



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 104 OF 2015

BETWEEN

FRANCIS WAKAHU THEURI.....APPLICANT

AND

MONICA NJERU

ESTHER WANGUI

CATHERINE MUTHONI

FRANCIS NJURU NGUGI

T/A WAWAGE INVESTMENT COMPANY.....1ST RESPONDENT

JOSEPH GITUMA & 29 OTHERS.....2ND RESPONDENT

(Being an Application for striking out the Notice of Appeal in an intended Appeal from the Judgment of the High Court of Kenya at Nairobi (P. Nyamweya, J.) delivered on the 14th December 2012

in

H.C.C No. 2484 of 1994)

RULING OF THE COURT

1. By a Motion on Notice dated 27th of April, 2015 and affidavit in support of even date lodged in this Court on 21st April, 2015 **Francis Wakahiu Theuri** the applicant herein, sought orders *inter alia* that: this Honourable Court strike out the Notice of Appeal dated 17th December, 2012 and; in the alternative the 1st respondent be deemed to have withdrawn the said notice.

2. A brief background to the application is that the applicant herein being the owner of all that property known as **Ruiru/Ruiru Block 1 (Witeithie/125)**, entered into a sale agreement dated 9th February, 1991 with the 1st respondent herein for the sale of 20 acres being the suit property at a consideration of Kshs. 4,000,000. The 1st respondent paid a deposit of Kshs. 1,221,000 but in breach of the said agreement failed to pay the balance of the purchase price as per the terms of the agreement. According to the applicant, the respondents also entered into the suit property and committed acts of wanton waste without his permission.

3. This is what prompted the applicant to move the High Court sitting in Nairobi vide **Civil Suit No. 2484 of 1994** seeking several reliefs which included, *inter alia*, orders of eviction and injunctive orders to restrain the respondents, their servants and/or agents from trespassing on the said property.

4. The respondents denied the claim through their joint statement of defence filed on 15th August, 1995 which was subsequently amended to include a counterclaim. The details of the suit do not nonetheless concern us at this point in time. Suffice to say that the matter was heard and the High Court in its Judgment rendered on the 14th December, 2012 found in favour of the applicant and gave orders, *inter alia* that: the respondents, their agents, servants vacate and remove their structures from the suit property; the respondents, their agents, servants and any

person claiming through them be restrained from entering, continuing to construct on, sub-dividing or in any other manner interfering with the ownership of the suit property and; the 1st respondent be refunded all amounts paid to the applicant towards the purchase of the suit property together with accrued interest.

5. Aggrieved by the said orders, the respondents on the 18th of December 2012, filed a Notice of Appeal dated the 17th of December, 2012 which was served on the applicant timeously on 20th December, 2012. The respondents also through the firm of Mboya Wangong'u & Waiyaki wrote the letter bespeaking proceedings to the Deputy Registrar of the High Court on 17th December, 2012 and served it on the applicant's counsel on 20th December, 2012.

6. It would nonetheless appear that the respondents went to slumber and did not pursue the matter with a view to ensuring the record of appeal was filed and served as required by the Rules of this Court. This perceived inertia is what prompted the applicant to move this Court vide the Notice of Motion dated 21st April, 2015, the subject of this Ruling. In the application which is pronounced to be premised on **Rule 82 and 83 of the Rules of this Court**, the applicant seeks to have the Notice of Appeal struck out and in the alternative the same be deemed as withdrawn on grounds that: whilst the same was filed in Court on 18th December, 2012 and served upon the applicant on the 20th December, 2012; the time limitation by law within which the intended appeal is to be lodged has since lapsed yet the 1st respondent has failed to institute the appeal in accordance with this Court's Rules; there is no application on record seeking an extension of time to file and serve the notice and record of appeal; the 1st respondent's delay in lodging the appeal demonstrates their reluctance to proceed with the appeal and the 1st respondent's delay in instituting the appeal is inordinate and it is in the best interest of justice to allow this application.

7. In the affidavit in support of the motion sworn by Judy W. Gichumbi, Advocate on 21st April 2015, learned counsel has deposed that the letter to the deputy registrar bespeaking proceedings was served on their office on 20th December, 2012 but thereafter the respondents have made no effort to follow up the matter with the Deputy Registrar. According to Ms. Gichumbi, there is inordinate delay on the part of the respondents to pursue their appeal and this is a clear demonstration of their disinterest in the matter.

