



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

Civil Application 103 of 2011

AMOS WAMUNYUA
JOHANA MAINA SIMON.....APPLICANTS

AND

NEHEMIAH NDUMO GITAHI
ALICE WANGARE NDUMO.....RESPONDENTS

*(Being an application to strike out the Notice of Appeal lodged from the Judgment of the High Court of Kenya at Nyeri (**Hon. Makhandia, J.**) dated 11th May 2009*

in

H.C.C.C. No. 164 of 2001)

RULING OF THE COURT

1. On 22nd day of March, 2009, **Nehemiah Ndumo Gitahi** and **Alice Wangari Ndumo** who are now the respondents filed a notice of appeal indicating that they were dissatisfied with the judgment of **Makhandia, J.** delivered in the High Court at Nyeri, Civil Appeal No. 164 of 2001. Since the filing of that notice, no further action appears to have been taken place. **Amos Wamunyu** and **Johana Maina Simon** hereinafter referred to as the applicants, were the respondents in High Court Civil Appeal No. 164 of 2001. They have now moved this court by way of a notice of motion under **Rule 83** of the Court of Appeal Rules seeking to have the respondents' notice of appeal lodged on 22nd May 2009 deemed to have been withdrawn.

2. The application is supported by an affidavit sworn by the applicants' advocate, **Samuel Kabugi Njuguna**, in which he states *inter alia* that the respondent's counsel received copies of the proceedings and judgment in regard to High Court Civil Appeal No. 164 of 2001 on 24th March, 2010 but that to date no further action has been taken in the appeal. Learned counsel for the applicants, **Mr. Njuguna**, has urged the Court to deem the notice of appeal filed by the respondents as withdrawn under **Rule 83** of the

Court Rules. Counsel has further argued that the respondents in any case, have no right of appeal and therefore their intended appeal is frivolous. In this regard counsel relied on **Muranda vs. Wambuko [2008] KLR 265.**

3. A replying affidavit has been sworn by one of the respondents, **Nehemiah Ndumo Gitahi**, in which the respondents lay blame on their former advocates, **M/s. Karweru & Co. Advocates** who failed to file the appeal within time. The respondents maintain that they are interested in pursuing the appeal and believe they have good grounds in support of their intended appeal, which grounds have been stated.

4. Learned counsel **Mr. Kiminda**, who appeared for the respondents, submitted that the respondents have explained the apparent delay in filing their appeal. **Mr. Kiminda** argued that the application cannot succeed under **Rule 83** of the Court of Appeal Rules as that rule envisages a situation where the intended appellant is dead. **Mr. Kiminda** further submitted that the respondents have an arguable appeal as the superior court erred in finding that the tribunal did not have jurisdiction; that the respondents are the ones currently in possession; and that the respondents should therefore be heard on their appeal.

5. **Rule 83** of the **Court of Appeal Rules 2010**, states as follows:

“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.”

It is clear from the above rule that contrary to the submissions made by the respondents’ counsel, the rule does not envisage a situation where the intended appellant is deceased. The rule is applicable where any intended appellant who files a notice of appeal, fails to institute an appeal within the appointed time.

6. **Rule 82(1)** of the Court Rules identifies the appointed time for lodging an appeal in the appropriate registry as sixty days from the date when the notice of appeal was lodged, with a proviso for the exclusion in the computation of the sixty days, of the period certified by the Registrar of the High Court as required for the preparation and delivery to the appellant of a copy of the proceedings in the superior court, where a copy of the request for the proceedings was served upon the respondents.

7. The applicants have admitted that the respondents’ advocates applied for copies of proceedings and judgment on 18th May, 2009 and the same were availed to them on 24th March, 2010. The notice of appeal having been lodged on 22nd May, 2009, and this application having been filed on 29th March, 2011, which is over a year after the proceedings were availed to the respondents’ counsel, it is evident that the respondents did not file their memorandum of appeal within the timelines provided under **Rule 82(1) & (2)** of the Court Rules. A feeble attempt has been made by the respondents to lay the blame on the respondents’ former advocates. That attempt cannot hold. The respondents have not revealed any efforts they themselves made in pursuing the appeal or explained why they did not instruct another counsel until the applicants brought this application.

8. We find that the respondents have been unable to provide any plausible explanation for their failure to file the record of appeal. Moreover, there is no application made by the respondents for extension of time within which to file the record of appeal. Therefore, the respondents’ notice of appeal lodged on 22nd May, 2009, in **HCCA No. 164 of 2001** must be deemed to have been withdrawn. Accordingly, we allow the application dated 29th March, 2011. We award costs of this application to the applicants.

Dated and delivered at Nyeri this 5th day of July, 2012.

E.M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

.....
JUDGE OF APPEAL

D. K. MARAGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR