



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASEKE-MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPLICATION NO. 49 OF 2018

BETWEEN

GEOFFREY MATOKE.....APPLICANT

AND

MORAA MASARE.....1<sup>st</sup> RESPONDENT

JEMIMAH MASARE.....2<sup>nd</sup> RESPONDENT

BWARI MASARE.....3<sup>rd</sup> RESPONDENT

EVANS SAMWEL MOCHACHE MASARE.....4<sup>th</sup> RESPONDENT

PETER MOKEBO MIENCHA .....5<sup>th</sup> RESPONDENT

*(Being an application to deem as withdrawn the Notice of Appeal filed at the High Court at Kisii on 25<sup>th</sup> day of June 2013*

*in*

*Kisii HCCA No. 44 of 2013)*

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**RULING OF THE COURT**

1. By way of Notice of Motion dated 14<sup>th</sup> May 2018, the applicant has moved this Court under the provisions of **Rules 42 and 83** of the Rules of this Court to deem the Notice of Appeal dated 25<sup>th</sup> June 2013 filed in Kisii High Court Civil Appeal No. 44 of 2010 as having been withdrawn.

2. The ground in support of the Motion is stated on the face thereof and in the supporting affidavit of the applicant. It is deposed that the respondents filed a Notice of Appeal at the High Court in Kisii in the Civil Registry on 25<sup>th</sup> June 2013. That subsequent to the filing of the Notice of Appeal, the respondents have failed to lodge the intended appeal within the prescribed sixty-day period. That the respondents' advocates were supplied with the certified copies of the court proceedings and judgment on 7<sup>th</sup> July 2017. That despite receiving the certified copies, the respondents have taken no steps to lodge the record of appeal within the requisite time.

3. In opposing the instant application, a replying affidavit deposed by Mr. Joseph Mboya Oguttu the counsel for the respondents was filed. He concedes that as counsel for the respondents, he prepared and lodged the Notice of Appeal dated 25<sup>th</sup> June 2013. That subsequent to the filing of the Notice of Appeal, he wrote a letter dated 25<sup>th</sup> June 2013 bespeaking the proceedings. That the letter bespeaking proceedings and the Notice of Appeal were duly served upon counsel for the applicant. That typed proceedings have never been supplied to the respondents. Counsel deposed that he had seen the letter dated 7<sup>th</sup> July 2017 from the Court Registry indicating that a certified copy of the proceedings was given to his firm as the advocates for the respondents. That the contents of the letter from the Court Registry is not true. That to date, neither counsel nor the respondents have received certified copies of proceedings to enable the record of appeal to be prepared and lodged. That upon seeing the Registry's letter dated 7<sup>th</sup> July 2017, counsel wrote a protest letter to the Kisii Deputy Registrar who has neither responded nor availed the fully typed copies of the proceedings. Counsel reiterated that the typed proceedings have not been supplied and or

availed to facilitate compilation of the record of appeal.

4. At the hearing of the instant application, learned counsel, Mr. Bosire Gichana appeared for the applicant while learned counsel, Ms Ochwal appeared for the respondents.

5. Counsel for the applicant reiterated the grounds in support of the application. It was emphasized that as per the letter from the Court Registry, the respondents advocate was supplied with certified copies of typed proceedings on 7<sup>th</sup> July 2017. That no step has been taken towards lodging the record of appeal within the requisite sixty days.

6. Counsel submitted that the dispute between the parties started way back before the Magistrate's Court in 1989. The judgment of the High Court was delivered on 21<sup>st</sup> June 2013. To date, over six years after being supplied with typed proceedings, the respondents have not taken any steps to file the record of appeal. The delay in filing the record of appeal has not been explained. Consequently, the applicant submitted that the Notice of Appeal filed on 25<sup>th</sup> June 2013 should be deemed as having been withdrawn.

