



**Musundi & another v Barasa & 2 others (Civil Application
E121 of 2021) [2022] KECA 1222 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1222 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E121 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
NOVEMBER 4, 2022**

BETWEEN

STEPHEN FRANCIS MUSUNDI 1ST APPLICANT

JOEL LUMBASI MUSUNDI 2ND APPLICANT

AND

JOYCE SIKHOYA BARASA 1ST RESPONDENT

DOROTHY LUSIKE MUYERA 2ND RESPONDENT

ESTHER MATINGI WESONGA 3RD RESPONDENT

(Being an application seeking to strike out the Notice of Appeal from the judgment of the High Court of Kenya at Kitale (Chemitei J) dated 23rd July, 2019 in Succession Cause No. 12 of 2019)

RULING

1. By their application dated August 12, 2021, the applicants, Stephen Francis Musundi and Joel Lumbasi Musundi ask this Court to strike out the notice of appeal filed by the respondents on July 23, 2019 against the decision of Chemitei J dated July 23, 2019 in Succession Cause No. 12 of 2019. They also pray that the costs of the application be borne by the respondents.
2. The application is brought under Rules 83 and 84 of the *Court of Appeal Rules 2010* (now Rules 85 and 86 of this *Court's Rules, 2022*.) It is based on the grounds that the respondents have failed to institute an appeal within 60 days from the date when the notice of appeal was filed, and the notice of appeal should therefore be deemed as withdrawn. The applicants further aver that the letter bespeaking typed proceedings was neither filed nor served upon them, nor have they ever been served with the notice of appeal. They urge the Court, in the interests of justice, to grant the orders that they seek.



3. The application is supported by an affidavit sworn by the 1st applicant, Stephen Francis Musundi. He avers that the impugned judgment was delivered on July 23, 2019 and a notice of appeal was filed by the respondents on the same date. Though the notice of appeal was filed within the stipulated time, it has never been served upon them, nor has a letter bespeaking the proceedings been served on them.
4. Mr. Musundi further avers that on August 7, 2019, the respondents sought leave to file their appeal out of time and enlargement of time to file their appeal, which prayer was granted on May 5, 2020. It is their contention that three years have elapsed since the notice of appeal was filed and no action with respect to the filing of the appeal has been taken.
5. In an affidavit sworn in opposition to the application by the 2nd respondent, Dorothy Lusike Muyera, on May 24, 2022, the respondents aver that they duly served the applicants upon lodging Civil Appeal No. 28 of 2020, together with a letter bespeaking proceedings, a fact which was not disputed by the applicants during the hearing of the application for extension of time.
6. At the hearing of the application, Mr. Musundi appeared in person and indicated that the applicants would rely on their written submissions dated May 19, 2022. Learned counsel for the respondents, Ms. Majune, also indicated that the respondents would rely on their written submissions.
7. In their submissions, the applicants basically reiterate their averments in the affidavit in support of the application. While a notice of appeal had been filed in time, no letter bespeaking the proceedings had been served on them, nor had a record of appeal been filed, even by the time of hearing the application. They submit further that the respondents were enjoying stay orders granted on May 5, 2020 to the detriment of the applicants and the deceased's family members.
8. In their submissions dated May 24, 2022, the respondents assert that the notice of appeal sought to be struck out was filed in court on July 23, 2019 and was served upon the applicants on July 26, 2019. They also submit that under Rule 84 of this *Court's Rules*, which is couched in mandatory terms, this application should have been filed within 30 days of the notice. It had, however, been brought after more than 12 months from the date on which the applicants were served with the notice of appeal and it is therefore incompetent.
9. We have considered the averments and submissions before us. It is common ground that the judgment that the respondents seek to appeal against was delivered on July 23, 2019. Dissatisfied with the judgment, the respondents filed a notice of appeal dated July 23, 2019. There is no evidence before this Court that a record of appeal has been filed or served on the applicants.
10. The applicants contend, correctly, that the record of appeal should have been filed within the timelines stipulated in Rule 82 (now Rule 84) of the *Court's Rules*. Rule 82 provided as follows:
 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; ...

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.



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.
11. In its decision in *Charles Wanjobi Wathuku vs. Gitinji Ngure & Another* [2016] eKLR, this Court reiterated the position taken in *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [2016] eKLR on the intent and purport of Rule 82 of the Court's rules as follows:

“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.

12. At the hearing of the application, counsel for the respondents was cagey with respect to if and when the respondents had filed their record of appeal. Further, we note that in their affidavit in response to the application, the respondents are silent on whether service of the notice of appeal was effected upon the applicants, and whether a record of appeal has ever been filed. It would appear, then, that the applicants' contention that the respondents have failed to comply with Rule 82 with respect to the filing of the record of appeal is unanswerable.
13. The issue before us, then, is whether the present application is merited under Rule 83 and 84 of the *2010 Rules* (Rule 85 and 86 of the Court of Appeal Rules, 2022), or whether, as the respondents contend, having been filed more than 30 days after the filing of the notice of appeal, it is incompetent.
14. Rule 84 (now 86) provides that an application to strike out a notice of 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.' It is not in dispute that the present application has been brought more than thirty days after the filing of the notice of appeal. Accordingly, the application under Rule 84 is incompetent. As was held in *Salama Beach Hotel Limited & 4 others -vs- Kenyariri & Associated Advocates & 4 others* (2016) eKLR:

“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.”



15. The applicants have, however, sought an order that the notice of appeal be deemed as having been withdrawn. Rule 83 (now 85) of the Rules of this Court provides that:

“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.”

16. From the pleadings before us, there is no dispute that the respondents have not taken any steps to institute their appeal since they filed the notice of appeal more than three years ago. Rule 82 of the 2010 Rules required that the record of appeal be filed within 60 days from the date of filing the notice of appeal. The respondents had no response to the contention that they have failed to comply with the Rules. As there is no time limit for an application to deem a notice of appeal as withdrawn under Rule 83, the present application is properly anchored under the said Rule. In its decision in *John Mutai Mwangi & 26 others vs. Mwenja Ngure & 4 others* (2016) eKLR this Court held that:

“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 those 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”.

17. See also *Judith Jemeli Kese v Moi Teaching and Referral Hospital* [2021] eKLR and *Nakuru Water & Sanitation Company Ltd v Asanyo & 2 others* (Civil Appeal (Application) 116 of 2018) [2022] KECA 139 (KLR) (18 February 2022) (Ruling).

18. In the result, we are satisfied that the application dated August 12, 2021 is merited, and it is hereby allowed. The notice of appeal dated July 23, 2019 is hereby deemed as withdrawn. The applicants shall have the costs of the application.

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

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

