



**Oigara & another v Mugisha (Civil Appeal 237 of 2016)
[2022] KEHC 16808 (KLR) (Civ) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16808 (KLR)

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

CIVIL

CIVIL APPEAL 237 OF 2016

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

EZRA OIGARA 1ST APPELLANT

RONALD MARAGA 2ND APPELLANT

AND

ISRAEL MUGISHA RESPONDENT

RULING

1. The motion dated August 11, 2021 by Israel Mugisha (hereafter the applicant) seeks the dismissal of the appeal for want of prosecution. The motion is expressed to be brought under section 3A of the *Civil Procedure Act* and order 51 rule 1 of the *Civil Procedure Rules* *inter alia*. The motion is supported by the grounds on the face thereof as amplified in the affidavit of Fredrick Otieno Mege, counsel having conduct of the matter on behalf of the applicant.
2. The gist of his affidavit is that the appeal herein was filed on May 6, 2016 and remained dormant until a motion dated November 6, 2018 was filed by the Applicant seeking dismissal of the appeal for want of prosecution and that the motion was subsequently compromised by the respective parties on April 10, 2019. That it has been more than two years since the said motion was compromised, yet Ezra Oigara and Ronald Maraga (hereafter the respondents) have not set down the appeal for directions or taken any other step towards prosecution of the appeal. Counsel goes on to depose that the conduct is evidence of disinterest on the part of the Respondents in the appeal. Further that, the pendency of the appeal is prejudicial to the Applicant who has been denied the fruits of his judgment pursuant to stay orders issued by the lower court at the respondents instance.
3. The motion is opposed by way of a replying affidavit deposed by Kelvin Ngure dated October 22, 2021, who swears to be the deputy claims manager at Directline Assurance Company Limited, at



whose instance the instant appeal is defended; that he is conversant with the facts, competent and duly authorized to depose; that by dint of the company's right of subrogation the company has the right to defend and or prosecute any claim in the insured's name. He views the motion as misconceived and premised on misapprehension of the law and facts. He states that record of appeal was filed on February 1, 2019 and shortly thereafter counsel unsuccessfully sought to fix a date for the appeal until the year 2020 when the Covid-19 pandemic struck, further slowing down court activities; that the delay to prosecute the appeal has not been occasioned by the Respondents or their counsel but court back log with the onset of the Covid-19 Pandemic.

4. The deponent further deposes that the motion is premature as directions on the appeal ought to have been taken first hence only the Deputy Registrar can act by listing the appeal for dismissal where directions under order 42 rule 35(2) of the *Civil Procedure Rules* and section 79B of the *Civil Procedure Act* have not been given. He asserts that the appeal ought not to be dismissed as the court has unfettered discretion to ensure just and expeditious disposal of matters; that the Respondents have a viable appeal and stand to suffer prejudice if the appeal is dismissed; that the respondents are keen on prosecuting the appeal and seek the indulgence of the court not to be ousted from the seat of justice; that the delay is not so inordinate as to prejudice the applicant; and that such delay can reasonably be compensated by an award of costs.
5. The motion was canvassed by way of written submissions. For the applicant, counsel underscored the fact that since filing of the appeal more the five years ago, the respondents have not taken any substantive steps to prosecute the appeal; that they have not explained the inaction on their part; that despite the Covid-19 pandemic courts have continued to conduct virtual sessions and hence the respondents have simply been lethargic in pursuing the appeal. It was further argued that the respondents have not proffered any reasonable explanation for the delay in prosecuting the appeal and are underserving of the court's discretion.
6. While calling to aid the decision in *Kenya Power & Lighting Co. Ltd v Benzene Holdings Ltd t/a Wyco Paints* [2016] eKLR and *Law Society of Kenya v Standard Chartered Bank Kenya Ltd* [2021] eKLR counsel argued that the instant motion is not predicated on the provisions of order 42 rule 35 of the *Civil Procedure Rules* but rather has invoked the court's inherent jurisdiction. Counsel submitted that the respondent failed to comply with the provisions of order 42 rule 11 to cause the appeal upon filing to be listed before a judge and thus urged the court not to reward the respondents lethargy but to dismiss the appeal for want of prosecution with costs.
7. On the part of the respondents, it was argued that the Applicant has not demonstrated the prejudice that he is likely to suffer if the Respondents are given more time to prosecute their appeal while the Respondents will lose their right of appeal if the appeal is dismissed. Counsel asserted that the appeal is meritorious and asserted that the court ought to strike a balance between the competing rights of the rival parties.
8. Further, placing reliance on several decisions including *Kirinyaga General Machinery v Hezekiel Mureithi* [2007] eKLR, *Allan Otieno Osula v Gurdev Engineering & Construction Ltd* [2015] eKLR, *Elem Investment Limited v John Mokora Otwoma* [2015] eKLR and the provisions of order 42 rule 35 counsel contended that directions having not been issued yet, as such the instant appeal cannot be dismissed for want of prosecution. In conclusion it was submitted that the motion lacks merit as the Applicant has failed to demonstrate why the appeal ought to be dismissed.
9. The court has considered the material canvassed in the present motion. The applicant has invoked section 3A of the *Civil Procedure Act* rather than order 42 rule 35 that provides for dismissal of an appeal for want of prosecution. Order 42 rule 35 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.
10. Section 3A of the [Civil Procedure Act](#) to which the Applicant’s motion is expressed to be brought under provides that;

Nothing in this [Act](#) shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

11. From the Applicant’s submissions before this court reliance on section 3A of the [Civil Procedure Act](#) was deliberate and not erroneous. Counsel for the Applicant rightfully argued and or acknowledged that fact that directions pursuant to order 42 rule 13 of the [Civil Procedure Rules](#) were yet to be taken in the matter but instead opted to invoke the court’s inherent jurisdiction to have the appeal dismissed for want of prosecution. As to what constitutes inherent jurisdiction, the Court of Appeal in [Rose Njoki King’au & another v Shaba Trustees Limited & another](#) [2018] eKLR rendered itself as follows;-

“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.”

The Supreme Court went further in [Board of Governors, Moi High School Kabarak and another versus Malolm 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. Section 3A of the [Civil Procedure Act](#) echoes the injunction in article 159(2) of the [Constitution](#) which provides that;-

“



- “(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
- (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and
 - (e) the purpose and principles of this *Constitution* shall be protected and promoted.”

See also the overriding objective in section 1A and B of the *Civil Procedure Act*.

13. The courts are commanded to dispense of substantive justice expeditiously without being encumbered by procedural technicalities. The Court of Appeal in *Pereira v Nation Media Group & 2 others* (Civil Appeal 122 of 2016) [2021] KECA 135 (KLR) while discussing the import 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 Sawe 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.”

14. The court went on further to discuss the import of the overriding objective in section 1A and 1B of the *Civil Procedure Act* by stating that;

“Principles that guide the Court in the application of the above overriding objective principle also now form a well-trodden path. We take it from the case of *Hunter Trading Company Ltd v Elf Oil Kenya Limited*, Civil Application No NAI 6 of 2010, stated inter alia as follows:

“It seems to us that in the exercise of our powers under the “02 principle” what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “02” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “02 principle” could easily become an unruly horse.”



Further in *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli v Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No.199 of 2008)* (unreported) the Court reiterated that:

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

15. Section 1B of the *Civil Procedure Act* states that;-
 - (1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.
16. Rule 35 (1) of order 42 *Civil Procedure Rules* is the only express provision which permits an applicant to seek the dismissal of an appeal for want of prosecution a fact duly acknowledged by the Applicant in his submissions before this court. That means directions must have been given under Rule 13 before an Applicant can move the court. In this case, Rule 13 has not yet applied; the Respondents having not moved the court as required, at the time of the filing of the instant application.
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, lies with the respondents. What the option then is left to a respondent party when the appellant, goes into slumber after filing the appeal? Is the respondent without recourse? In my own view, such a party is not without options and may prod the Deputy Registrar to move under 42 rule 35(2) of the *Civil Procedure Rules*. Equally, such a party is not barred from seeking the court’s intervention under section 1A, 1B & 3A of the *Civil Procedure Act*.
18. It was stated in *Osho 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. A court confronted with an application such as the present one is not hamstrung, and where circumstances demand, may invoke its inherent power to give meaning to the overriding objective principle, notwithstanding the absence of an express provision for the dismissal of an appeal which has not been set down for directions. An indolent Appellant cannot be allowed to use the provisions of order 42 rule 35 (1) as both a sword and a shield.
20. The court has considered the explanation proffered by the respondent. However, a perusal of the record of proceedings reveals that the respondents have not taken any steps to prosecute the appeal despite the applicant having earlier filed a similar application on November 29, 2018 which was compromised. This court will agree with the applicants’ observations that no steps have been demonstrated by the respondents and the continued pendency of the matter is prejudicial to the applicant who continues to be denied the fruits of his judgment. The respondents, rather than admit their own tardiness have chosen the easier road of laying blame on court back log and the Covid-19 pandemic. Litigation must come to an end. The delay in this case is inordinate, unjustified and must be ended by allowing with costs the Applicant’s motion dated August 11, 2021. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF DECEMBER 2022

C MEOLI

JUDGE

In the presence of:

For the Applicant: Mr Ndegwa h/b for Mr Mege

For the Respondents: Mr Nganga

C/A: Adika

