



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, NAMBUYE & J. MOHAMMED, JJA)

CIVIL APPLICATION NO. 6 OF 2017

BETWEEN

EVANS ACHIMBAAPPLICANT

AND

STITCH MASTERS LIMITEDRESPONDENT

(An application for an order to deem the notice of appeal dated 24th June, 2015 as withdrawn in respect of the Judgment and Ruling of the Employment and Labour Relations Court at Nairobi (Nduma Nderi, J.) dated 21st November, 2014 and 19th June, 2015 respectively

in

Cause No. 539 of 2012)

RULING OF THE COURT

1. Before us is an application anchored on **Rules 1 (2), 82 (1) & 83** of the **Court of Appeal Rules** (the Rules) and **Sections 3A & 3B** of the **Appellate Jurisdiction Act**. The applicant seeks that the notice of appeal filed by the respondent on 24th June, 2015 against the judgment and ruling of the Employment and Labour Relations Court (ELRC) dated 21st November, 2014 and 19th June, 2015 respectively to be deemed as withdrawn. His application is premised on the ground that since the respondent lodged the notice of appeal in question it has failed and/or neglected to institute the appeal within the stipulated time frame.

As such, of interest to this matter is **Rule 83** of the Rules which stipulates:

“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who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order.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.”

2. The rationale and criteria for a notice of appeal being withdrawn under the aforementioned rule were succinctly discussed by this Court in **Quicklubes E. A. Limited vs Kenya Railways Corporation [2014] eKLR** as follows:

“Rule 83 gives this court unfettered discretion to deem an appeal as withdrawn if a party files a notice of appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of court but fail to inform the court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allow the court to invoke Rule 83 suo motu if the respondent in the intended appeal does not move the court.”

3. Does the application meet the above criteria? It is common ground that the applicant through his union instituted a suit against the respondent in the ELRC being Cause No. 539 of 2012 claiming his services had been unfairly terminated and towards that end, he sought terminal benefits which he believed were due to him. The trial court upon hearing evidence tendered on behalf of the parties entered judgment in favour of the applicant on 21st November, 2014 and granted him an award of Kshs.234,464. The respondent was not happy and as a result, filed an application for review of the said judgment which application was dismissed with costs vide a ruling dated 19th June,

2015.

4. The respondent was equally not pleased with the outcome of the application for review and this time around he lodged the notice of appeal in question and requested for certified proceedings. The applicant deposed that on 30th August, 2016 the Registrar of the ELRC informed the parties that the certified copy of the proceedings were ready for collection and he annexed the relevant notice to his application. He argued that from that date the respondent had not taken any steps to institute its appeal which signifies that it has since lost interest in doing so. It is on the basis of the foregoing that the applicant seeks the order in issue.

5. On our part, taking into account that the parties herein were notified by the Registrar ELRC that the certified proceedings were ready on 30th August, 2016, the appeal as per **Rule 82 (1)** of the Rules, ought to have been filed on or before 31st October, 2016. No such appeal has been filed to date. In the circumstances, we are convinced that the failure to file the appeal coupled with the fact that despite being served with the application and hearing notice, the respondent neither filed a response nor made any appearance at the hearing of the application is a clear indication that it is not keen proceeding with an appeal against the impugned ruling and judgment.

6. Accordingly, the application falls squarely within the operation of **Rule 83** of the Rules. In the end, we find that the application has merit and is hereby allowed with costs. The notice of appeal dated 24th June, 2015 is deemed as withdrawn with costs.

Dated and delivered at Nairobi this 25th day of January, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR