



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 24 OF 2017

BETWEEN

BAMBURI CEMENT LTD.....APPLICANT

AND

EVANSON MWAWASI MWADIME.....RESPONDENT

(An application for withdrawal of the Notice of Appeal dated 4th March, 2009 filed against the Judgment of the High Court of Kenya at Mombasa (Sergon, J.) delivered on 26th February, 2009

in

H.C.C.C No. 442 of 2000.)

RULING OF THE COURT

1. The application before us is anchored on **Rule 83** of the *Court of Appeal 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who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order.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. Apparently, the respondent instituted a suit in the High Court at Mombasa being H.C.C.C No. 442 of 2000 seeking what he believed were the terminal dues owing from the applicant after the termination of his services. At the end of the trial, the High Court (**Sergon, J.**) dismissed the suit vide a judgment dated 26th February, 2009. Aggrieved with that decision the respondent lodged the Notice of Appeal on 4th March, 2009 and also requested for typed proceedings.

3. Thereafter, the applicant filed its notice of address of service on 10th March, 2009. Since then no further step has been taken by the respondent to institute the appeal. By the time the current application was filed on 11th May, 2017 a period of 8 years had lapsed. According to the applicant, the respondent’s indolence has not only held it at ransom but continues to make it incur unnecessary administrative and legal costs. It is on that basis that the applicant is asking us to deem the Notice of Appeal dated 4th March, 2009 as withdrawn.

4. It is instructive to note that despite the respondent being served with the application as well as the hearing notice of the same he neither filed a response nor appeared at the hearing of the application.

5. Be that as it may, we find that the inexcusable and inordinate delay of about 9 years to file an appeal within the prescribed timeline under **Rule 82(1)** of the Rules coupled with the obvious lack of interest to oppose the application are indicative that the respondent is no longer keen on pursuing an appeal. We also find that the respondent placed himself squarely within the operation of **Rule 83**. This Court while discussing the import of **Rule 83** in *Quicklubes E. A. Limited vs. Kenya Railways Corporation [2014] eKLR* aptly observed:

“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.”

6. Consequently, we find that the application lodged in this Court on 11th May, 2017 has merit and is hereby allowed with costs. The Notice of Appeal dated 4th March, 2009 is deemed as withdrawn.

Dated and delivered at Mombasa this 15th day of November, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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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