



**Kaitet Tea Estate (1977) Ltd v Simatwa & another (Civil Application E059 of 2021) [2022] KECA 1421 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1421 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E059 OF 2021  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
DECEMBER 16, 2022**

**BETWEEN**

**KAITET TEA ESTATE (1977) LTD ..... APPLICANT**

**AND**

**PETER M. N. SIMATWA ..... 1<sup>ST</sup> RESPONDENT**

**GATATHA FARMERS CO. LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Application to deem as withdraw the notice of appeal against the judgment and decree of the High Court of Kenya at Kitale (Mwangi Njoroge, J.) dated 30th May, 2018 in ELC No. 36 of 2013)*

**RULING**

1. The motion dated April 30, 2021, filed by Kaitet Tea Estate [1977] LTD (the applicant), seeks to have the notice of appeal filed at the High Court by Peter M N Simatwa (the 1<sup>st</sup> respondent) on June 7, 2018 deemed as withdrawn under rule 83 of the *Court of Appeal Rules, 2010* (now rule 85). The said notice of appeal is dated June 6, 2018 and signified the 1<sup>st</sup> respondent's intention to file an appeal against a judgment of that court (Mwangi Njoroge, J) delivered on May 30, 2018.
2. The grounds on which the motion is premised appear on its face and in the affidavit of Peter Kipngeno Kotut, a director of the applicant company. The grounds are that, the judgment against which the 1<sup>st</sup> respondent intends to appeal was delivered on May 30, 2018; the 1<sup>st</sup> respondent filed his notice of appeal on June 6, 2018 and lodged it on June 7, 2018; a letter bespeaking proceedings was also filed the same day as the notice of appeal; the 1<sup>st</sup> respondent, however, failed to institute his appeal within the stipulated 60 days and neither has he taken any steps so far to ensure that the appeal proceeds for hearing; the delay in prosecuting the intended appeal is prejudicial to the applicant as the 1<sup>st</sup> respondent continues to occupy its land reference No 6137 in Trans-Nzoia, and leasing part of it, thus interfering with the applicant's quiet enjoyment of its rightful property.



3. During the hearing of the motion, it was apparent that the respondent had not filed a response and neither did he appear for the hearing even though he had been served with the application and the notice for hearing. Learned counsel Mr Odoyo, appeared for the applicant sought to rely on his written submissions, although there are none on record. Learned Counsel Mr Kiira appeared for the 2<sup>nd</sup> respondent and expressed his support for the application.
4. The case before us is one in which even had the applicant not moved the court, we ought on our motion to have made an order under rule 83, now rule 85 of the rules of the court which is in unequivocal terms;

“ 85. Effect of default in instituting appeal

- (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.” (Our emphasis)

5. The 1<sup>st</sup> respondent having lodged his notice of appeal on June 7, 2018 and not taken any steps thus far to institute the appeal should, naturally and logically, in the absence of any showing to the contrary be considered to no longer have interest in the appeal. It is thus obvious that this motion is not only unanswered, but also quite unanswerable.
6. We reiterate what we said in Martin Kabaya v David Mungania Kiambi, Nyeri Civil Application No 12 of 2015;

“The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”

7. In the result, the notice of motion is allowed, and the notice of appeal dated June 6, 2018 is hereby struck out with costs. The applicant shall have the costs of this motion also.

**DATED AND DELIVERED AT KISUMU THIS 16<sup>TH</sup> DAY OF DECEMBER, 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**

