



REPUBLIC OF KENYA



KENYA LAW
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**Bitok v Lelei (Civil Application E037 of 2022)
[2022] KECA 1230 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1230 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E037 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
NOVEMBER 4, 2022**

BETWEEN

HOSEA BITOK APPLICANT

AND

KIMUTAI LELEI RESPONDENT

(An application to deem as withdrawn the notices of appeal against the rulings and orders of the Environment and Land Court at Eldoret (M. Odeny, J.) dated 10th December 2019 and 25th February 2020 in ELC No. 414 of 2012))

RULING

1. By a motion dated 8th March 2022 under Rule 83 of the Court of Appeal Rules, 2010, then in operation, Hosea Bitok, the applicant, seeks the following prayers;
 1. The Notice of appeal against the ruling and order of the Environment and Land court of Kenya at Eldoret (Hon. Justice Milicent Odeny) in Eldoret ELC No. 414 of 2012 dated the 10th December, 2019 given and lodged by the Respondent be deemed as withdrawn.
 2. The Notice of appeal against the ruling and order of the Environment and Land court of Kenya at Eldoret (Hon. Justice Milicent Odeny) dated 25th February 2020 in Eldoret ELC No. 414 of 2012 given and lodged by the Respondent be deemed as withdrawn.
 3. Costs of all proceedings in this court arising from the lodging of the aforesaid notices of appeal be paid by the Respondent.
 4. The orders of stay of execution and injunction pending the hearing and determination of the intended appeals given by this Honourable Court on 4th December 2020 in Civil Application No 48 of 2020 be discharged and/or vacated forthwith.



2. The motion is based on 3 grounds and is supported by an affidavit sworn by the applicant. He deposed that Odeny, J. delivered a judgment in his favour on 31st July 2019 declaring him as the true and absolute owner of parcel number Pioneer/ngeria Block I (EATEC)/113 (suit property). Consequently, the respondent's occupation thereon was declared unlawful and the appellant was granted vacant possession.
3. Thereafter, the respondent sought a stay of execution of the judgment. By a ruling delivered on 10th December 2019, Odeny, J. dismissed the application on the ground that it lacked merit. She pointed out that the respondent's counsel's failure to attend the delivery of judgment yet a notice of the same had been properly served on him was inexcusable. Further, she observed that the respondent could not hold the applicant at ransom due to his counsel non-attendance in order to delay the matter. Aggrieved by the dismissal, the applicant filed a notice of appeal dated 20th December 2019 and lodged it on 24th December 2019.
4. Another ruling was delivered by the learned Judge on 25th February 2020 on an application made by the applicant given that the respondent had failed to honor the court's order for vacant possession. Accordingly, an eviction order was granted and the Uasin Gishu County Commander and OCS Langas were ordered to assist the respondent to enforce it. Dissatisfied with that decision, the respondent filed another notice of appeal dated 28th February 2020 and lodged it on 4th March 2020.
5. The respondent was duly served with certified proceedings and rulings for the intended appeals on 10th September 2020 and the respective certificates of delay were issued by the Deputy Registrar on 1st October 2020. The applicant established that the respondent filed an appeal against the ruling delivered on 10th December 2019 via email to the Eldoret sub-registry of the Court. He was duly invoiced on 9th October 2020 but has never paid the filing fees nor lodged the hard copies of the record of appeal. Furthermore, the respondent has not appealed against the ruling delivered on 25th February 2020. He, however obtained an order of stay of execution of the eviction order from this Court on 4th December 2020.
6. The applicant complained that it has been almost one and half years since the respondent was supplied with the certificate of delay yet he has neglected to file any appeal. He averred that the respondent went to slumber and is no longer concerned with prosecuting the appeal. Moreover, he is enjoying the orders of injunction and stay whilst in possession of the suit property to the detriment of the applicant. He asserts that the failure to prosecute the appeal is a deliberate attempt to prolong the benefit of the injunctive orders which amounts to an abuse of the court process. To buttress his submissions, the appellant relied on the case of MAe Properties Limited Vs. Joseph Kibe & Another [2017] eKLR. He urged this Court, in the interest of justice do allow the application as prayed.
7. During the hearing of the application, learned Counsel Mr. Kamau appeared for the applicant while learned Counsel Mr. Kigamwa appeared for the respondent. It came to light that Mr. Kigamwa had filed a record of appeal for the ruling delivered on 25th February 2020. However, he had not served the respondent. What is more, Counsel for the respondent filed the replying affidavit to this application a day to the hearing denying the Court and Counsel for the appellant an opportunity to peruse it before the hearing. As a result, the Court made the following order;

Despite having received clear directions on April, 22nd, 2022 that the replying affidavit was to be filed within 3 days, Mr. Kigamwa, learned counsel for the respondent, concedes that he never did file such replying affidavit in time. He now says that he filed one yesterday, which is more than a month, under which after the time which he was allotted had expired. In the



circumstances, we have not had occasion to look at and we shall not look at the said affidavit. If the same has been filed at all it, shall be expunged from the record.”

8. The applicant has invited the Court, based on Rule 83 of this Court’s old Rules (now Rule 85) to make an order deeming the notices of appeal dated 20th December 2019 and 28th February 2020 respectively as withdrawn for lack of institution of the appeals by the respondent. The said Rule provides;

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 of any persons on whom the notice of appeal was served.” (Our emphasis)

9. The mandatory nature of this Rule was well captured by this Court in *Mae Properties Limited vs. Joseph Kibe & Another* [2017] eKLR;

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.” (Our emphasis)

10. Counsel for the respondent admitted that they had not filed the record of appeal against the ruling delivered on 10th December 2019. Even though there was a record filed against the ruling delivered on 25th February 2020, the filing fees had not yet been paid despite the documents being lodged on 8th October 2020. Counsel then sought time to regularize the error and pay the requisite fees. As things stand, there is no appeal against the ruling delivered on 10th December 2019 while the appeal against the ruling delivered on 25th February 2020 is not properly on record due to the respondent’s failure to pay the requisite filing fees for 7 months.

11. We need only reiterate this Court’s holding concerning the importance of adherence to Rule 83 in *John Mutai Mwangi & 26 Others Vs. Mwenja Ngure & 4 Others* [2016] eKLR;

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 succor.”

12. It is evident that the respondent has failed to properly file any record of appeal against both rulings within the 60 days as required by the Rules. We are thus satisfied that the applicant has demonstrated that the 60 days required for the lodging of the record of appeal against both notices have lapsed and no proper appeal is on record.



13. The inevitable consequence is that the notices of appeal dated 20th December 2019 and 28th February 2020 respectively, are deemed as withdrawn. It follows naturally that the stay orders granted on 4th December 2020 are vacated.

14. Accordingly, and without much ado, this application succeeds with costs to the applicant.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2022.

P.O KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