8. In response to the application, Francis Njuru Ngugi, the 1st respondent, through his affidavit sworn on 15th June, 2015 denying any laxity on their part and lays the entire blame for the delay at the feet of the trial court, saying that the original file was said to have gotten lost and the proceedings could not therefore be typed. He also blames the applicant for inundating the trial court with multiple applications, thus making it difficult for the proceedings to be typed. The respondent did not annex to his affidavit any letters to demonstrate any attempts to follow up the typing of the proceedings with the Deputy Registrar.

9. A day after filing the replying affidavit, learned counsel for the respondents filed a preliminary objection dated the 16th June, 2015 which was premised on **Rule 84 of the Court of Appeal Rules**. He asserted that the applicant's application to strike out the notice of appeal dated 17th December, 2012 was time barred under **Rule 84 of the Court of Appeal Rules 2010** having been brought after the expiry of 30 days from the date of service of the Notice of Appeal and that it is frivolous and otherwise an abuse of the Court process. He urged the Court to allow the preliminary objection and dismiss the application.

10. When the application came up for plenary hearing before us on 27th June 2019, learned counsel Samuel Kihara Ndiba and Judy Gichumbi appeared for the applicant while Ms. Mumbi Kathungu appeared for the 1st respondent and also held brief for Gachie Mwanzia for the second respondent. Urging the Court to dismiss the preliminary objection, Mr. Kihara maintained that they had moved the Court under Rule 83 of the Rules of this Court and not Rule 84, and so the 30 days limitation did not apply to their application.

11. As far as the application itself was concerned, Mr. Kihara maintained that the only letter they had been served with was the one bespeaking proceedings dated 20th December, 2012 and the respondent had not availed any other letters to the court as proof that they had been pursuing the matter. He urged us to dismiss the preliminary objection and allow the application. Both parties filed lists of authorities which we have considered along with the application, the law and the oral submissions.

12. We shall consider the preliminary objection first. A clear distinction must be drawn between Rule 83 and Rule 84 of the Court of appeal Rules. Before we go to the specific provisions, it is imperative to point out that there is no dispute that the application at hand is anchored on Rules 82 and 83 of the rules of this Court where it seeks an order to deem the notice of appeal as withdrawn and not Rule 84 which deals with striking out an appeal. It is noteworthy that Rule 83 does not give any timelines within which such an application may be filed in Court.

13. Rule 83 provides as follows:-

“Rule 83. Effect of default in instituting appeal.

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.”

On the other hand Rule 84 provides as follows:-

“Rule 84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

14. Where a party invokes Rule 84 of the rules, then the application for striking out must be filed within 30 days of service of the notice of

appeal or the record of appeal as the case may be. Where however a party invokes Rule 83, then the 30 day strictures do not apply. The Court would however be slow to deem the appeal as withdrawn where the respondent is able to demonstrate that he/she has exercised diligence in pursuing the proceedings but his/her efforts have been frustrated by circumstances beyond their control.

15. Unfortunately, as pointed out earlier, the respondents have not demonstrated any effort on their side to obtain the proceedings from the High Court. In absence of any communication between the respondents and the deputy registrar of the High Court seeking to expedite the typing of the proceedings, this Court cannot be left to speculate that such correspondence does indeed exist.

16. The 1st respondent argues that there were numerous applications which were filed with the superior court post-delivery of the judgment subject of an intended appeal but there has been no evidence adduced to demonstrate that the filing of the said applications directly or indirectly impeded the typing of the said proceedings other than mere speculation.

17. The rationale and criteria for a notice of appeal being withdrawn under this rule were succinctly discussed by this Court in **Quicklubes E.A. Limited v. 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 favorable 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 moto if the respondent in the intended appeal does not move the court.”

See also this Court’s decision in **Mae Properties Limited vs Joseph Kibe and Another (2017 eKLR)**

18. In our considered view, the respondents have not satisfied us that they have been prudent or diligent in pursuing this appeal since 18th December, 2012 when the notice of appeal was lodged. This matter falls on all fours with the **Quicklubes case** (supra). Accordingly, we allow the application dated 21st April, 2015 and deem the Notice of Appeal dated 17th December, 2012 as having been withdrawn. We also award costs of the application to the applicant, who is the respondent in the appeal.

Dated and delivered at Nairobi this 27th day of September, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR