes of this Ruling, circumstances changed seven months later and they were issued with notices to show cause as to why their appointment should not be revoked. A decision was subsequently made to terminate their services and they were therefore, terminated. This prompted them to move to the Employment and Labour Relations Court (ELRC) at Nyeri where they challenged the termination terming it unfair, unprocedural, misplaced, untenable, illegal, null and void. They prayed for orders of reinstatement to employment with payment of salaries and allowances and arrears.
2. The claim was resisted by the applicants herein who averred that the respondents had no cause of action against them and that the suit was an abuse of the court process. After hearing the parties, the learned Judge, Nzioka wa Makau found that the claimants were obligated to approach the Public Service Commission first by way of appeal against the decision of the 1<sup>st</sup> applicant instead of moving



to court pursuant to Section 77 of the County Governments Act. The suit was accordingly dismissed on 2<sup>nd</sup> December, 2019 with an order that each party bears its own costs. It is important to note that while the 129 respondents were represented by the firm of Warutere & Co. Advocates, the 120<sup>th</sup> respondent (Eustace Ndeke) appeared in person and still appears in person.

3. Being aggrieved by the dismissal, the firm of Warutere & Associates filed a Notice of Appeal dated 11<sup>th</sup> December, 2019 and served the same on the applicants on 8<sup>th</sup> January, 2020. Apparently, the letter bespeaking the proceedings was never served on the applicants, and that is the elephant in the room. We shall advert to that issue later. On his part, the 120<sup>th</sup> respondent, Eustace Ndeke filed his Notice of Appeal and applied for proceedings vide his letter dated 27<sup>th</sup> January, 2020. We shall also advert to this issue later.
4. The applicants, who are the respondents in the appeal have moved this Court by way of the Notice of Motion dated 21<sup>st</sup> November, 2020, under Rules 42, 43, 82, 83 and 84 of the Rules of this Court seeking orders as follows: -
  - “ 1. That the Record of Appeal filed by the appellants/respondents on 7<sup>th</sup> August, 2020 be struck out with costs.
  2. In the alternative, to (1) above, the Notice of Appeal dated 11<sup>th</sup> December, 2019 be deemed withdrawn.”

The application is predicated on grounds that although the Notice of Appeal was filed and served on the applicants on time, the letter requesting for proceedings was never served on them; that the appeal should have been instituted within 60 days of the filing of the Notice of Appeal; and that if a party failed to institute the appeal within the appointed time, then the appeal will be deemed to have been withdrawn under Rule 83 of the Court of Appeal Rules (the Rules). The application is supported by the affidavit of Lilian Kiruja, the 1<sup>st</sup> applicant’s attorney on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> applicants. Ms. Kiruja avers that the applicants’ advocates were served with the Record of Appeal on 3<sup>rd</sup> November, 2020 well out of the 60 days provided for under the Rules.

5. In regard to the Notice of appeal filed by the 120<sup>th</sup> respondent, Ms. Kirunja deposes that the same was never served on the applicants, and is therefore, invalid. She states further that the letter bespeaking proceedings which the 120<sup>th</sup> respondent has attached to his affidavit is dated 27<sup>th</sup> January, 2020 which means it was sent to the Court outside the 30 days prescribed by the Court of Appeal Rules. She deposes further that Mr. Ndeke had also moved the ELRC on Review on the impugned judgment but unfortunately, the application was dismissed on 8<sup>th</sup> October, 2020. Having pursued that route, Mr. Ndeke cannot therefore come to this Court on appeal. She therefore, urges the Court to allow this motion and either strike out the appeal or in the alternative deem it as withdrawn pursuant to Rules 83 and 84 of the Rules.
6. In his replying affidavit sworn on 28<sup>th</sup> February, 2022, Eustace Ndeke, the 120<sup>th</sup> respondent reiterates that he filed the Notice of Appeal on time, and admits that he applied for proceedings vide the letter dated 27<sup>th</sup> January, 2020. He does not explain why the letter was sent to the court outside the 30 days required by the Rules. He blames the Covid – 19 pandemic for the delay in the typing of the proceedings and seem to leverage on the fact that he was issued with a certificate of delay from the Deputy Registrar and that he filed the record only 7 days after receiving the proceedings. He urges the Court to dismiss the application and allow the appeal to be determined on its merits. He has annexed as ENK2 a copy of his letter requesting for proceedings from the Deputy Registrar. The letter is dated 27<sup>th</sup> January, 2020 and is Not copied to the applicants herein.



