



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPLICATION NO. NYR. 25 OF 2014

BETWEEN

ALEXANDER MUNENE .R. NGUU 1ST APPLICANT

EPHANTUS NJIRU KITHOGONDO 2ND APPLICANT

DAUDI KATHENDU 3RD APPLICANT

AND

NJUE M'TETU 1ST RESPONDENT

ELIAS NDWIGA NGARI 2ND RESPONDENT

MWANIKI MUGANE 3RD RESPONDENT

CATHERINE MUTHONI NJIRU 4TH RESPONDENT

(An application for striking out the Notice of Appeal dated 16th October, 2013 from the ruling of the High Court of Kenya at Kerugoya (Olao, J.) dated 1st October, 2013

in

H.C.ELC No. 7 of 2013)

RULING OF THE COURT

1. Before us is an application brought pursuant to **Rules 82(1) & (2), 83** of the **Court of Appeal Rules** (the Rules) and **Sections 1A, 1B & 3A** of the **Civil Procedure Act**. The applicants' seek the following orders:-

- ***That the Notice of Appeal dated 16th October, 2013 be struck out.***
- ***That in the alternative, the respondents be deemed to have withdrawn their Notice of Appeal dated 16th October, 2013.***

The grounds in support of the application are that the 1st, 2nd and 3rd respondents filed the Notice of Appeal dated 16th October, 2013 and served the same upon the applicants on 25th October, 2015. Since then, the said respondents have failed to institute an appeal. We take note that the respondents' did not file a replying affidavit.

2. The genesis of this application is that the applicants filed a suit against the respondents in the High Court being H.C.ELC. No. 7 of 2013. Subsequently, the 1st, 2nd and 3rd respondents filed an application seeking leave to file their statement of Defence out of time. The respondents attributed the delay in filing the Defence to the fact that they were engaged in the preparation of affidavits and submissions in respect of an application which had been filed by the applicants in the said suit. The applicants opposed the application on the ground that the respondents had not given a reasonable explanation for the delay.
3. The learned Judge (Olao, J.) found that the explanation tendered by the 1st, 2nd and 3rd respondents was not reasonable. The learned Judge declined to exercise his discretion in favour of the respondents and dismissed the respondents application vide a ruling dated 1st October, 2013. It is against that decision that the 1st, 2nd and 3rd respondents' filed the Notice of Appeal dated 16th October, 2013.
4. At the hearing of this application Mr. Kamunyoru appeared for the applicants. There was no appearance by the respondents despite being served with the hearing notice. Mr. Kamunyoru reiterated the grounds of the application and urged us to strike out the Notice of Appeal.
5. We have anxiously considered the application, submissions by counsel and the law. ***Rule 82(1)*** of the Rules provides in part:-

“82(1) 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.***

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant such copy.”

6. The respondents herein under ***Rule 82*** of the Rules were required to lodge the appeal within 60 days of filing the Notice of Appeal. It is not in dispute that the applicant herein filed the Notice of Appeal on 16th October, 2013. Therefore, when did the time frame within which the respondents' could file the appeal lapse? The respondents' ought to have filed the appeal on or before the 16th December, 2013. We cannot help but note that no explanation for the delay has been tendered by the respondents. The respondents neither filed a replying affidavit nor attended the hearing of this application.
7. It is not in dispute that the respondents have to date not filed the appeal. hence this Court has no

option but to invoke the provisions **Rule 83** of the Rules:-

“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.”

In **Mohammed Sheikh Abubakar –vs- Zacharius Mweri Baya- Civil Application No. Nai. 184 of 2005**, this Court expressed itself as herein under:-

“In this matter, there was a notice of appeal filed on 10/9/2004 and, as we have found, served within time. We have not been shown any appeal instituted within 60 days of filing the notice of appeal. Nor have we been shown there was compliance with the provisions of rule 81 or that an application has been made and granted for extension of time....

In the end, we are satisfied that the applicant was justified in seeking the order for deeming the notice of appeal to have been withdrawn by the time the application was filed in Court on 26/5/2005. We grant the application and give the declaration and consequential order that the notice was withdrawn upon the failure to institute the appeal in accordance with the rules.”

8. The upshot of the foregoing is that we find that the respondents’ Notice of Appeal dated 16th October, 2013 is deemed to have been withdrawn under **Rule 83** for failure to institute the appeal in accordance with the Rules of this Court. Consequently, the application is allowed with costs to the applicants.

Dated and delivered at Nyeri this 17th day of December, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO- ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR