



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G. B. M. KARIUKI, MUSINGA & KIAGE, JJ.A.)**

**CIVIL APPLICATION NO. NAI 247 OF 2010**

**BETWEEN**

**MBUGUA & MBUGUA, ADVOCATES .....APPLICANT**

**AND**

**KENINDIA ASSURANCE COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

*(An application to strike out NOTICE OF APPEAL dated 24<sup>th</sup> February, 2010 lodged by the respondent on 24<sup>th</sup> February 2010, against the ruling of the High Court of Kenya at Nairobi (MWERA, J.) delivered 18<sup>th</sup> February, 2010*

*in*

**MISC APPLICATION NO.506 OF 2005)**

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**RULING OF THE COURT**

The applicant, Messrs Mbugua & Mbugua, Advocates, lodged in this Court on 28.10.2010 an application by way of Notice of Motion dated 6.10.2010 seeking an order that the notice of appeal lodged on 24.2.2010 by Kenindia Assurance Company Limited, the respondent herein, be struck out because no steps have been taken to file the record of appeal and also because rule 82 was not complied with in that the respondent did not within 30 days of the date of delivery of the ruling on 18.2.2010 apply for the proceedings with a copy to the applicant so as to have excluded in computation of time for lodging appeal such time as would be required for the preparation and delivery of such proceedings. The application was made on the grounds both on the face of the motion and in the supporting affidavit of Joseph Njoroge Mbugua sworn on 6.10.2010. It is averred in the supporting affidavit that the respondent filed notice of appeal on 2<sup>nd</sup> March 2010 against the ruling delivered by the High Court (Mwera J. as he then was) on 18.2.2010 and that since then, the respondent has not taken any steps to lodge the appeal and that it is now more than six months since the notice of appeal was lodged.

Though served with the application, the respondent did not file a replying affidavit.

When the application came up for hearing before us on 24.03.2014, learned counsel, Mr. Joseph Mbugua, appeared for the applicant while learned counsel Ms Moraa Kambuni appeared for the respondent. Relying on the supporting affidavit to the notice of motion, Mr. Mbugua urged the Court to allow the application and grant the orders as the respondent had not filed any replying affidavit and did not appear interested in appealing. Miss Moraa Kambuni for the respondent left the matter to court.

We have perused the notice of motion and the supporting affidavit. We observe that although the application was served on the respondent, the latter did not file any replying affidavit. Miss Moraa Kambuni for the respondent informed the Court that the respondent left the matter to Court. As a result, the averments in the affidavit in support of the application remain uncontroverted. Having given notice of appeal under rule 75 of the rules of this court and served the same pursuant to rule 77(1), the respondent was enjoined to institute the appeal by lodging within 60 days of the date of the filing of the notice of appeal a record of appeal made up of the documents enumerated in rule 82(1) (a) to (d). The respondent did not do so.

By dint of rule 83, a party who, having lodged a notice of appeal, fails to institute appeal within 60 days of lodging the notice of appeal, shall be deemed to have withdrawn the notice of appeal and the Court may on application, as in this case, or on its own notion, make an order to that effect. In such event, the party in default shall be liable to pay the costs arising therefrom of any person on whom the notice of appeal was served.

We are satisfied in the circumstances of this application that there is default in institution of appeal by the respondent. Accordingly the notice of appeal dated 24.2.2010 served on the applicant is deemed to have been

abandoned. We so order. We also order that the respondent shall pay the costs of the application dated 28.10.2010 which we hereby allow.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of April 2014.**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**