



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 194 OF 2020

BETWEEN

ELIZABETH WANJIRA EVANS.....APPLICANT

AND

JIMMY AGGREY SIMIYU T/A B.W. MATHENGE

& CO. ADVOCATES.....RESPONDENT

(An application to withdraw a Notice of Appeal from the Ruling of the High Court of Kenya at Nakuru. (J.N. Mulwa, J.) dated 21st February, 2019 in Misc. Civil Appli. No. 128 of 2015)

RULING OF THE COURT

1. *Elizabeth Wanjira Evans* (the applicant) has moved this Court vide a motion on notice dated 16th December, 2019 in which she is seeking that a notice of appeal dated 7th March 2019 that was lodged in the High Court on 12th March 2019 be deemed to have been withdrawn by the firm of Advocates trading under the name and style of **B.W. Mathenge & Co Advocates** (the respondent). The motion is predicated under the provisions of **Sections 3(1) & (2), 3A & 3B** of the **Appellate Jurisdictions Act Cap 9** of the Laws of Kenya, **Rules 1(2), 82(1) & (2)** and **83** of the **Court of Appeal Rules, 2010**.

2. Briefly, the dispute that was determined in the Ruling delivered by **Mulwa, J.** in **Nakuru Civil Appeal No. 233 of 2007**, which was about an advocate-client bill of costs that was drawn by the respondent. The Taxing Master had taxed the said bill and awarded the respondent a sum of Kshs 122,120 on 29th May, 2018. The applicant applied in the aforesaid suit to set aside the said taxation order on the grounds that the respondent had not taken out a practicing certificate for the period between, 2009 to 2017; that the respondent was an unqualified Advocate who could not offer legal services let alone be entitled to legal fees and that the respondent was an illegal entity that was operating in contravention of **Section 37** and **39** of the **Advocates Act**.

3. The learned Judge vide her Ruling delivered on 21st February, 2019 set aside the Taxing Master's decision and declared the law firm an illegal entity. This provoked the respondent to file the notice of appeal dated on 7th March, 2019. However, since the respondent took no action to file the record of appeal as required by the Court of Appeal rules, the applicant filed the instant application seeking to have the notice of appeal deemed as withdrawn.

4. The application is supported by an affidavit sworn by the applicant on 16th December, 2019 stating that after the respondent lodged the notice of appeal, no action has been taken as prescribed by **Rule 82(1)**, thus she moved the Court to deem it withdrawn because maintaining the notice of appeal on record, makes her continue incurring unnecessary legal expenses in a matter where the perhaps the respondent lost interest in pursuing an appeal which was evinced in the notice.

5. The respondent did not file any response to this application which was canvassed by way of written submissions without appearance by counsel or parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global pandemic.

6. That said, we have considered the notice of motion which invokes the jurisdiction of this Court as provided under **Rule 83** of the **Court of Appeal Rules**, 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.”

The guiding principle when exercising this jurisdiction is well articulated in a long line of case law. In **Mae Properties Limited vs. Joseph Kibe & another [2017] eKLR**, this Court while dealing with a similar matter on whether or not to deem a notice of appeal as withdrawn had this to say: -

“Under the same Rule 83, and assuming that the Court will not have sooner made the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been lodged. Once those two facts are established, we do not see why the Court should not, unless persuaded by some compelling reason in the interests of justice, simply make the order deeming the notice of appeal as withdrawn.”

7. It is obvious the respondent merely lodged the notice of appeal in 12th March, 2019 and did not file any record of appeal. There is no indication that the respondent applied for the proceedings or filed the record of appeal as provided under the rules of this Court. We also note the respondent was served with the instant application as well as the hearing notice of t this motion but did not file any averments to contradict the fact that they have not taken any steps to file the record of appeal. In light of the provisions of the Court rules that sixty (60) days have elapsed since the notice of appeal was filed and there having been no record of appeal that was lodged, twenty-three months later, we are satisfied that the instant motion is merited.

8. The above being our view, the notice of motion dated 16th December, 2019 is hereby allowed. We make no order as to costs since the respondent did not appear and hopefully to bring this advocate-client relationship to a less painful end.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR