Gatoka Limited v Wainaina (Civil Appeal 689 of 2016)
[2024] KEHC 9770 (KLR) (Civ) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9770 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 689 OF 2016

CW MEOLI, J

JULY 31, 2024

BETWEEN

GATOKA LIMITED ..... APPLICANT

AND

ELIAS KABUKU WAINAINA ..... RESPONDENT

RULING

1. Gatoka Limited (hereafter the Applicant) filed the Notice of Motion dated March 22, 2024 (the Motion) seeking that the order made by this court on December 2, 2021 be set aside and/or vacated and the Applicant be allowed to prosecute the appeal.

2. The Motion which is expressed to be brought under Sections 1A and 3A of the *Civil Procedure Act* (CPA); Order 10, Rule 11 and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR); and Articles 50 (1) and 159 (2) of the *Constitution* of Kenya, is premised on the grounds featured on its face and amplified in the supporting affidavit sworn by the Applicant's advocate, Margaret W. Githaiga.

3. Therein, the said advocate stated that when the matter came up on the 2nd day of December, 2021 the court directed that the record of appeal in respect of the appeal be served upon Elias Kabuku Wainaina (hereafter the Respondent) through his advocates and that directions on the appeal be taken within 60 days thereof, failing which the appeal would stand dismissed. The advocate further stated that the Applicant's attempts at tracing the whereabouts of the Respondent's advocates were impeded by the fact that the said advocates relocated offices from Mercantile House in Nairobi to Isinya; and that further attempts at effecting service at their offices situated in Isinya proved futile, the said offices being closed at all material times and unreachable on phone.

4. Counsel stated that the Respondent was threatening to proceed with execution and yet the Applicant has always been willing to prosecute the appeal, were it not for the frustrations caused by the

Respondent's advocates. That it would therefore be in the interest of justice for the order sought to be granted.

5. The Respondent resisted the Motion by filing the Grounds of Opposition dated April 17, 2024 setting out the following:

> " Take notice that the respondent/respondent shall oppose the appellant/applicant's Notice of Motion dated 22/03/2024 on the following grounds;
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> 1. That the said application is frivolous, vexatious and an abuse of the process of the court.
> 2. That the said application has no merit whatsoever.
> 3. That the said application is brought after undue and unreasonable delay." sic

6. The Respondent also relied on the replying affidavit sworn by his advocate, Kibunja Nyambura, on 18th April, 2024. Therein, she deposed that contrary to the claims made by the Applicant's advocates, they were privy to the fact that they had changed addresses by relocating to Solonte Plaza in Isinya town, as early as September, 2015. She deposed that the Applicant's advocates therefore had no basis for attempting to effect service upon them at their previous offices at Mercantile House. The advocate further refuted the claims made by the Applicant's advocate regarding inability to effect service due to closure of their offices, by stating that their offices have remained open on weekdays and during official working hours. That even so, the Applicant's advocate took no active steps in effecting service through alternative means, despite having her personal telephone contacts at all material times.

7. Or alternatively seeking an extension of time from the court, to enable compliance with the order made on December 2, 2021. That she came to learn of the order by Visram J sometime in March, 2024 while intending to file an application seeking dismissal of the appeal for want of prosecution. Counsel therefore faulted the Applicant's indolence for the delay in the appeal and urged that the Motion be dismissed with costs.

8. In rejoinder, advocate Margaret W. Githaiga by her further affidavit sworn on May 3, 2024 reiterated the attempts by their process server to locate the Respondent's advocates, asserting that there was no proof that the Respondent's advocates were operating from Solonte Plaza , Isinya. The advocate further stated that efforts made at effecting service through the postal address for the Respondent's advocates have also been unsuccessful, with the served letters being returned unclaimed due to the misleading postal address. In responding to the averment regarding access to the telephone details belonging to advocate Kibunja Nyambura, it was counsel's averment that she lost the said contact details and that attempts were made to reach the said advocate using a different number purportedly listed on the law firm's letterhead. That it is therefore apparent that the Respondent's sole aim is to hinder the Applicant from prosecuting its appeal.

9. During the hearing of the Motion, counsels for the respective parties agreed that the Motion be determined on the basis of the affidavit material tendered, as well as the Grounds of Opposition filed.

10. The court has therefore considered the rival affidavit material and the Grounds of Opposition. The Motion essentially seeks the reinstatement of the appeal. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However,

the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and Another* [1967] EA 116:

> " The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

11. The Motion was brought inter alia, under Order 10, Rule 11 of the *CPR*, which provides for the setting aside of judgments entered on the basis of non-appearance, default of defence and failure to serve. This particular provision has no relevance here, the applicable provisions on the setting aside of a dismissal order and the reinstatement of an appeal as in the present instance, being Order 42, Rule 35 of the *CPR* provides thus:

    1. Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

    2. If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

12. Section 3A of the *CPA* reserves the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court." The Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR stated thus:

> " Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that
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> "Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the *Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

13. The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, to add the following:

> " Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

14. The events leading to the dismissal order which became effective on February 23, 2022 are as follows. The Applicant filed the memorandum of appeal on 10th November, 2016. However, from the record that no further progressive action took place in the appeal, resulting in issuance of a notice to show

cause on October 25, 2021 requiring the parties to attend court on December 2, 2021 to show cause as to why the appeal ought not to be dismissed for want of prosecution. On that date, only the Applicant's advocate was in attendance. The court therefore directed that the record of appeal be filed/ served upon the Respondent and/or his advocate and the appeal be set down for directions within 60 days therefrom, failing which the appeal would stand dismissed. Subsequently on June 3, 2022 the court noted that the previous directions had not been complied with, the timelines given for compliance having expired on February 23, 2022. Consequently, the appeal had been rendered automatically dismissed with effect from the said date.

15. Returning to the merits of the Motion, the explanation given in support thereof is that the Applicant's advocate had been unable to trace the Respondent's firm of advocates in order to effect service, pursuant to the order and directions made on December 2, 2021. The Applicant's advocate further stated that even upon discovering the location of the Respondent's advocates' offices, service was impossible since the said offices remained closed at all material times.

16. In retort, the Respondent's advocate maintained that the Applicant's advocate was well aware of the location of their offices and which offices remained open at all material times. That in any event, the Applicant's advocate ought to have taken active steps at either seeking an extension of time to enable compliance, or pursued other alternative means of service, in the circumstances.

17. The court having perused the material on record noted that counsel for the Respondent annexed copies of correspondence dated September 16, 2015 and 1st September, 2016 (annextures marked "KN 1" and "KN 2") between the respective advocates, to support her averment that the Applicant's advocate had material knowledge of their office details in the material period. The said annextures indicate that the offices for the Respondent's advocates (the firm of M/S Kibunja Nyambura & Co. Advocates) were situated at Solonte Plaza, 1st Floor, Isinya. It is therefore apparent that the Applicant's advocates knew or ought to have known the offices of counsel for the Respondent.

18. As to whether the said offices were operational at all material times, the court noted that no credible evidence was tendered by the Applicant in that regard. In fact, in the affidavit of service sworn by the Applicant's process server Stanley Kalu Kisilu on February 3, 2022 and exhibited in affidavit supporting the Motion as annexture marked "MWG 1", the said process server stated that he was completely unable to trace the location of the offices belonging to the Respondent's advocates and attempts to reach them on phone were similarly futile. Therefore , the court is not satisfied that the claims of closure of the Respondent's advocate's offices are proven, nor related explanation justified.

19. Furthermore, if indeed the Applicant's advocates were experiencing challenges in complying with the directions given on December 2, 2021 as purported, the prudent next step would have been for them to move the court appropriately or to pursue alternative means of service. Instead, they opted to sleep on the appeal, initially for almost five years until woken up by the NTSC, and thereafter for over two (2) years, until awoken from their slumber by the letter dated March 19, 2024 from the Respondent's advocates, seeking to execute the decree. It is therefore fair to state that the facts demonstrate apathy and indolence on the part of the Applicants.

20. In total, the delay involved exceeds a period of seven (7) years, and there is no reasonable explanation thereof offered by the Applicant. It will be a travesty of justice and an affront to the overriding objective to grant the motion in these circumstances, thus allowing the Applicant to prosecute the appeal at its leisure. All to the prejudice of the Respondent who has a judgment in his favour and is therefore entitled to the fruits thereof.

21. In the court's considered view, the Notice of Motion dated March 22, 2024 is without merit, and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mrs. Githaiga

For Respondent: Mr. Kibunja

C/A: Erick