



**Kriza Motors Limited & another v Mutunga (Civil Appeal
E124 of 2021) [2024] KEHC 9488 (KLR) (Civ) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E124 OF 2021

CW MEOLI, J

JULY 31, 2024

BETWEEN

KRIZA MOTORS LIMITED 1ST APPELLANT

JAMES MUSYOKA MWIKALI 2ND APPELLANT

AND

JUSTUS KALUI MUTUNGA RESPONDENT

RULING

1. The Notice of Motion (hereafter the Motion) dated 28th December, 2023 was brought by Kriza Motors Limited and James Musyoka Mwikali (hereafter the 1st and 2nd Applicants) seeking that the court be pleased to reinstate the appeal for hearing and determination; and a further order to stay of execution of the judgment delivered by the trial court on 30th April, 2020 in Milimani Cmcc No. 1187 of 2017, pending the hearing and determination of the appeal.
2. The Motion invokes Sections 1A, 1B, 3A, 94 and 95 of the *Civil Procedure Act (CPA)* and Order 45, Rule 1; Order 42, Rule 21; Order 49, Rule 22; Order 50, Rule 6 and Order 51, Rule 1 of the *Civil Procedure Rules (CPR)*, and is premised on the grounds on its face as amplified in the supporting sworn by the Applicants' advocate, Lawrence Njuguna.
3. The advocate stated that upon filing the appeal, the Applicants made partial payments on the decretal sum to the tune of Kshs. 600,000/- and provided a bank guarantee in the sum of Kshs. 1,022,177/- being in satisfaction of conditions for stay pending determination of the appeal. He further stated that upon obtaining the requisite documents, the Applicants, subsequently filed their record of appeal; that when the matter came up in court on 28th July, 2023 Visram, J. directed the Applicants to prosecute the appeal within 90 days therefrom, failing which the appeal would stand dismissed with costs; and that due to work pressures, the Applicant's advocate forgot to comply with the said orders, resulting in the



- automatic dismissal of the appeal. That this mistake on the part of counsel ought not to be visited upon the clients. The advocate concluded by stating that the Applicants have filed a comprehensive record of appeal and final submissions, and that any resulting prejudice to the other side can be compensated by way of costs. He therefore urged the court to exercise its discretion in favour of the Applicants.
4. Justus Kalui Mutunga (hereafter the Respondent) resisted the Motion by way of a replying affidavit sworn by his advocate, Kisiang'ani Diana, on 19th April, 2024. Therein, she deposed that upon lodging the appeal sometime in the month of March, 2021 the Applicants went into a slumber, only to be awoken by the Notice To Show Cause (NTSC) why the appeal should not be dismissed for want of prosecution, issued on 6th April, 2023. That when the parties consequently attended court on 21st July, 2023 Visram, J. exercised his discretion by granting the Applicants an opportunity to prosecute the appeal, within the timelines set out above. Despite the order, the Applicants once again went into a slumber, and even failing to respond to a subsequent NTSC issued on 11th October, 2023.
 5. The advocate deposed that the foregoing demonstrate indolence on the part of the Applicants in prosecuting their appeal, and that such indolence ought not to be aided. That despite the court having accommodated them in the past, the Applicants have shown no interest in prosecuting the appeal to its conclusion. That to reinstate the appeal would occasion a grave injustice to the Respondent, who is entitled to enjoy the fruits of his judgment, and that in the premises, the Applicants are disqualified from seeking any further extension of time.
 6. At the hearing of the Motion, respective parties agreed that the Motion be determined on the basis of the affidavit material tendered.
 7. The court having considered the rival affidavit material takes the following view of the matter. 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] E.A 116:

