



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & MWILU, JJ.A)

**CIVIL APPLICATION NO. NAI. 301 OF
2014**

BIVAC INTERNATIONALAPPLICANT

VERSUS

CHIENI ENTERPRISES LIMITED1ST RESPONDENT

THE HON. ATTORNEY GENERAL (for and on behalf of

THE MINISTER FOR FINANCE2ND RESPONDENT

(Being an application to deem as withdrawn the notice of appeal dated 15th November, 2010 filed by Chieni Enterprises Limited (1st respondent) filed in H.C.C.C. NO. 1947 OF 1999)

RULING OF THE COURT

1. **CHIENI ENTERPRISES LIMITED (1st respondent)** was the unsuccessful party in the High Court below following which it took out a Notice of Appeal which it filed in that court on the 15th November, 2010. It would appear that nothing more was done by the 1st respondent giving rise to the filing in this Court by **BIVAC INTERNATIONAL (appellant/applicant)** of the notice of motion dated the 11th November, 2014, which motion seeks orders that the 1st respondent be deemed to have withdrawn its Notice of Appeal, and for the costs of the application.
2. That motion is premised on the grounds that though the 1st respondent applied for typed and certified proceedings and judgment on the 15th November, 2010 and further that it was notified by the registrar of the High Court on 23rd July 2013 that such typed and certified proceedings and judgment were ready for collection, the 1st respondent had failed to institute its appeal within the prescribed time and it had not sought leave of the court to extend time for the purpose. The applicant has a further ground that the applicant lost interest in prosecuting the intended appeal and hence the pendency of the Notice of appeal serves to cause unnecessary anxiety to the applicant, unfairly denying the applicant its right to enjoy the fruits of its judgment, and that it is in the interest of justice, fairness and the overriding objective of the law that the Notice of Appeal be deemed to have been withdrawn.

3. The affidavit in support of the application is sworn by **DANIEL SIFUMA** which affidavit merely reiterates the contents of the grounds upon which the application is based. At the hearing of the motion Mr. Sifuma learned counsel for the applicant relied on his application and urged us to allow the same. Mr. Nguyo Wachira learned counsel for the 2nd respondent supported the applicant's motion. M/s Enonda Makoloo advocates representing the 1st respondent were served with the hearing notice on 27th May 2015 as appeared from the affidavit of service. That notwithstanding, they did not attend the hearing. There was nothing filed in response to the motion.

4. **Rule 83** of the **Court of Appeal Rules** under which the motion is brought provides as hereunder:

“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 an 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.”

It is indisputable from the record that the 1st respondent, after filing its notice of appeal did no more, either within the prescribed time, to file the record of appeal or at all. The prescribed time by **Rule 82 (2)** of the **Court's Rules** within which the record of appeal is to be filed is 60 days.

5. In the circumstances such as are in this case where the appellant after filing the notice of appeal retreated into deep slumber, it brought itself squarely within the operations of **Rule 83** cited above. Of that rule this Court has variously pronounced itself, suffice for this application to cite what we said in **QUICKCUBES E.A. LTD V KENYA RAILWAYS CORPORATION [2004] e KLR**;

“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. We are fully satisfied that the present is one such case. The Notice of appeal herein serves the negative purpose of clogging our efficiency and takes unearned space in our registry records. It must give way to deserving appeals. For all the 1st respondent's failures in complying with **Rule 82** of the **Court's Rules** and in obedience to **Rule 83**, the notice of appeal dated and filed on 15th November 2010 is deemed as withdrawn. The applicant and the 2nd respondent shall have the costs of the motion.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of July, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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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