7. In reply to the present application, learned counsel for the respondents submitted that they had not received from the High Court Registry in Kisii the certified copies of typed proceedings. Counsel reiterated that the respondents deny the truth and veracity of the contents of the letter from the Court Registry dated 7<sup>th</sup> July 2017 and which letter indicates that typed proceedings were supplied to the respondents' counsel. It was submitted that the first time the respondents saw the letter dated 7<sup>th</sup> July 2017 is when it was attached to the instant application by the applicant.

### **ANALYSIS and DETERMINATION**

8. Before us is a Notice of Motion dated 14<sup>th</sup> May 2018. The key prayer in the Motion is that *'the Notice of appeal dated 25<sup>th</sup> June 2013 filed in Kisii HCCA No. 44 of 2013 be deemed as withdrawn under Rules 42, 82 (1) (a) and 83 of the Court of Appeal Rules*. The reason advanced in support of the prayer is that the respondents have failed to comply with the timelines set out under the Rules regarding the filing of the record of appeal.

9. **Rule 82 (1)**, provides for institution of appeals and states as follows:

*"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.* (Emphasis added)

10. The import of this provision is that where no application for typed proceedings is made, the appeal must be instituted strictly within 60 days of lodging the Notice of appeal.

11. On the other hand, **Rule 83 provides for deeming as withdrawn a Notice of Appeal. Rule 83 states** as follows:

*"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."* (Emphasis added)

12. In this matter, we have perused the letter dated 31<sup>st</sup> July 2017 from the Deputy Registrar of the High Court at Kisii addressed to the applicant's counsel in relation to typed proceedings of Kisii HCCA No. 44 of 2013. In relevant excerpts, the letter states that "the appellant's counsel was furnished with a certified copy of typed proceedings and judgment on 7<sup>th</sup> July 2017."

13. The instant application is grounded on the said letter from the Deputy Registrar. Counsel for the applicant submitted that the respondents had sixty days from 7<sup>th</sup> July 2017 when they received the typed proceedings to lodge and file the record of appeal. That having failed to file the record of appeal within the sixty-day period, the Notice of Appeal filed in this matter should be deemed as having been withdrawn.

14. On their part, the respondents have denied the truth of the contents of the letter from the Deputy Registrar dated 31<sup>st</sup> July 2017. The

respondents insist that they have not received a certified copy of typed proceedings.

15. We have considered the submissions by both counsel as to whether or not the respondents received certified copies of typed proceedings from the Kisii High Court Registry as stated in the letter dated 31<sup>st</sup> July 2017. The letter from the Court Registry is an official record of a public office. The sanctity of court records cannot be doubted. The respondents have not placed any material before us that can lead us to doubt the veracity of the contents of the letter dated 31<sup>st</sup> July 2017. In the absence of evidence to the contrary, we find that the respondents' counsel was supplied with a certified copy of typed proceedings and judgment on 7<sup>th</sup> July 2017.

16. In **Mae Properties Limited - v - Joseph Kibe & another [2017] eKLR**, this Court expressed as follows in relation to application of **Rules 82 and 83** of the Rules of this Court:

*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 nor reference to the parties. The Court has this inherent power to make the formal order of the 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 make the order deeming the notice of appeal as withdrawn.*

17. In the instant matter, we have made a finding that the respondents were supplied with certified copies of typed proceedings on 7<sup>th</sup> July 2017. There is no certificate of delay on record. The respondents have never applied for extension of time to file and lodge the record of appeal. It is thus manifest that sixty days have lapsed since the Notice of Appeal was lodged and no record of appeal has been filed. Accordingly, we find that the Notice of Notion dated 14<sup>th</sup> May 2018 has merit. Pursuant to the provisions of **Rule 83** of the rules of this Court, we hereby deem the Notice of Appeal dated 25<sup>th</sup> June 2013 filed in Kisii HCCA of 44 of 2013 as having been withdrawn. The respondents shall pay the costs of this application.

**Dated and delivered at Kisumu this 20<sup>th</sup> day of November, 2019.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**