“The discretion to set aside an ex-parte 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.”
 8. The Applicants invoked inter alia, under Order 22, Rule 22 (on general stay of execution) and Rule 50 (on determination of attachment); Order 42, Rule 6 (on stay of execution pending appeal); Order 42, Rule 21 (on re-admission of an appeal dismissed for default under Rule 20); Order 45, Rule 1 (on review); Order 50, Rule 6 (on the enlargement of time) and Order 51, Rule 1 (on the general procedure for filing applications) of the CPA. The Applicants further cited Sections 1A, 1B (on the overriding objective of the Act) and 3A (on the inherent powers of the court) as well as Section 95 (on the enlargement of time) of the CPA.
 9. From a reading of the provisions cited above and a consideration of the prayers in the Motion, the court is of the view that the applicable provisions here would be Section 3A; Order 51, Rule 1 and possibly Order 42, Rule 6 (*supra*).
 10. Section 3A of the CPA as earlier referenced, 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

“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.”

11. 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)

12. The record reveals the events leading to the instant Motion to be as follows. The Applicants filed their memorandum of appeal on 11th March, 2021 followed by their record of appeal which, filed on 29th March, 2023. The record shows that no further progressive steps took place in the appeal, resulting in issuance of the NTSC on 6th April, 2023 requiring the parties to show cause as to why the appeal should not be dismissed for want of prosecution. At the hearing of the said notice to show cause, on 28th July, 2023 it was noted that the Applicants’ advocate had sworn a replying affidavit on 16th May, 2023 explaining the delay in the matter.
13. Upon considering the explanations given, Visram, J. declined to dismiss the appeal but directed the Applicants to prosecute the same within 90 days thereof, failing which the appeal would stand automatically dismissed. Upon the Applicants’ non-compliance with the aforesaid order, the matter was subsequently listed for dismissal before this court on 27th October, 2023. Upon consideration of the orders earlier made by Visram, J. this court marked the appeal as automatically dismissed with effect from the said 27th October, 2023 upon expiry of the 90-day period granted by Visram J.
14. The Applicants then brought the instant Motion two (2) months later. Upon considering the explanation given on behalf of the Applicants’ counsel, namely, work pressures and inadvertence the court acknowledges the existing legal principle that the mistake of an advocate should not be visited upon the client. However, this principle does not apply in a blanket sense. It is trite that a suit/appeal ultimately belongs to the litigant and not the advocate at the end of the day and thus, it is the litigant’s duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim.



15. This position was laid out by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR when it held thus:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

16. Moreover, the Court of Appeal in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR held that:-

“While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in *Mwangi v Kariuki* [1999] LLR 2632 (CAK)) Shah, JA. ruled that “mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.” The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.”

17. In the present instance, no credible material was tendered to demonstrate any attempts made by the Applicants at following up on the progress of the appeal with their advocates or at prompting them to timeously prosecute the appeal since its inception, at any point in time. Indeed, the said Applicants did not deem it necessary to swear their own affidavit, opting instead to remain in the shadows of their advocate.

18. On the part of the Applicants’ advocates, it is a prudent practice to keep track of all matters scheduled through diarization and the explanation therefore given that the matter was simply ‘forgotten’ due to work pressures is hardly tenable. Especially given that the Applicants were previously accommodated by the court and given an opportunity to prosecute the appeal within strict timelines.

19. Furthermore, upon perusal of the record, the court noted that there had been a prolonged delay of over two (2) years between the date of lodging the appeal and issuance of the order resulting in dismissal thereof. The casualness and indolence on the part of the Applicants and/or their advocates is self-evident. In the foregoing circumstances, the court is not convinced that the explanation given by and on behalf of the Applicants is sufficient to warrant the exercise of discretion in their favour. Besides, the court is persuaded that the Respondent is lawfully entitled to enjoy the fruits of his judgment, and will likely suffer prejudice if the orders sought are granted. Surely, litigation must come to an end. The first prayer in the Motion must fail.

20. This finding renders moot the remaining prayer seeking stay of execution. In the result, the Notice of Motion dated December 28, 2023 fails, 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 Applicants: Mr. Njuguna



For Defendants: Mr. Kiptanui

C/A: Erick

