



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), W. KARANJA & OKWENGU, J.J.A.)

CIVIL APPLICATION NO. 48 OF 2018

BETWEEN

HARRIET NKUENE MUTUAIRANDU.....APPLICANT

AND

JEDIEL MUTHURI.....RESPONDENT

(Being an application to be deemed to have been withdrawn, the Notice of Appeal against the decision of the High Court (J. Lesiit, J.) dated 16th June, 2011

in

Meru HC Succ. Cause No. 4 of 1994)

RULING OF THE COURT

Before this Court is a notice of motion dated 9th May, 2018 pursuant to **Rule 42(1) and 83** of this Court's Rules, substantively seeking orders that:

“a) The notice of appeal herein dated 20th June, 2011 and lodged in Court on 23rd June, 2011, be deemed as withdrawn.

b) Costs of this application be borne by the respondent”.

Grounds on its body and an affidavit in support of the application deposed by Harriet Nkuene Mutuairandu are to the effect that the respondent has failed to institute an appeal within the appointed time. In summary, the applicant avers that the estate to which these proceedings relate belonged to her late father M'Rwito

Manga who died on 11th December, 1987; that following his death his widow Philis Kajuju M'Rwito (the applicant's mother) petitioned for grant of letters of administration; that the grant was issued to her but was challenged by the respondent; that by a judgment dated 16th June, 2011 the court confirmed the grant in favour of the applicant's mother and gave her the liberty to proceed to distribute the said estate; that aggrieved by the said judgment, the respondent lodged the notice of appeal on 23rd June 2011; that the respondent's application for stay of execution was rejected by the High Court; that the respondent then moved this Court for the same orders; that on 14th May, 2012 parties entered a consent to the effect that *status quo* be maintained pending the hearing and determination of the intended appeal and that the respondent was to lodge and serve the appeal within 30 days thereof; that upon the death of her mother who was the sole administrator of the estate, the applicant was substituted as the administrator; that when she took over, she found that the respondent had not filed an appeal for a period of over 6 years; that through her advocate she has written several letters to the respondent inquiring on the status of the appeal but there has been no response; and that she is unable to complete the administration of the estate due to the pending notice of appeal. For these reasons, it was submitted that to date the delay is about 9 years which is not only unjustifiable but also inordinate; and that the respondent has no intention of lodging an appeal, hence this application.

The respondent, who is now acting in person, opposed the application, submitting that he has been diligent in following up the matter and frequently visited his erstwhile advocate's chambers and that no information regarding the appeal was ever passed to him. He pleaded with us to consider that the appeal involves land, which ought to be heard on merit; that the delay in filing the appeal was not his fault but rather it

was occasioned by the court that delayed in supplying proceedings to his advocate even after paying the requisite fees and making many visits to the court registry.

The proviso to **Rule 82(1)** and **(2)** of this Court's Rules states 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;**
- (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)” (My Emphasis)

It is not in dispute that the respondent filed his impugned notice of appeal on 23rd June 2011. Since the lodging of the said impugned notice of appeal, the respondent has not taken the necessary procedural steps provided for in **Rule 82(1)** of this Court's Rules to progress his initiated appellate process. The applicant has also alluded to the fact that parties recorded consent before this Court on 14th May 2012. One of the conditions of the consent required the respondent to file his appeal within 30 days thereof, which fact is not denied by the respondent. The appeal has not been lodged, 9 years since the respondent lodged his notice of appeal.

The respondent has not placed before us any letter requesting for proceedings to show that he has diligently been following up on the typing of proceedings and that indeed it is the court registry that has delayed in supplying the proceedings.

This application is hinged on **Rule 83** of this Court's Rules which provides as follows:

“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”.
(My Emphasis)

See **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others** (2016) eKLR.

Having lodged his notice of appeal on 23rd June 2011 the applicant ought to have filed and served his record of appeal within sixty (60) days as stipulated in **Rule 82(1)**. Alternatively, having entered into consent on 14th May, 2012 which consent obligated him to file and serve his record of appeal within 30 days thereof, he ought to have complied.

The applicant has therefore laid a proper basis for the invocation of **Rule 83** of this Court's Rules

We allow this application with costs. The applicant is deemed to have withdrawn his notice of appeal.

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

W. OUKO, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR