



**Keitany v Nation Media Group Limited & another (Civil Appeal
491 of 2019) [2023] KEHC 27079 (KLR) (Civ) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27079 (KLR)

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

**CIVIL
CIVIL APPEAL 491 OF 2019**

CW MEOLI, J

DECEMBER 20, 2023

BETWEEN

WILLIAM KIMUTAI B KEITANY APPELLANT

AND

THE NATION MEDIA GROUP LIMITED 1ST RESPONDENT

AGGREY MUTAMBO 2ND RESPONDENT

RULING

1. William Kimutai B. Keitany (the Applicant) brought the Notice of Motion (the Motion) dated 17th October, 2022 seeking that the order made on 7th October, 2022 dismissing the appeal be set aside and the appeal be reinstated. The Motion which is expressed to have been brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 42, Rules 11 and 35 of the *Civil Procedure Rules* (CPR) is premised on the grounds featured on its face and amplified in the supporting affidavit sworn by the Applicant.
2. Therein, the Applicant stated that being aggrieved with the decision rendered by the trial court in Milimani CMCC No. 3525 of 2013, he instructed his advocate on record to lodge the present appeal vide the memorandum of appeal dated 23rd August, 2019 followed by the record of appeal which was filed on 8th December, 2020. The Applicant further stated that his advocate subsequently wrote to the Deputy Registrar by way of the letter dated 29th June, 2021 seeking a mention date before a Judge for purposes of obtaining directions on the hearing of the appeal, to no avail.
3. He further deposed that his advocate was therefore taken by surprise upon learning that the appeal had been dismissed for want of prosecution on 7th October, 2022 and yet no directions had been given in the appeal and no notice had been served upon the Applicant's advocate prior to such dismissal. The Applicant averred that he is keen on prosecuting his appeal which in his view, raises arguable grounds



with reasonable chances of success. Resultantly, the Applicant urged the court to exercise its discretion in his favour.

4. The Nation Media Group Limited and Aggrey Mutambo (hereafter the 1st and 2nd Respondents) resisted the Motion by filing Grounds of Opposition dated 21st March, 2023 portraying the following grounds:
 1. The Applicant has failed to give any or sufficient reasons for the court to exercise its discretion in his favor.
 2. The Applicant is seeking an equitable remedy and has not come to court with clean hands.
 3. The Application is frivolous, vexatious and an abuse of the process of the court.
 4. The Application has no merit.
5. The Respondents also filed a replying affidavit sworn by Sekou Owino, Head of Legal of the 1st Respondent. Therein, he deposed that notwithstanding the fact that the 1st Respondent settled in full the decretal sum awarded by the trial court in favour of the Applicant, the latter still proceeded to lodge the present appeal. He further deposed that since filing the record of appeal on 8th December, 2022 the Applicant took no further steps in ensuring the prosecution of the appeal, and hence the dismissal order made was proper. That the Applicant has not offered any reasonable basis upon which the appeal can be reinstated.
6. The Applicant rejoined with a further affidavit sworn on 12th April, 2023 stating *inter alia*, that any payments made by the Respondents towards satisfaction of the decree were received on a ‘without prejudice’ basis and hence he was entitled to lodge an appeal against the trial court’s decision subsequently. The Applicant also reiterated his earlier averments that he has not been indolent in the prosecution of his appeal and that it would be in the sole interest of justice for the court to allow the Motion.
7. The Motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the decision rendered in *Pinpoint Solutions Limited & another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR on the procedure for admission of appeals and the issuance of directions in respect of appeals, pursuant to the CPR. The counsel further referenced Order 42, Rules 11, 12 and 13 of the Civil Procedure (Amendment) Rules 2020 and Order 42, Rule 35 of the CPR relating to directions and dismissal of appeals for want of prosecution, respectively.
8. Counsel argued that the memorandum of appeal having been filed in the present appeal, the mandate lay with the Deputy Registrar to cause the appeal to be listed before a Judge in the Division, for directions. That in the absence of such directions, the appeal could not be dismissed for want of prosecution. It was equally contended that unless the dismissal order is set aside, the Applicant stands to suffer grave prejudice since he will be prevented from seeing his appeal through to its proper conclusion. The court was therefore urged to allow the Motion as prayed.
9. On the part of the Respondent, his counsel opted to rely on the Grounds of Opposition and the averments made in the aforementioned replying affidavit.
10. The court has considered the rival affidavit material, the Grounds of Opposition and the submissions filed. The power of the court to grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, 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-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.”

11. The provisions for the setting aside of a dismissal order and the reinstatement of an appeal as in the present instance, are Order 42, Rule 35 of the [CPR](#) as read together with Section 3A of the [Civil Procedure Act](#), the latter which 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.”

12. 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.”

13. Order 42, Rule 35 (*supra*) provides that:

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.

14. Rule 13(1) [CPR](#) provides that:

“Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.”

15. The objection by the Applicant to dismissal of the appeal before the giving of directions does not inure an indolent appellant. The Court of Appeal in [Pereira v Nation Media Group & 2 others](#) (Civil Appeal



122 of 2016) [2021] KECA 135 (KLR) while discussing the application of Article 159 (2) (d) had this to say;-

“Case law on the invocation and application of the above principle now form a well-trodden path. We take it from the cases of *Jaldesa Tuke Dabelo v IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others v IEBC & 3 Others* [2013] eKLR; *Lemanken Arata v Harum Meita Mei Lempaka & 2 Others* [2014]eKLR; *Patricia Cherotich Saawe v IEBC & 4 Others* [2015]eKLR. The principles enunciated therein and which we find prudent to highlight are as follows: Rules of procedure are handmaidens of justice; a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case; the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice also that Article 159 (2)(d) of the Constitution is not a panacea for all procedural ills.”

16. The court proceeded to discuss the import of the overriding objective in Section 1A and 1B of the Civil Procedure Act. In this instance the court moved *suo motu* under Rule 35 (2) of Order 42 of the Civil Procedure Rules to issue a notice to show cause (NTSC) to the Appellant to show cause why the appeal should not be dismissed for want of prosecution, notwithstanding the fact that directions had not been given under Rule 13 as indeed the Respondent had filed his record of appeal late in 2020. The duty to file the record of appeal and to pursue issuance of directions on the appeal lay with the Appellant. He could have nudged the Deputy Registrar to action through correspondence in the two years before dismissal.
17. As held in *Haron E. Ongechi Nyaberi v British American Insurance Co Ltd* HCCA No 110 of 2001, the duty of moving the court in terms of Order 42 Rule 11 & 13, lay with the Appellant. What option then is left to a court, when the appellant goes into slumber after filing his record of appeal? Is the court without recourse despite the express provisions of Order 42 Rule 35 (2) of the CPR? The reading of these Rules as asserted by the Appellant’s advocate would defeat the express provisions of Order 42 Rule 35 (2) CPR and run afoul of the overriding objective. An indolent appellant cannot be allowed to use the provisions of Order 42 Rules 13(1) and 35 as both a sword and a shield.
18. It was stated in *Osbo Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR that the court bears the duty imposed by Section 1B & 1A of the Civil Procedure Act, to further the overriding objective in Section 1 of the Civil Procedure Act which states:

“ 1A

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;
- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
- (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”



19. The events leading to the dismissal order issued on 7th October 2022 are as follows. The Applicant filed the present appeal on 23rd August 2019, followed by the filing of the record of appeal sometime on or about the 8th of December, 2020. However, it is apparent from the record that no further progressive action took place in the appeal, resulting in issuance of the NTSC on 4th August, 2022 requiring the parties to attend court on 7th October, 2022 when none of the parties were in attendance.
20. Upon considering the explanation by the Applicant to the effect that the NTSC was not served upon his advocate, the court upon perusing the record observed that an affidavit of service was sworn by the court process server, Jackson Kanyoro, on 26th September, 2022 wherein he deposed that he received a copy of the NTSC and served it upon the firm of M/S Nderitu & Partners Advocates, being the firm of advocates on record for the Applicant at all material times. This position therefore casts doubt on the claims made by the Applicant.
21. Equally, no copy of the letter dated 29th June 2021 and annexed to the Applicant’s supporting affidavit as “WKBK 4” is found on the record, the first correspondence being after the dismissal.
22. That said, the right to a fair hearing is guaranteed by the Constitution. In *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR the Court of Appeal had this to say in that regard:
- “Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is ... crystalized ... in the case of *Richard Ncharpi Leiyagu v IEBC & 2 Others (supra)*; *Mbaki & Others v Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding *inter alia* that:
- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
 - (ii) the right to be heard is a valued right; and
 - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice...”
23. The Applicant is reasonably entitled to an opportunity to prosecute his appeal to its conclusion. Consequently, and whilst acknowledging the prolonged delay in the appeal, the court will reluctantly exercise its discretion in favour of the Applicant in this instance. Therefore, allowing the Notice of Motion dated 17th October, 2022 on condition that the reinstated appeal shall be fully prosecuted by end of March 2024, failing which the appeal will stand automatically dismissed for want of prosecution, with costs to the Respondents. The costs of the Motion are awarded to Respondents in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of:



For the Applicant: N/A

For the Respondent: Ms. Jan Mohamed

C/A: Carol

