



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. 37 OF 2017

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

FRED MIRIGA ALCOP LIMITED.....1ST APPLICANT

SUPER NOVA PROPERTIES.....2ND APPLICANT

AND

FRED IMMANUEL MIRIGA.....RESPONDENT

(Being an application to strike out the Notice of Appeal filed against the Ruling and Order of the High Court of Kenya at Mombasa (Kasango. J.) delivered on 29th March, 2012 in Mombasa HC Case No. 14 of 1999)

RULING OF THE COURT

[1] The filing of civil appeals is governed by **Rule 82 (1)**, which states *inter alia* that:

“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.

(Emphasis supplied)

[2] The Notice of Appeal in this matter was filed on 16th April, 2016 however by the 14th June, 2017 when the applicants filed a notice of motion seeking to strike it out, the record of appeal had not been filed and there is no explanation as to whether the respondent has made any efforts towards its filing. The motion before us was brought under the provisions of **Rules 42, 77, 83 and 84** of this Court’s Rules. The applicants are seeking an order that the Notice of Appeal filed by the respondent herein, be deemed withdrawn or struck out. This is on the grounds that despite having lodged the Notice of Appeal on 16th April, 2012, the respondent neglected to file his appeal within time or at all, and that given the time within which he was to file it expired, the Notice of Appeal should be deemed withdrawn.

[3] The application is supported by an affidavit sworn on 14th June, 2017 by the applicants’ advocate, one Shamsa Gathini Ibrahim. Although the application was served upon the respondent, it was unopposed. As per the copy of the Notice of Appeal annexed to the applicants’ supporting affidavit, it is apparent the respondent, was dissatisfied with the decision of the High Court in Mombasa **HCCC No 14 of 1999 (Kasango, J.)** delivered on 29th March, 2012. He intimated an intention to appeal against the said decision. Consequently he lodged a Notice of Appeal on 16th April, 2012 and the applicants were among five respondents in the intended appeal.

[4] Nonetheless, since lodging the Notice of Appeal, the respondent appears to have done nothing else. He never applied for the proceedings

(no letter bespeaking the proceedings was served on the applicants) nor did he file his record of appeal to meet the other requirements as per the aforesaid Rule. As a result, the sixty days within which he was to file his appeal lapsed on 25th June, 2012. Under **Rule 83** of the rules, where a party fails to file an appeal within the appointed time, this Court has the mandate either *suo motu* or upon application by any party, to order that such a Notice of Appeal be deemed withdrawn.

[5] Accordingly the respondent having failed to file an appeal within the time provided, and having not opposed this application, we hereby allow the application dated 14th June, 2017 with the result that the Notice of Appeal dated 12th April, 2012 and lodged on 16th April 2012, is hereby deemed withdrawn. We are not inclined to award costs as this application was unopposed.

Dated and delivered at Mombasa this 6th day of December, 2018

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR