



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, G.B.M. KARIUKI & MWILU, JJ.A.)**

**CIVIL APPLICATION NO. NAI 100 OF 2013**

**BETWEEN**

**NAIROBI BOTTLERS LIMITED.....APPLICANT**

**AND**

**ANTONY SURRE LUKEYA .....RESPONDENT**

***(Civil applications Nos.149/2013; Nai 150/2013; Nai 151/2013; Nai 152/2013 for striking out the Notice of Appeal dated 21<sup>st</sup> February 2005, from the Judgment of the High Court of Kenya at Nairobi, (Ransley, J) dated and delivered on 7<sup>th</sup> day of February, 2005***

***in***

**H.C.C.C. No.1136 of 2000**

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**RULING OF THE COURT**

1. Mr. D. M. Michuki, learned counsel for the applicant in the five notices of motions Nos Nai 100/2013; Nai 149/2013, Nai 150/2013, Nai 151/2013 and Nai 152/2013 in all of which Nairobi Bottlers is the applicant and Antony Surre Lukeya, Peter Njoroge Kamau, Peter Ndirangu Kariuki, John Sidika Ohaya and Simon Ndambuki Makau are the respondents respectively has urged us to allow the applications to strike out the notices of appeal filed in the year 2005 as no appeals have hitherto been filed. He pointed out that it is now over 11 years since the respondents filed the notices of appeal against the judgment of the High Court (Ransley J) dated 7<sup>th</sup> February 2015.

2. On his part, Mr. Kirimi Mbugua, learned counsel for the respondents, relying on the replying affidavits, maintained that the motions are defective as they are deemed under rule 83 of this Court's Rules to have been withdrawn. Counsel indicated that the respondents are still intent on filing appeals and he attempted to informally seek extension of time but we stopped him in his tracks and indicated that a formal application is required.

3. The background to the application is straight forward. The High Court sitting in Nairobi delivered judgment on 7<sup>th</sup> February 2015 and dismissed the consolidated suits Nos.1136/2000; 1138/2000;

1139/2000; 1140/2000; and 1141/2000. Aggrieved by the decision, each of the five plaintiffs in the suits gave a notice of appeal on 21<sup>st</sup> February 2005 pursuant to rule 75 of the Rules of this Court. Since that time, no record of appeal has been filed in any of the suits.

4. On 13<sup>th</sup> May 2013, Nairobi Bottlers Ltd, the defendant named in each of the five suits filed a notice of motion in each of the suits that is to say the five notices of motion aforementioned seeking like orders for striking out of the notices of appeal and for costs. The notices of motion were predicated on rules 42(1) & (2); and 81 and 83 of the Court of Appeal Rules. Rule 42 deals with the form of applications to this Court and requires that applications be by way of notice of motion. Rule 81, though invoked, seems irrelevant to the application as it relates to withdrawal of notice of appeal by the party lodging it.

5. Rule 83 on which the motion hinges is germane. It states –

***“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.”***

6. By effluxion of time, each of the notices of appeal filed by each of the plaintiffs in the aforesaid civil suits is deemed to have been withdrawn by dint of the fact that no appeal was filed within the period stipulated by the Rules of this Court.

7. Rule 82(1) of the Court of Appeal Rules required an appeal to be lodged within 60 days of the date when the notice of appeal was lodged. The notices of appeal having been lodged on 21<sup>st</sup> February 2005, the period of 60 days within which the appeals should have been lodged expired way back in the year 2005.

8. The affidavits in support of the application to strike out the notices of appeal show that proceedings in the suits were supplied to the plaintiffs way back on 9<sup>th</sup> July 2007 so that even if time to lodge appeal was extended, or started to run from that date, it would have expired by 2013 when the motions to strike out were filed.

9. As at the time when the applicants brought the motions to strike out the notices of appeal, there was not in being a notice of appeal, the same having been deemed to have been withdrawn under rule 83. In effect, therefore, there was no notice of appeal in being capable of being struck out. The motions were misplaced on this account.

10. At any rate, rule 83 is not the relevant rule as far as striking out of notices of appeals is concerned. The relevant rule for striking out of notice of appeal is rule 84. Even if rule 84 had been invoked, it would not have aided the applicant, much less saved the motions. The rule stipulates –

***“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.”***

11. Needless to emphasize, an application to strike out notice of appeal (or record of appeal) must be made within 30 days from the date of service of the notice of appeal (or record of appeal). If no application is made within that period, the right is lost or waived to strike out the notice of appeal (or record of 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.

12. Even if the motions were predicated on rule 84, which they were not, the applicants had lost their right to apply to strike out the notices of appeal by dint of the proviso to the said rule (84).

13. It goes without saying that the motions are incompetent as they seek to strike out non-existent notices of appeal. For these reasons, the 5 notices of motion are hereby struck out as incompetent and the costs thereof are given to the respondents. It is so ordered.

14. As the notices are deemed to have been withdrawn, (and we so order) and do not therefore exist, this brings closure to the erstwhile intended appeals.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of October, 2016.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI SC**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

*I certify that this is a true copy*

*of the original.*

**DEPUTY REGISTRAR**