



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & M'INOTI, J.J.A)

CIVIL APPEAL NO. 201 OF 2016

BETWEEN

MAE PROPERTIES LIMITED.....APPLICANT

VERSUS

JOSEPH KIBE..... 1ST RESPONDENT

PLANFARM INVESTMENTS LIMITED.....2ND RESPONDENT

*(An application to strike out or withdraw the notice of appeal from the ruling of the High Court of Kenya at Nairobi (Gikonyo, J) dated 18th May, 2015 in H.C.C.C. No. 311 OF 2004*

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JUDGMENT OF THE COURT

By the notice of motion dated 29th August 2016, the applicant **Mae properties Ltd** seeks to strike out or have deemed as withdrawn the respondents' notice of appeal dated 25th May 2015 and filed the next day at the High Court registry. The said notice was lodged in signification of an intention to appeal against a ruling of Gikonyo, J delivered on 18th May 2015.

The motion is expressed as brought under **Rules 83** and **84** of the Court of Appeal Rules 2010, among other provisions of the law. The grounds on which it is based appear on its face as follows;

- "i. The ruling intended to be appealed from was delivered by the superior court on 18th May 2015.***
- ii. The intended appellants, the respondents herein, lodged their notice of appeal in the High Court registry on 26th May 2015.***
- iii. The respondents were required to have instituted their appeal within sixty (60) days of lodging their notice of appeal.***
- iv. The respondents have not instituted their appeal; it is now 455 days after the lodging their notice of appeal.***
- v. The respondent's delay is inexcusable as they have all the documents required for filing an interlocutory appeal.***

*vi. The delay in prosecuting the intended appeal is extremely prejudicial to the applicant.*

*vii. It is in the interests of the expeditious administration of justice that this application be granted.”*

In support of the motion is filed an affidavit sworn by one **Emma Wachira** the applicant’s Company Secretary and Chief Legal Officer on 23rd August 2016, which essentially repeats the grounds aforesaid and adds to them some evidentiary flesh. For the respondents was filed a replying affidavit sworn by **Kevin Wakwaya**, an advocate in the firm of Rachier & Amollo Advocates.

It is a bold unapologetic swearing that is dismissive of the application. Sample this;

*“3. That application is frivolous, scandalous and an abuse of court process and ought to be dismissed with costs.*

*4. That the application fails to give a justifiable reason as to why the respondents’ notice of appeal dated 25th May 2015 and lodged in the High court registry on 26th May 2015 be withdrawn (sic).*

*5. That in the circumstances, no reason has been advanced as to why the respondents’ notice of appeal dated 25th May 2015 and lodged at the registry on the 26th of May 2015 should be struck out.”*

The deponent went on to state that the respondents bespoke certified proceedings by their letter dated 29th May 2015 but had not received them, hence their failure to file the record of appeal. He prayed that the application be dismissed for want of merit.

Those rival positions were agitated before us by counsel appearing. **Mr. Gachuhi** for the applicant added that the intended appeal is an interlocutory one and the delay was prejudicial to the ultimate determination of the dispute between the parties still pending before the High Court. He added that there is no requirement for proceedings to be availed in order for one to file an interlocutory appeal. Moreover, it was open for the respondents to invoke **Rule 87** of the Rules for the exclusion of the proceedings but they preferred to do nothing after writing the letter requesting proceedings.

Opposing the application, **Mr. Wakwaya** criticized the applicant for bringing the striking out application nearly a year outside of the 30 day period stipulated under **Rule 84** of the Rules of Court. He went on to state that the Rules of Court require that an appeal be filed containing the typed proceedings hence the non-filing due to non-availability of the requested proceedings. He then cited **Article 159** of the Constitution as well as **Sections 3A** and **3B** of the appellant Jurisdiction Act which, he submitted, lean towards sustaining as opposed to striking out the notice of appeal, which would prejudice the respondents by abrogating their fair trial rights.

In his reply to those submissions, Mr. Gachuhi, placing reliance on this Court’s decision in **ELIZABETH WANJIKU MUCHAI vs. STANDARD LIMITED [2017] eKLR**, submitted that the 30 day limit for bringing an application under the *proviso* to **Rule 84** did not apply to the instant application. He then contended that the ‘oxygen principle’ cannot be invoked to assist an indolent party such as the respondents who had failed to prove why the exercise of the Court’s discretion in their favour would be in the public interest.

We have given this application, the affidavits and submissions as well as authorities cited due consideration. It is not in dispute that the notice of appeal was lodged at the High Court registry on 26th May 2015. It is also not in dispute that by dint of **Rule 82(1)** of the Court of Appeal Rules 2010, the appeal should have been instituted within sixty days thereafter, but was not. It in fact had not been instituted as at the date of the filing of the motion some 15 months later. As at the hearing of the motion, more than two years had elapsed.

We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.

Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, **Rule 83**, which is invoked by the applicant herein, provides thus;

***“83. 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.”***

We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party **shall be deemed** to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.

Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged *ex abundanti cautela* by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper – with the attendant risks, prospects and consequences.

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.

Whatever path is followed, the Rule decrees that the party in default shall be liable to the costs arising from the notice of appeal to any persons who had been served with the said notice. Viewed from that perspective, we think that the arguments proffered by the respondents herein about having been delayed by non availability of proceedings do not lie. We think, moreover, there has been no evidence placed before us of any serious attempt to follow up and obtain the said proceedings or to otherwise pursue the lodgment of the substantive appeal. We think, indeed, that it is such cavalier and indolent parties that the Rule was intended to weed out of the Court system by the deeming provision. At any rate, as the matter is one in our discretion, we are unmoved by anything said by the respondents to stand in the way of the express legal consequence of their default. Nor need we, in the circumstances of this case, enter into a discourse on the effect of the 30 day period prescribed in the *proviso* to **Rule 84** for the bringing of an

application to strike out a notice of appeal on account of the failure to file an appeal within the prescribed time. It is a question to be pronounced on in a matter that turns on precisely the point.

This is no such matter and we are content to simply declare the notice, as required by **Rule 83**, to be withdrawn. We do so alive to the need for expedition in the pursuit of justice. We frown upon indolence and dilatoriness. We still hold the view we expressed in MARTIN KABAYA vs. DAVID MUNGANIA KIAMBI Nyeri Civil Application 12 of 2015;

*“The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by complaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”*

The inevitable outcome of this application is that it succeeds and we grant it. The respondents shall bear the costs thereof, to be taxed if not agreed.

**Dated and delivered at Nairobi this 19th day of October, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**