



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OUKO (P), NAMBUYE & KOOME, JJA**

**CIVIL APPLICATION NO. 91 B OF 2019**

**PAUL JOHN KIMANI.....APPLICANT**

**VS**

**ANDREW KARIUKI NJOROGE.....1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

*(Being Applications to strike out Notice of Appeal from the Judgment of the*

*Environment & Land Court Court of Kenya at Nairobi (E.O. Obaga, J.)*

*Dated 26<sup>th</sup> July, 2018*

**in**

***Environment & Land Court Cause No. No. 2020 of 2001)***

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**RULING OF THE COURT**

Before us is a Notice of Motion dated 22<sup>nd</sup> March, 2019 and filed in the Court's Central Registry at Nairobi on the same day. It is premised on **Rule 83** and **84** of the Court of Appeal Rules (CAR). It seeks prayers as follows:

***“(1) That the Notice of appeal filed by the 1<sup>st</sup> respondent be struck out***

***(2) That the costs of the application be paid for by the 1<sup>st</sup> Respondent.”***

It is supported by an affidavit of **John Paul Kimani** deposed on his own behalf together with annexures thereto. It has been opposed by way of a replying affidavit of **Andrew Kariuki Njoro**, the 1<sup>st</sup> respondent together with annexures thereto, deposed on 9<sup>th</sup> April, 2019 and filed on 11<sup>th</sup> April, 2019.

The application was canvassed by way of oral submissions. The applicant appeared in person, learned counsel **J. K Thuku** holding brief for **Alice Wahome** appeared for the 1<sup>st</sup> respondent, while **W. A Merichi** appeared for the 2<sup>nd</sup> Respondent.

In a brief submission, **Mr. Kimani** reiterated the content of his supporting documents and submitted that it is now over seven (7) months since the filing of the Notice of Appeal and 18 years since the 1<sup>st</sup> respondent trespassed on the suit property; that the 1<sup>st</sup> Respondent had applied for a stay of execution seven months ago upon his filing of the Notice of appeal. An order of stay of execution was issued for a period of 30 days. The order was later extended for the reason that the 1<sup>st</sup> respondent had not been furnished with the certified copies of the typed proceedings; that he is relying on Rules 83 and 84 of the Court of Appeal Rules as well as the case of **Civil Appeal No. 201 of 2016 – Mae Properties Ltd vs Joseph Kibe and Another [2017] Eklr**, in support of his application.

**Mr. J.K. Thuku** on behalf of the 1<sup>st</sup> respondent relying on the replying affidavit sworn on 9<sup>th</sup> April 2019, submitted that on 31<sup>st</sup> July 2018, a Notice of

Appeal was filed against the judgement of the High Court in ELC No. 2020 of 2001 by Hon. Justice **Obaga** which was delivered on 26<sup>th</sup> July, 2018. The 1<sup>st</sup> Respondent requested for typed proceedings and judgment for purposes of the appellate process. He also applied for a stay of execution of the judgement pending the hearing and determination of the intended appeal. The typed proceedings are yet to be availed. It is therefore impossible for him to progress his appellate process as initiated without being capacitated to do so by all the requisite documents. Further, that even after sending a reminder on 3<sup>rd</sup> April, 2019, the Deputy Registrar had not reacted to both correspondences.

**W.A Merichi** appearing for the 2<sup>nd</sup> respondent intimated to the court that the 2<sup>nd</sup> respondent was not opposed to the application.

We have considered the application and the submissions made in support of the respective parties opposing positions. We note that as already highlighted above in the submissions of **Mr. Thuku**, a Notice of Appeal was filed on 26<sup>th</sup> July, 2018, to challenge a judgment of the trial Court, Justice **E. O. Obaga** delivered on 26<sup>th</sup> July 2018. On 31<sup>st</sup> July, 2019, the 1<sup>st</sup> respondent requested for copies of typed proceedings from the Deputy registrar and a reminder to that effect followed on 3<sup>rd</sup> April, 2019 after the filing of this application.

The instant application is anchored on **Rule 83** and **84** of the Court of appeal Rules.

**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.”***

While **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.”***

In light of the above provisions, it is our view that, where a party invokes Rule 84 of the CAR, 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 timeline do not apply. In this matter, the applicant who is acting in person and he has indicated that he is relying on both provisions.

The principles that guide the court in the exercise of its jurisdiction under both rules now form a well beaten path.

In **Quicklubes E.A. Limited v. Kenya Railways Corporation [2014] eKLR** it was held 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.”***

Further in **Mae Properties Ltd vs Joseph Kibe & Another [2017] eKLR**: it was stated as follows:

***“It is safe to say, therefore, that a notice of appeal dies a natural death after 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 an 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”.***

Applying the above threshold to the rival position herein, it is our finding that in order to succeed on his application, the applicant has to demonstrate that the 1<sup>st</sup> respondent has not been diligent in prosecuting the appeal. It is not disputed that the 1<sup>st</sup> respondent indeed timeously

requested for copies of typed proceedings for purposes of pursuing his appellate process, and only did a reminder after the filing of this application. In **Banking Institution & Finance Union Kenya Vs Murata Sacco Society [2018]**, the following observations were made:

***“It cannot be the business of the courts and therefore responsibility should not casually be cast on registries, to drive the process of compliance with timeliness on the part of litigants. An intending appellant who has a desire to vindicate his position and secure his rights must be seen to be diligent. A cavalier and indifferent attitude towards timelines is to be frowned upon and this Court, when moved as we have been moved, will not hesitate to strike out a notices of appeal that has not been followed by the institution of appeals and have, moreover, no reasonable prospects of being so followed in the foreseeable future.”***

Applying the above threshold to the rival position herein, it is evident that the 1<sup>st</sup> respondent timeously applied for a typed copy of the proceedings. Although it took seven months to send a reminder, on 3<sup>rd</sup> April, 2019 apparently woken up from his slumber by the application under consideration, as at the time of hearing of the application on 19<sup>th</sup> September, 2019, the Deputy Registrar of the High Court had not responded. In the absence of a respondent’s request, there is no way the 1<sup>st</sup> respondent could progress his appellate process. Second, in the absence of proof that the 1<sup>st</sup> respondent is responsible for the delay in the submissions of a typed copy of the proceedings he cannot be penalized for any inaction on the part of the Deputy Registrar concerned. The above finding notwithstanding, he is impressed upon to ask the Deputy Registrar of the High Court to expedite the process of typed proceedings.

In the result we find no merit in the application and the same is dismissed.

For ends of justice to both parties, we direct that a copy of this ruling to be served upon the Deputy Registrar of the High Court to expedite the process.

Costs to abide the outcome of the intended application.

**Dated and Delivered at Nairobi this 6<sup>th</sup> day of December, 2019.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**