7. Parties filed brief submissions which Mr. Munyiri, learned counsel for the applicants and Mr. Warutere, learned counsel for the 129 respondents highlighted during the plenary hearing of the application on 7<sup>th</sup> March, 2022. Mr. Ndeke also highlighted his submissions and urged the Court not to strike out his appeal. In their submissions the applicants submit that the appeal is incompetent because it was filed out of time, without leave of the Court and fails to comply with Rule 82 of this Court's rules. Rule 82(1) provides that the period for preparation and delivery of typed proceedings could be excluded from the computation of time to file the record of appeal, only if the request for proceedings was made to the registry and the opposing party was served with a copy of the request within 30 days of filing the Notice of appeal. This was not complied with and the respondents have not exhibited any copy of a letter filed within 30 days of the judgment requesting for typed proceedings. Therefore, the Notice of appeal should be deemed as withdrawn pursuant to rule 83 of the *Court of appeal rules*. The court has been urged to allow the application.
8. In opposing the application, Mr. Ndeke filed his submissions. He urged that the application be dismissed with costs for the reason that the record of appeal was properly on record and it was filed within the prescribed time.
9. We have considered the application, the rival affidavits with the annexures thereto and the written and oral submissions by all the parties herein. We think, we need to deal in the first instant with the question of the 120<sup>th</sup> appellant/respondent having preferred a review against the judgment and then proceeding with the appeal after his application for review was dismissed. The 120<sup>th</sup> respondent has not controverted that averment, so clearly he did move the court to review the impugned judgment. Could he therefore come before this Court on appeal over the same judgment? We do not think so. We note that the 120<sup>th</sup> respondent filed his review pursuant to section 16 of the *Employment and Labour Relations Court Act* after he had already filed his notice of appeal to this Court. Having done so, he can only be deemed to have withdrawn his appeal as he could not pursue the appeal and the review of the same judgment at the same time. That conduct is tantamount to abuse of the court process.
10. Having said so, we now turn to the other issues raised in the application pertaining to the 120<sup>th</sup> respondent's appeal. The motion is premised on rules 82, 83 and 84 of this Court's rules. Rule 84 which provides for striking out a notice or record of appeal states as follows: -

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, 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.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”
11. Mr Ndeke filed his Notice of appeal on 11<sup>th</sup> December, 2019, which was within the prescribed time. He further states that he wrote the letter bespeaking the proceedings on 27<sup>th</sup> January, 2020. Without belabouring the point, this letter was clearly filed outside the 30 days prescribed by the Rules. Secondly, and this is not disputed, the said letter was not copied to the applicants. Mr. Ndeke argues that he filed the record within time since there is a certificate of delay, therefore time taken to type the proceedings



should be excluded in computation of time. For purposes of clarity and for the benefit of Mr. Ndeke who is unrepresented, we quote Rule 82, in extenso, below: -

- “(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged —
- (a) a memorandum of appeal, in quadruplicate;
  - (b) the record of appeal, in quadruplicate;
  - (c) the prescribed fee; and
  - (d) security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy. (Emphasis ours)

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent. (Emphasis added)

12. There is no doubt that Mr. Ndeke did not comply with the above provisions and the proviso cited above is not available to him. His certificate of delay cannot assist him to circumvent compliance with the above rule. We note that by the time Mr. Ndeke filed his appeal, and presumably served it on the applicants, this motion seeking to deem the appeal as having been withdrawn had already been filed. We believe we have said enough to demonstrate that the application has merit and the appeal by Mr. Ndeke is for deeming as withdrawn.
13. As far as the appeal filed by the other respondents is concerned, Mr. David Githaka Gachiu who filed a replying affidavit on behalf of the other respondents deposes that the Notice of appeal was filed on time. It was also served on time. The issue here, as in the appeal filed by the 120<sup>th</sup> respondent, lies with the letter bespeaking proceedings. In this case, the letter requesting for typed proceedings is said to have been filed in court but the same has not been annexed to the respondent’s replying affidavit. The applicants deny having been served with the said letter as demanded by the Rules. What we have here is a reminder dated 25<sup>th</sup> June, 2020 making reference to the said letter.
14. Computation of time can only come into play if the respondents had made a request to be supplied with the proceedings and served the letter requesting for the proceedings on the applicant. As stated earlier, an appellant who fails to comply with rule 82 of the *Court of Appeal Rules* cannot benefit from the proviso to that rule. The consequence of not complying with rule 82 is that rule 83 takes effect, the Notice of appeal which had been filed is deemed to have been withdrawn. The Rule provides as follows:-

- “(83) If 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 on application by any party, make



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

Faced with a similar application, this Court in the case of *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [2016] eKLR, on the intent and purport of Rule 83 expressed itself 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.”

See also this Court’s decision in *Muzaffer Musafce Essajee & Another vs. Anne Njeri Mwangi* [2021] eKLR.

15. This Court has time without number emphasised the importance of compliance with the rules of Court. 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 82 and failure to comply with the same renders an appeal defective.

This Court in *MaeProper ties Limited vs. Joseph Kibe & Another* [2017] eKLR, reiterated its position as follows:-

We have said on numerous occasions that the rules of court exist for the purpose of orderly administration of justice before this court. The timelines for the doing of certain things and takings of certain steps are indispensable to the proper adjudication of the appeals that come before us. The rules are expressed in clear and unambiguous terms and they command obedience...”

The respondents failed to comply with rule 82 of the rules and consequently rules 83 and 84 come into play. The instant application to strike out the record was made within 30 days of service of the record, which was on 3<sup>rd</sup> November 2020. From the foregoing, it is inescapably clear that the application dated 21<sup>st</sup> November, 2020 is with merit. It is allowed with the result that Civil Appeal No. 107 of 2021 is deemed as withdrawn with costs to the applicants.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2022.**

**W. KARANJA**

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**JUDGE OF APPEAL  
HANNAH OKWENGU**

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**JUDGE OF APPEAL  
DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

