IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI, JJ.A.)

CIVIL APPLICATION NO. E271 OF 2020

BETWEEN

MUZAFFER MUSAFEE ESSAJEE.....1ST APPLICANT

HUSEINA MUZAFFER ESSAJEE ..... 2ND APPLICANT

-VERSUS-

ANNE NJERI MWANGI .....RESPONDENT

(Being an application to be deemed as withdrawn; the Notice of Appeal against the decision of the High Court of Kenya (Hon. J. B. Havelock J.) dated 25th *March 2014* ***in Nairobi HCCC No. 49 of 2011)***

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RULING OF THE COURT

Before us, is a Notice of Motion dated 9th March, 2020 under **Rules 1(2), 42, 43** and **83** of the **Court of Appeal Rules**, substantively seeking orders that:

> **a. The notice of appeal herein dated 1st April, 2014 and lodged in the High Court at Nairobi on 3rd April, 2014 be deemed to have been withdrawn.**
>
> **b. Costs of, and incidental to, this application be provided for.**

It is supported by grounds on its body and a supporting affidavit sworn by **Muzaffer Musafee Essajee** together with annextures thereto. It is not opposed. It was canvassed virtually through the Applicants' sole pleadings and written submissions, in their absence and without oral highlighting.

In summary, it is the Applicants' averments and submission that the respondent filed a claim against them in the above mentioned cause seeking various reliefs, which was dismissed on 25th March, 2014. The respondent was aggrieved and on 3rd April, 2014 timeously filed a notice of appeal dated 1st April, 2014. She also filed a notice of motion dated 4th April, 2014 in the trial court seeking a stay of execution of the judgment dated 25th March, 2014 pending hearing and determination of the intended appeal. In a ruling dated 15th July, 2014 the High Court rejected that application with costs to the respondents (now the Applicants). On 8th August, 2014, the trial court issued both the decree and an order of the court pursuant to the ruling dated 15th July, 2014. The respondent, in compliance with the above processes surrendered vacant possession of property **LR No. 209/7755/19 Nairobi** (the suit property) to Applicants in August 2014. The Co-operative Bank of Kenya Ltd, in obedience to the said judgment and decree of the court also surrendered the original certificate of **Title No. LR. 33726, LR No. 209/7755/19 Nairobi** to the Applicants' on 29th September, 2014.

Applicants in the circumstances, therefore rely on the case of **Mae Properties Ltd vs. Joseph Kibe & Another [2017] eKLR** and submit that respondent's notice of appeal died in the eyes of the law upon expiry of sixty (60) days from the date of the lodging of the notice of appeal in the absence of demonstration that the same is curable by operation of the proviso to **Rule 82(1)** of the **Court of Appeal Rules**, or alternatively, by an order for extension of time under **Rule 4** of the **Court of Appeal Rules**, both of which are non-existent herein.

We have considered the record in light of the above Applicants' sole pleadings and submissions. Our invitation to intervene on behalf of the Applicants has substantively been invoked under **Rule 83** of the **Court of Appeal Rules**. It 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 on any persons on whom the notice of appeal was served".

This being an application to deem the notice of Appeal filed herein as withdrawn, **Rule 83** cannot be considered as a stand alone rule. It has to be considered in conjunction with **Rule 82** which provides as follows:

82(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.

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.

3. .....

The Court has already pronounced itself on the consequence for non-compliance with the prerequisites in **Rule 82(1)** and **(2**) of the **Court of Appeal Rules**. We take it from the case of **Mae Properties Limited vs. Joseph Kibe** (supra) in which the Court expressed itself as follows:

"It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo motu, on its own motion and at its sole discretion, presumably with neither notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure.

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 made the order deeming the notice of appeal as withdrawn."

See also the case of **Charles Wanjohi Wathuku vs. Githinji Ngure & Another [2016] eKLR,** in which the Court reiterated the position taken in the case of **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."

Turning to **Rule 83** of the **Court of Appeal Rules**, the Court expressed itself as follows in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others** [supra], on the intent and purport of **Rule 83**:

"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".

As was explicitly stated in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others** [supra], the Respondent was obligated to process the filing and service of the record of appeal within sixty (60) days as stipulated in **Rule 82(1)** of the **Court's Rules** or alternatively within the time envisaged in the proviso to the said rule. No such efforts were made prompting the Applicants to seek to have the notice of appeal deemed as withdrawn under **Rules 83** of the Rules of the Court in the application under consideration.

The above being the uncontroverted position herein, we adopt the position taken by the Court in the **Mae Properties vs. Kibe case** (supra), in which it approved the holding of the Court in **Martin Kabaya vs. David Mungania Kiambi Nyeri Civil Application No. 12 of 2015** as follows:

"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."

The law has to take its own course. We allow the application dated 9th March, 2020 as prayed with costs.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. Ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR