



REPUBLIC OF KENYA



KENYA LAW
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**Dahir v Juma (Civil Appeal E960 of 2022)
[2025] KEHC 112 (KLR) (Civ) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 112 (KLR)

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

CIVIL

CIVIL APPEAL E960 OF 2022

CW MEOLI, J

JANUARY 16, 2025

BETWEEN

MARKABA DAHIR APPLICANT

AND

FRANCIS JUMA RESPONDENT

*(Arising from the judgment in Nairobi Small Claims Court Case No.
E5333 of 2022 (hereafter lower Court suit) delivered on October 28, 2022.)*

RULING

1. For determination is the motion dated October 15, 2024 by Markaba Dahir (hereafter the Applicant) essentially seeking that the withdrawal of the appeal be reversed and the appeal be revived or reinstated for hearing on merit. The motion is expressed to be brought under Sections 1A, 1B & 3A of the Civil Procedure Act (CPA) and Order 51 Rule 1 of the Civil Procedure Rules (CPR). It is premised on the grounds on its face, as amplified in the supporting affidavit sworn by Lily Umazi, counsel having conduct of the matter on behalf of the Applicant.
2. The gist of her deposition is that following the judgment in Nairobi Small Claims Court Case No. E5333 of 2022 (hereafter lower Court suit) on October 28, 2022, the Applicant being aggrieved filed the instant appeal accompanied with an application seeking stay of execution pending appeal. That on March 6, 2023, parties recorded a consent before the lower Court in respect of the appeal and agreed that the appeal be withdrawn, as a consequence of which erstwhile counsel for the Applicant proceeded to file a Notice of Withdrawal of this appeal.
3. She goes on to depose that Francis Juma (hereafter the Respondent), through counsel, thereafter, filed a motion before the lower Court claiming that erstwhile counsel who recorded the above consent on behalf of the Respondent lacked a practicing certificate. That vide a ruling delivered on 14.07.2023,



- the lower Court set aside the said consent. She asserts that there is need to have the appeal revived as the consent adopted before the lower Court leading to withdrawal was subsequently set aside.
4. Adding that the grounds in the memorandum of appeal are solely focused on the impugned decision of the lower Court and constitute sufficient cause for reinstatement of the appeal. In summation she deposes that this Court ought to exercise its discretion by allowing the instant motion because the act of setting aside the consent automatically negated the Notice of Withdrawal filed in respect of the instant appeal.
 5. The Respondent opposes the Applicant's motion by way of grounds of opposition dated 18.11.2024. He takes issue with the motion on the following grounds. First, that the application is incompetent to the extent that it purports to seek revival of an appeal that was voluntarily withdrawn while proceeding with a similar appeal which the Applicant filed before this Court, namely, Nairobi HC. Civil Appeal E1240 of 2024; that the motion is an abuse of the court process coming after the withdrawal of the appeal by the Applicant; and that the motion is an afterthought and unsustainable in law as it offends the principles of expeditious delivery of justice as enshrined in Article 159 of *the Constitution* and further violates the overriding objective under the CPA, espousing the proportionate, fair and just determination of the matters in regard to both parties.
 6. Further, the grounds state, the revival of the appeal is highly prejudicial to the Respondent due to passage of time and the Respondent may not be accorded fair trial, as manifestly, there is a similar appeal being Nairobi HC. Civil Appeal E1240 of 2024 addressing the same subject matter and which is currently awaiting a judgment date; that consequently the motion is an invitation to this Court to revive an appeal in violation of sub judice rule encapsulated in Section 6 of the CPA ; that the orders sought in the motion are unenforceable and the Applicant is inviting this Court to issue orders in vain; that the motion is brought for the sole malicious aim of delaying the fair and just conclusion of the matter; that the motion is bad in law as it offends the mandatory provisions of Section 6 and 7 of the CPA; and that the motion is fatally defective and filed in contravention of the overriding objective in Section 1A & 1B of the CPA.
 7. At the hearing of the motion, it was agreed by consent that the motion be determined on the premise of the respective parties' rival material on record, which the Court has duly considered, together with the record.
 8. From the record, the appeal herein was withdrawn on 19.03.2024 by way of a Notice of Withdrawal dated 01.03.2023. Clearly, the CPR while providing for withdrawal and discontinuance of suits does not expressly provide for the procedure and consequences of withdrawal of an appeal. Neither is there an express provision in Order 42 of the CPR providing for the reinstatement of an appeal voluntarily withdrawn by an appellant. This appears intentional and not due to inadvertent omission. Indeed Order 25 of the CPR which could probably apply mutatis mutandis in view of the definition of the term "suit" in the interpretation section of the CPA, provides for the withdrawal and discontinuance of suits. That provision however envisages, not the subsequent reinstatement of such withdrawn suit, but a subsequent fresh action by the plaintiff.
 9. In this instance, however, the possibility of bringing a fresh appeal may be caught up by limitation of time within which to appeal the lower court decision. The Applicant's motion invokes inter alia the provisions of Order 51 Rule 1 of the CPR, and Section 3A of the CPA, 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".



10. Regarding the latter provision, the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR, observed that: -

“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 v 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 & Anor v 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)

11. Here, what the Court is called upon to determine is whether it ought to reverse the withdrawal and revive the appeal withdrawn by the Applicant. In a proper case, this would involve discretion which is unfettered, but a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his favor. In the case of *Shah –vs- Mbogo and Another* [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

“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.”

12. The principles enunciated in *Shah –vs- Mbogo* (supra) were further amplified further by Platt JA in *Bouchard International (Services) Ltd vs. M'Mwereria* [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal measure in herein. Indeed, it would appear that the withdrawal of the instant appeal conclusively settled that appeal notwithstanding the fact that the appeal had not proceeded to hearing or been determined on its merits.
13. . The Court of Appeal in *Peter Kimani Kairu t/a Kimani Kairu & Company Advocates v Anna Marie Cassiede & another* [2017] eKLR while addressing itself to Rule 70 of the Court of Appeal Rules, which appertains to withdrawal of appeals, observed that an application of this nature invokes



the Court's inherent jurisdiction. While highlighting the applicable principles, the Court referred to Tanzanian and Ugandan decisions, and stating in part that: -

“Across the border in Tanzania, the Court of Appeal in *Tanzania Equipment Ltd v. Devram P. Valambia*, [*CA No. 18 of 1993*](#) held that it had inherent jurisdiction to review its decisions where there is a manifest error on the face of the record which resulted in miscarriage of justice, or where the decision was obtained by fraud or where a party was wrongly deprived of the opportunity to be heard. Similarly in Uganda in *Seiste Luyombya v. Uganda* [1965] EA 698, the same approach is evident, even though that decision was in respect of a criminal case. An appellant who had given written notice of abandonment of his appeal leading to its dismissal subsequently applied to reinstate the same. The rules did not provide for reinstatement of such appeals and the High Court dismissed the application on the ground that the appeal was already dismissed, and the court was functus officio. On appeal, the Court of Appeal allowed reinstatement of the appeal, holding that an appellate court has jurisdiction to restore an abandoned appeal if it can be shown that the notice of abandonment was given by mistake or fraud such as to involve a possible failure of justice in the event of the appeal not being restored.” (sic)

14. Earlier, the Court of Appeal in *Sospeter Mwangi Karanja v Republic* [2008] eKLR, although therein addressing a criminal matter, similarly observed that:-

“An appeal which has been withdrawn may be restored by leave of the court on the application of the appellant if the Court is satisfied that the notice of withdrawal was induced by fraud or mistake and that the interests of justice require that the appeal be heard.

15. By the above decisions it can be observed that the ingredients to be considered by a Court while exercising its inherent jurisdiction to restore an appeal that was withdrawn, is whether the said withdrawal was induced by fraud or mistake and the interest of justice to have the appeal restored for hearing and determination on merit. The thrust of the Applicant's affidavit material is that there is need to have the appeal revived as it was compromised because of a consent adopted by the lower Court which was subsequently set aside by the same Court. The Applicant further maintains that the grounds in memorandum of appeal are solely focused on the impugned decisions of the lower Court therefore they constitute sufficient cause for reinstatement of the appeal.
16. The Respondent opted to file grounds of opposition to the motion. By filing grounds of opposition, and pursuant to Order 51 Rule 14 (1) of the CPR, the Respondent confined himself to issues of law only. See the Court of Appeal case of *Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020)* [2022] KECA 1240 (KLR). Even so, some pertinent historical facts can be observed from the record. The gist of the Respondent's riposte is that the Applicant's motion is an afterthought and unsustainable in law as it offends the principles of expeditious delivery of justice as enshrined in Article 159 of *the Constitution* and further violates in every way the overriding objective in Section 1A & 1B of the CPA espousing the proportionate, fair and just determination of the matter.
17. The pertinent events in this matter are as follows. The appeal was filed by the firm of Bundi & Co. Advocates. However, the impugned consent that was adopted and later set aside by the lower Court, and which the Applicant alleges to be the basis of the withdrawal of the present appeal, was executed between the parties' advocates in the lower court suit, namely, Messrs. Onyango Oyieko & Associates and O.N Makau & Mulei Advocates. The said consent was not adopted or presented before this court or even referred to in the Notice of Withdrawal of the appeal. Thus, for all intents and purposes and



for whatever reason, the firm of Bundi & Co. Advocates were duly instructed by the Applicant to unconditionally withdraw the entire appeal.

18. The fact that the consent in the lower court was set aside on grounds that the Respondent's erstwhile advocate lacked a practicing certificate does not by itself prove any mistake or fraud in respect of any party, and is indeed negated, especially on the part of the Applicant and his advocate, by the fact that they had proceeded almost one year after the setting aside of the consent, to file the Notice of Withdrawal of the appeal. Moreover, nowhere in his affidavit does the Applicant allege fraud and or mistake on the part of his advocate or any other key party in the withdrawal of the appeal in question. None of the advocates representing the Applicant at the time of the consent or filing of the Notice of Withdrawal swore an affidavit in support of the motion.
19. While the asserted consent in the lower court was recorded on 6.03.2023 and set aside on 14.07.2023, the Notice of Withdrawal was filed on 19.03.2024 and it is not until 16.10.2024 that the instant motion was presented. No explanation has been offered for the delay in moving the court despite the ruling setting aside the impugned consent before the lower Court being delivered on 14.07.2023. Little wonder that the Respondent views the motion as an afterthought. While equally citing the existence of another allegedly similar appeal namely, Nairobi HC. Civil Appeal E1240 of 2024 which matter the court will presently address.
20. It is trite that the discretion invoked in the motion herein is intended to avoid injustice or hardship resulting excusable mistake or fraud but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. The Applicant's affidavit material is deficient of any evidence of mistake or fraud on his part or on the part of the firm of Bundi & Co. Advocates whereas the delay in bring the instant motion is not only inordinate but equally unexplained. In an application of this nature, the period of delay as well as explanation thereof are key considerations. See *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR. A party must not be seen to presume on or trifle with the court's discretion, as appears to be the case here. It seems to the court, having considered all the circumstances and especially the sequence of events herein, that the true motives behind the Applicant's motion lie elsewhere than stated therein, but for whatever reason, and have not been disclosed to the court.
21. Before concluding, however, it would be remiss of the court to fail to address the question whether the present appeal and Nairobi HC. Civil Appeal E1240 of 2023 cited by the Respondent relate to the same subject matter as asserted. Having taken the liberty of perusing the record in the latter appeal, the Court noted that the appeal originates from a decision delivered on 24.10.2023, by the lower court regarding the Applicant's motion essentially seeking review of the ruling of the trial Court delivered on 14.07.2023 (in respect of the setting aside of the consent) and the Respondent's Preliminary Objection (PO) thereon dated 03.08.2023 asserting that the lower Court was functus officio in the matter. The lower Court ruling allowing the Respondent's PO prompted Nairobi HC. Civil Appeal E1240 of 2023. Conversely, the grounds in the memorandum of appeal herein had challenged the judgement of the lower Court as rendered on 28.10.2022. Therefore, the Respondent's contention that the Applicant's present motion portended contravention of the sub judice rule in Section 6 of the CPA is without basis and could only have been raised by the Respondent with the intention of misleading the court.

Such conduct coming from counsel is reprehensible.

22. In closing, it is a matter of public notoriety that at this time, the courts are weighed down by heavy caseloads and therefore cannot allow parties the luxury to whimsically withdraw cases and thereafter seek their reinstatement, thus abusing the court process and resultantly clogging the wheels of the



administration of justice. All parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the CPA. While the constitutional right of the Applicant to be heard on the merits of his appeal is undisputed, it is not absolute and must be balanced against the Respondent's equal right to the expeditious determination of the appeal to which he had been dragged. Considering all the foregoing, the Court is of the firm view that the justice of the matter lies in dismissing the Applicant's motion dated October 15, 2024 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

