Awino v Batiza Limited (Civil Appeal 766 of 2016) [2025] KEHC 136 (KLR) (Civ) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 136 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 766 OF 2016

CW MEOLI, J

JANUARY 16, 2025

BETWEEN

JOSEPH AWINO .... APPLICANT

AND

BATIZA LIMITED .... RESPONDENT

RULING

1. For determination is the motion dated 26.07.2022 by Joseph Awino (hereinafter the Applicant) seeking inter alia that the Court be pleased to review and set aside the orders issued on the 17.03.2022; and to stay execution of the judgment of the Advocates Disciplinary Tribunal Cause No. 22 of 2015 pending hearing and final determination of this appeal. The motion is expressed to be brought pursuant to Section 1A, 1B, 3, 3A, 63(e), 95 & 100 of the *Civil Procedure Act* (CPA), among others, and premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Joseph Awino, who describes himself as a legal practitioner. The gist of his affidavit is that failure to prosecute the appeal was not deliberate on his part as he wrote several letters requesting seeking a date which was not forthcoming and that he has an arguable appeal that ought to be heard and determined on merit.

2. Batiza Limited (hereafter the Respondent) opposes the motion via the replying affidavit sworn on 01.12.2024 by Japheth Munyendo, counsel having conduct of the matter on behalf of the Respondent. He attacks the motion as frivolous, vexatious, an abuse of the Court process and a mockery of justice. Further deposing that the Applicant, aggrieved with the decision of the Advocates Disciplinary Committee, instituted his appeal in 2016 but failed to take any progressive steps for six (6) years, leading to its dismissal on 17.03.2022. That despite a Notice to Show Cause (NTSC) being served, the Applicant failed to appear before the Court to show cause, leaving this Court with no option but to dismiss the appeal. He continues to state that the continued pendency of the appeal was not only

against the principles of justice but also prejudicial to the Respondent. That record herein discloses the Applicant's indolence in prosecuting the appeal, the Applicant having absconded and or failed to appear before this Court for a record twenty-two (22) times when the matter came up for mention.

3. He points out that the Applicant did not take any steps towards prosecution of the motion after filing; that the motion fails to furnish sufficient cause or reason for intentional delay and non-prosecution of the matter; that no likely prejudice has been demonstrated by the Applicant if the Court were to dismiss the motion; and that in any event the instant motion entails discretion of which this Court ought not to exercise in favour of the Applicant. Further contending that it is the duty of litigants and advocates to ensure the timeous disposal of matters and hence the Respondent ought not be punished for the Applicant's indolence. In summation, he states that the Respondent has suffered and continues to suffer the heavy financial burden of instructing counsel to appear in Court with no prospects of determination of the matter, and therefore the Court ought to dismiss the Applicants motion with costs.

4. Directions were taken for the determination of the motion on the premise of the respective affidavit material on record, and a ruling date reserved. However, before the ruling date, the Applicant filed a second motion under certificate of urgency, dated 26.11.2024 pursuant to which through orders issued on 29.11.2024, the Court accorded the Applicant leave to file an affidavit in rejoinder.

5. By his further affidavit, the Applicant states that delay in the prosecution of the motion, as admitted by the Respondent, was occasioned by the parties attempts to amicably settle the matter out of Court. He points out that his affidavit in support cites the steps he took towards prosecution of the appeal. He concludes by stating that it is in the interest of justice and fairness the appeal is determined on its merit.

6. The court has considered the rival affidavit evidence before it, as well as the record herein. The Applicant's motion invokes inter alia the provisions of Section 3A of the CPA which specifically 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". However, in the court's view, the motion turns on the question of its competency in light of the context in which it was brought.

7. Here, it is undisputed that the appeal herein was dismissed on 17.03.2022 pursuant to a Notice to Show Cause premised under Order 42 Rule 35 of the CPR which provides:

> " (1) Unless within three months after the giving of directions under rule 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."

8. An examination of the record herein discloses that the appeal was filed on 19.12.2016 and on 14.07.2017 the Applicant moved the court vide a motion dated 13.07.2017 seeking to stay execution, which was allowed by Mbogholi, J. (as he then was) on 29.08.2017. Beyond filing the said application, no steps were taken by the Applicant to progress the appeal. Subsequently, on 31.01.2022 the Deputy Registrar (DR) issued a Notice to Show Cause (NTSC) pursuant to Order 42 Rule 35(2) of the CPR for hearing on 17.03.2022. The NTSC was addressed to Messrs. Oluoch Owino & Co. Advocates and the Advocates Complaints Commission, and an affidavit of service by the Court Process Server filed as proof of service.

9. On 17.03.2022 when the matter came up for the NTSC, appearance on behalf of the Applicant/ Appellant was by a Mr. Awino who at the time stated that he was holding brief for Mr. Njeru whereas there was no appearance by the Respondent and or the Advocates Complaints Commission. I find it useful to set out ad verbum the proceedings of the said date; -

> " Mr. Awino: We did not get proceedings in the disciplinary Tribunal. We are trying to get them.
>
> Court: No good cause shown. Appeal dismissed for want of prosecution."

10. Thus, from the above proceedings the appeal was dismissed pursuant to Order 42 Rule 35(2) of the CPR upon the court hearing representation by the Applicant. That being the case and for arguments sake, had the appeal been listed for hearing on 17.03.2022 and been thereafter dismissed for non-appearance by the Appellant, there would be liberty for the Applicant to move the Court pursuant to Order 42 Rule 20(1) & 21 of the CPR to have the orders set aside. In this case, however, the NTSC required the Applicant to appear on 17.03.2022 to show cause why the appeal should not be dismissed. By placing before the Court detailed and cogent reasons why the appeal ought not to be dismissed. A good practice that has developed over time is that an appellant served with a NTSC usually files an affidavit in that regard. The Applicant herein opted to orally address the Court in deflecting the NTSC rather than file such affidavit.

11. Accordingly, the Applicant was given an opportunity to be heard in the bid to salvage the appeal. In its brief ruling, the Court found that the reasons advanced by the Applicant's counsel to be unsatisfactory and proceeded to dismiss the appeal. The Court having thus made a finding regarding the NTSC cannot revisit its own decision save by way of review. Despite the Applicant's use of the trouble inviting pair of words of "review and set aside" in the motion, neither the cited provisions, grounds nor affidavits by the Applicant evince any invocation of the Court's jurisdiction under Order 45 of the CPR as read with Section 80 of the CPA.

12. There is no jurisdiction under Order 42 Rule 35(2) of the CPR or under Section 3A of the CPA for this Court to purport to set aside its own orders of dismissal in the present situation. Had the Applicant not been heard in respect of the NTSC, he could have invoked the Court's inherent jurisdiction under Section 3A of CPA in seeking to set aside the orders of 17.03.2022. The absence of an express provision regarding an important matter such as the reinstatement of an appeal dismissed upon due hearing of a NTSC under Order 42 Rule 35(2) of the CPR cannot be assumed to be accidental and the Court's inherent jurisdiction cannot be invoked to cloth it with jurisdiction.

13. In my view, this is not the kind of situation for which the inherent jurisdiction of the Court, properly understood, was intended or can be invoked. Because, the Court having rendered its decision on 17.03.2022 regarding the NTSC was rendered functus officio, which event is not merely a technicality, but a serious matter going to the jurisdiction of this Court to entertain the motion. The Applicant by his motion is essentially attempting a second bite at the cherry by the introduction of fresh material, further to the determined NTSC. Despite having been granted an opportunity to show cause on 17.03.2022.

14. The Supreme Court of Kenya in expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR cited with approval an excerpt

from an article by Daniel Malan Pretorius, in "The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:

> "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

15. The Supreme Court also relied on the holding in the case of Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550 to the effect that;

> "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors, nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available." (Emphasis added).

16. Similarly in this case, the Court having pronounced itself on the NTSC proceedings before it, cannot re-open the issue already determined. In my reading of the CPR, a dismissal order made pursuant to Order 42 Rule 35(2) of the CPR may only be challenged through the avenue of appeal or review. Indeed, Order 43 Rule 1 (1)(w) provides that an appeal shall lie as of right from an order made pursuant to Order 42, Rules 3, 14, 21, 23 and 35 of the CPR. The Court having pronounced itself on the NTSC after a hearing, cannot now sit on appeal over its decision rendered almost two years ago on 17.03.2022, after the appeal had been pending for six years. Accordingly, the Applicant's incompetent motion dated July 26, 2022 is ripe for dismissal with costs to the Respondent. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF JANUARY 2025.

C. MEOLI

JUDGE

In the presence of

For the Applicant:

For the Respondent:

C/A: Erick