



**Maroco Properties Limited v Mawani & 2 others (Environment and Land Appeal 56 of 2015) [2022] KEELC 15408 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15408 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 56 OF 2015  
SO OKONG'O, J  
DECEMBER 19, 2022**

**BETWEEN**

**MAROCO PROPERTIES LIMITED ..... APPELLANT**

**AND**

**AMIN SHERALI MAWANI ..... 1<sup>ST</sup> RESPONDENT**

**ASMAT AMIN MAWANI ..... 2<sup>ND</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. On February 11, 2019, the court gave directions that this appeal be heard by way of written submissions and gave timelines within which the parties were to file their respective submissions. On December 16, 2020, the appellant that had not filed its submissions sought more time to do so and was granted 30 more days. By February 2, 2021, the appellant had not filed its submissions and asked for 14 more days to do so. On that date, court ordered the appellant to file its submissions within 14 days from the date of the order in default of which this appeal was to stand dismissed with costs to the respondents. The appellant filed its submissions on February 17, 2021 outside the 14 days period that it was granted by the court to file the said submissions. On November 4, 2021, the court ordered on application by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that this appeal stood dismissed with costs to the respondents in terms of the orders made by the court on February 2, 2021 on account of the appellant's failure to file submissions within the time that was given by the court.
2. What is now before the court is the appellant's application brought by way of Notice of Motion dated December 22, 2021 in which the appellant has sought the following orders;
  1. That the court be pleased to set aside the orders made on November 4, 2021 and reinstate this appeal for hearing on merit.



2. That the court be pleased to extend the time within which the appellant should file its submissions and deem the submissions filed on February 17, 2021 as having been duly filed within time.
3. That the costs of the application be provided for.
- 3 The application is brought on the grounds set out on the face thereof and on the affidavit sworn by the appellant's advocate Njugi B Gachogu on December 22, 2021. The appellant has averred that on February 2, 2021, the court ordered the appellant to file its submissions within 14 days failure to which the appeal was to stand dismissed. The appellant has averred that on November 4, 2021 the court ordered that the appeal stood dismissed for non-compliance by the appellant with the orders made by the court on February 2, 2021 aforesaid. The appellant has averred that it filed its submissions on February 17, 2021 and that the delay in filing the said submissions was not intentional. The appellant has averred that the late filing of the submissions was a result of an inadvertent error in the computation of time by the appellant's advocate. The appellant has averred that the said error on the part of the advocate should not be visited on the appellant.
- 4 The appellant has averred that the Constitution provides that justice shall be administered without undue regard to procedural technicalities. The appellant has averred that the dismissal of the appeal at the stage when it was pending judgment was a very drastic action against an innocent litigant. The appellant has averred further that it is ready, willing and able to abide by any order that may be made by this court as a condition to the grant of the orders sought. The appellant has averred that respondents stand to suffer no prejudice that cannot be put right by payment of costs should the orders sought be granted.
- 5 The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through a replying affidavit sworn by their advocate, Sharon Mbithe on March 7, 2022. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have termed the appellant's application as frivolous, vexatious, an abuse of the court process and devoid of merit. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have contended that the application is predicated on misinterpretation and misleading information with the objective of influencing the court to reinstate a dismissed appeal.
- 6 The 1<sup>st</sup> and 2<sup>nd</sup> respondents have averred that in paragraphs 4, 5 and 6 of the affidavit sworn by Njugi Gachogu on August 24, 2021 in opposition to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' application seeking a declaration that the appeal had stood dismissed on account of the appellant's failure to file submission within the period that was fixed by the court, the reason advanced for the appellant's failure to file submissions within the period that was set by the court was that the appellant had tried to file the submissions on February 16, 2021 in vain as a result of a delay that was occasioned by the e-filing system. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have averred that in the affidavit sworn by the said Njugi Gachogu on December 22, 2021 in support of the present application, the reason given for the delay in filing the submissions is an inadvertent error in the computation of time by the appellant's advocate. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have averred that due to factual inconsistencies and material distortions contained in the two affidavits with regard to the reason for the failure on the part of the appellant to file submissions as was directed by the court, it is clear that the appellant is not being candid and is deliberately misleading the court.
- 7 The 1<sup>st</sup> and 2<sup>nd</sup> respondents have averred that Article 159 (2) (d) of the Constitution is not a panacea for all shortfalls and urged the court to decline the invitation to invoke the said Article of the Constitution in the circumstances of this matter. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have averred that the appeal has taken several years to be determined. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have averred that litigation must come to an end. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have urged the court to find that if the application is allowed, the 1<sup>st</sup>



and 2<sup>nd</sup> respondents will suffer great prejudice in terms of time and costs. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have urged the court to disallow the application in the interest of justice to all parties.

- 8 The 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that on December 16, 2020, the appellant was granted 30 days to file its submissions. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have averred that on February 2, 2021 when the matter came up for mention to confirm compliance, the appellant had not filed its submission and the court in the interest of justice and fair play granted the appellant an additional 14 days to file its submissions which timeline the applicant failed to comply with. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have urged the court to find that the present application has not been brought timeously and that there is no basis upon which the court can exercise its discretion to reinstate the appeal and proceed to dismiss the application with costs.
- 9 The 3<sup>rd</sup> respondent opposed the application through grounds of opposition dated January 17, 2022. In its grounds of opposition, the 3<sup>rd</sup> respondent has contended that the application is *res judicata*. The 3<sup>rd</sup> respondent has averred that the appellant is bound by the orders that were made by the court on February 2, 2021 and is therefore estopped from denying the outcome of its own negligence and delay.
- 10 The 3<sup>rd</sup> respondent has contended that the appellant's appeal raises no triable issues and has no chance of success. The 3<sup>rd</sup> respondent has averred that the appeal should not be allowed to proceed as it is meant to waste the court's time. The 3<sup>rd</sup> respondent has contended that the appellant intentionally delayed in the filing of its written submissions. The 3<sup>rd</sup> respondent has contended that no reason or explanation has been given by the 3<sup>rd</sup> respondent to justify such delay.
- 11 The 3<sup>rd</sup> respondent has averred that by engaging in wilful and deliberate delay in the filing of its submissions, the appellant waived its right of audience before this court. The 3<sup>rd</sup> respondent has averred that the appellant stands to suffer no prejudice if the application is dismissed since the appeal has no merit and is bound to eventually fail. The 3<sup>rd</sup> respondent has averred that it stands to suffer great prejudice if the application is allowed since this would amount to double jeopardy against it. The 3<sup>rd</sup> respondent has contended that after its deliberate delay and disobedience of the court order made on February 2, 2021, the appellant should not be allowed to unjustly benefit from the discretionary powers of this court and use this court to illegally benefit from its own wrong.
- 12 The 3<sup>rd</sup> respondent has contended further that allowing this application would diminish the reputation of this court since it will be seen as a court that condones contempt of its own orders and promotes abuse of procedures. The 3<sup>rd</sup> respondent has contended further that the application is fatally incompetent, incurably defective, and the orders sought by the appellant are devoid of merit hence the application is hopelessly misadvised and ought to be struck out by this court.

### **The appellant's submissions:**

- 13 The application was argued by way of written submissions. The appellant has in its submissions dated March 28, 2022 submitted that the issues that this court need to determine are whether the court has the discretion to reinstate the appeal and if so, whether it should do so and proceed to enlarge the time for filing submissions as prayed. The appellant has relied on [\*Belinda Murai & Others v Amos Wainaina \[1978\] KLR\*](#) and submitted that the overriding objective and constitutional and statutory framework of the civil procedure is to achieve substantive justice for the litigants. It is further submitted by the appellant that the inconvenience to be suffered by the respondents as a result of the reinstatement of this appeal can be adequately remedied through an award of costs. The appellant has relied on [\*Philip Chemwolo & Another v Augustine Kubede \[1982-88\] KAR 103\*](#) in support of this submission.



14 The appellant has submitted that the issue before this court is one that calls on the court to exercise its discretion. The appellant has submitted that the court should find in favour of substantive justice and proceed to allow the application as prayed. On the issue of prejudice, the appellant has submitted that the respondents will suffer no prejudice that cannot be adequately remedied by costs and that none has been demonstrated by the respondents.

**The 1<sup>st</sup> and 2<sup>nd</sup> respondents' submissions:**

15 In their submissions dated June 17, 2022, the 1<sup>st</sup> and 2<sup>nd</sup> respondents framed the issues arising for determination by the court as, whether the orders made herein on November 4, 2021 should be set aside/varied, the appeal reinstated and time for filing submissions enlarged as prayed for by the appellant. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have submitted that an application for the reinstatement of a dismissed appeal should have been brought under Order 12 Rule 7 of the *Civil Procedure Rules* while an application seeking to have the order made on November 4, 2021 set aside /varied should have been brought under Order 45 Rule 1 of the Civil Procedure Rules. It has been submitted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the appellant's application is neither anchored on Order 12 Rule 7 nor Order 45 Rule 1 of the Civil Procedure Rules as required by the law.

16 The 1<sup>st</sup> and 2<sup>nd</sup> respondents have submitted further that the application is brought under section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules which provisions speak to the powers of the court to enlarge time and have nothing to do with the reinstatement of a dismissed appeal or suit. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have submitted further that the orders made on November 4, 2021 reaffirmed and reiterated the orders of February 2, 2021 pursuant to which the appeal was dismissed. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have submitted that the appellant's application is predicated on misrepresentation and misleading information.

17 The 1<sup>st</sup> and 2<sup>nd</sup> respondents have submitted that the ruling of November 4, 2021 was delivered in the presence of the advocates for both parties and that the present application was filed on December 22, 2021 close to two months after the said ruling the orders in which are sought to be set aside. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have submitted that the application is an afterthought. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have submitted that since the prayers being sought are discretionary, the appellant ought to have explained the reason for such delay. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have urged the court to dismiss the appellant's application with costs for lack of merit.

**The 3<sup>rd</sup> respondent's submissions:**

18 In its submissions dated March 16, 2022, the 3<sup>rd</sup> Respondent has submitted that the appellant's application dated December 22, 2021 before the court is *res judicata*. The 3<sup>rd</sup> respondent has submitted that where a suit is found to be *res judicata*, the court has no other option open to it other than to strike it out. The 3<sup>rd</sup> respondent has submitted that the appellant had made a similar application that was dismissed by the court on February 16, 2021. In support of this submission, the 3<sup>rd</sup> respondent relied on *Christopher Orina Kenyaririri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 Others [2017] eKLR* and *Uburu Highway Development Ltd v CBK & 2 Others [1996] eKLR*.

19 The 3<sup>rd</sup> respondent has submitted that the applicant is not entitled to the orders sought. The 3<sup>rd</sup> respondent has submitted that the application offends section 7 of the *Civil Procedure Act*. The 3<sup>rd</sup> respondent has submitted that the application is fatally defective and devoid of merit. The 3<sup>rd</sup> respondent has submitted that the appeal raises no triable issues and as such has no chance of success. The 3<sup>rd</sup> respondent has submitted that allowing the appeal to proceed to hearing will be a waste of the



court's time. The 3<sup>rd</sup> respondent has reiterated that allowing the application would subject it to great prejudice. The 3<sup>rd</sup> respondent has urged the court to dismiss the application.

### **Analysis and Determination:**

20 I have considered the appellant's application together with the supporting affidavit. I have also considered the replying affidavit and grounds of opposition filed by the respondents in opposition to the application. Finally, I have considered the written submissions filed by the parties. What I have been called upon to determine is whether the orders made on November 4, 2021 should be set aside or varied, the appeal reinstated and time enlarged for filing of submissions by the appellant.

21 At the outset, I wish to point out that the appellant's application is aimed at the wrong target. The appeal herein was not dismissed pursuant to the orders issued on November 4, 2021 which are sought to be set aside herein. The appeal was dismissed for the appellant's failure to comply with the directions that were given by the court on February 2, 2021. As mentioned earlier in the ruling, on February 2, 2021, the court directed the appellant to file its submissions within 14 days in default of which the appeal was to stand dismissed. The appellant failed to file the appeal within 14 days as a consequence of which the appeal stood dismissed pursuant to the said orders made on February 2, 2021. The orders made on November 4, 2021 did not dismiss the appeal but merely confirmed that since the appellant failed to comply with the orders made on February 2, 2021, the appeal stood dismissed and was no longer in existence. The appellant's application should therefore have been targeted at the orders made on February 2, 2021. The appellant should have sought the setting aside of the orders made on February 2, 2021, the reinstatement of the appeal, and an extension of time within which to file submissions.

22 On the merit of the application, this court has inherent power to set aside its orders for the ends of justice to be met or to prevent abuse of its process. Section 3A of the *Civil Procedure Act* provides as follows:

3A. 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.'

23 To bring itself under this rule, the appellant has to establish that the orders sought are either necessary for the ends of justice to be met or to prevent abuse of the court process. I am not satisfied that that is the case. Section 1A of the *Civil Procedure Act* provides as follows:

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 subsection (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 processes of the Court and to comply with the directions and orders of the Court.'

24 Section 1B of the same Act on the other hand provides as follows:

1B.



- (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.'

25 This appeal was brought by the appellant against the decision of the lower court that was made in favour of the respondents in 2012. As at the time the court gave directions on December 16, 2020 that the appellant files its submissions within 30 days from that date, the appeal had been pending in court for over 5 years. The appellant did not comply with the said directions that were given on December 16, 2020. By February 2, 2021 almost 45 days later, the appellant had not filed its submissions. This was a breach of the provisions of Section 1A (3) of the *Civil Procedure Act* reproduced above. In furtherance of the overriding objectives of the *Civil Procedure Act* and Rules pursuant to Section 1B of the Act, the court extended the time it had granted to the appellant to file its submissions by a further 14 days from February 2, 2021 and to ensure compliance put a rider that unless the submissions were filed within that time, the appeal would stand dismissed. The 14 days period extended to the appellant expired on February 16, 2021 without the appellant filing its submissions as a consequence of which its appeal stood dismissed. As at the time the appeal stood dismissed on December 16, 2021, 60 days had lapsed from the time the appellant was directed by the court to file its submissions on December 16, 2020.

26 The appellant has not given any convincing reason why it failed to comply with the orders given by the court on December 16, 2020 and February 2, 2021. For this court to exercise its discretion in favour of the appellant, the appellant has a duty to give a good cause or sufficient cause for its failure to file submissions as directed by the court. Sufficient cause was defined in *Attorney General v Law Society of Kenya & another [2017]eKLR* as follows:

**Sufficient cause or good cause in law means:**

'The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black's Law Dictionary, 9th Edition, page 251*.

**Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.'**

27 The appellant has not given any cause leave alone sufficient cause why it failed to file submissions between December 16, 2020 and February 16, 2021 when the appeal was dismissed. I am in agreement with the respondents that there is no basis upon which this court can exercise its discretion in favour of granting the orders sought. The court's discretionary powers must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in *Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR* as follows:

**'It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because**



**the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.'**

- 28 From the history of the dispute between the parties set out in the record of appeal before the court, the conduct of the appellant in these proceedings and the length of time this appeal had remained pending as at the time it was dismissed for failure by the appellant to comply with the directions by the court, I am not persuaded that justice would be done to the respondents if the appeal is reinstated. I am in agreement with the respondents that litigation must come to an end. The appellant was given an opportunity to prosecute its appeal which it did not utilise. It has only itself and its advocates to blame.
- 29 In the final analysis and for the foregoing reasons, I find no merit in the appellant's Notice of Motion Application dated December 22, 2021. The application is dismissed with costs to the respondents.

**DELIVERED AND DATED AT KISUMU ON THIS 19<sup>TH</sup> DAY OF DECEMBER 2022**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Njugi for the Appellant

Ms. Mwanzia for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

N/A for the 3<sup>rd</sup> Respondent

Ms. J.Omondi-Court Assistant

