Smata General Supplies Limited v Claude & another (Civil Appeal 261 of 2019) [2025] KEHC 135 (KLR) (Civ) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 261 OF 2019

CW MEOLI, J

JANUARY 16, 2025

BETWEEN

SMATA GENERAL SUPPLIES LIMITED ..... APPLICANT

AND

TENNYSON JONATHAN CLAUDE ..... 1ST RESPONDENT

LINUMAK INVESTMENT LIMITED ..... 2ND RESPONDENT

RULING

1. For determination is the motion dated 18.10.2024 by Smata General Supplies Limited (hereinafter the Applicant) seeking inter alia to set aside and or vary the Court's order of 09.10.2024 dismissing the appeal; that the appeal herein be reinstated for hearing on merit; and directions do issue. The motion is expressed to be brought pursuant Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules (CPR). And is premised on the grounds amplified in the supporting affidavit sworn by Lwanga Mbeche Caroly, the director of the Applicant duly authorized to swear the affidavit on behalf of the Applicant.

2. The gist of his affidavit is that there is an error apparent on the face of the record leading to the delivery of the ruling on 09.10.2024. That following directions for disposal of the latter motion by way of submissions the ruling was eventually delivered on 09.10.2024. By which ruling the court dismissed the Applicant's notice of motion dated 09.10.2023. He goes on to depose that although counsel for Tennyson Jonathan Claude (hereinafter the 1st Respondent) had denied service of the Record of Appeal, this Court verified the correct email address from the 1st Respondent's counsel and rightly observed that there was evidence of service by virtue of an email dated 03.07.2023 that was attached to the motion dated 09.10.2023. And the court urged the parties to attempt a compromise of the matter.

3. Further that, parties attempted to settle the matter amicably and subsequently entered into a consent compromising the motion dated 09.10.2023 to which the Respondents had not filed any response. He asserts that he was thereafter informed that the appeal was to be disposed of under the Rapid Results Initiative (RRI) and that directions were issued upon the adoption of the consent. That the consent in question was filed electronically on 07.05.2024 and a physical copy submitted to the Court on the same date for adoption administratively as per the Deputy Registrar's directions. He further states that pursuant to directions issue on 06.05.2024, the Applicant filed and served the submissions in respect of the main appeal on 27.05.2024 whereupon judgment was reserved for 03.10.2024 and rescheduled for 09.10.2024.

4. He asserts that the Respondents were served with all notices and returns of service filed. Hence, there is an error apparent on the face of the record given that the motion dated 09.10.2023 had been compromised and submissions filed in respect of the main appeal. He states that unless the motion is granted, the Applicant will be greatly prejudiced and stands to be condemned unheard. In conclusion, he deposes that the Appplicant has an arguable appeal with a high chance of success, and therefore it would be in the interest of justice that the appeal is heard and determined on its merit.

5. The 1st Respondent and Linumak Investment Limited (hereinafter the 2nd Respondent) offered no responses to the Applicant's motion. Directions were taken on the disposal of the Applicant's motion on the premise of the affidavit material in support thereof.

6. The Applicant's motion invokes inter alia the provisions of Section 3A of the CPA as well as Order 45 Rule 1 of the CPR. The former provision, 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" of which its purport was reasonably addressed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR. The latter provision provides that; -

    (1) Any person considering himself aggrieved—

        (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

        (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

    (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

7. The main prayer in the motion essentially seeks to set aside and or vary the orders of the court issued on 09.10.2024. However, the grounds cited, principally, error apparent on the face of the record, invoke the review jurisdiction of the court in relation to the decision delivered on 9.10.2024. Despite the seeming ambiguity it appears that the Applicant's intention was to invoke the Court's review jurisdiction. Hence the court will proceed to consider the motion as such. Characteristic of their previous indifferent and lethargic conduct marked by non-attendance of court and non-compliance with orders in the matter, the Respondents abstained from the application. That notwithstanding, the

court must satisfy itself that the Applicant's motion satisfies the considerations relevant to a review motion.

8. In Jason Ondabu t/a Ondabu & Company Advocates & 2 Others v Shop One Hundred Limited [2020] eKLR the Court of Appeal stated that: -

> "An application for review, therefore, involves exercise of judicial discretion. The circumstances in which this Court, as an appellate court, can interfere with the exercise of judicial discretion are limited".

9. There is a long line of authorities on the principles governing review applications brought under Order 45 (1) of the CPR. In the judgment of Okwengu JA in Associated Insurance Brokers v Kenindia Assurance Co. Ltd [2018] eKLR the Court of Appeal stated that:

> "It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:
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> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

In Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:

> "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

10. Further, in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR the Court of Appeal held that:

> "It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which

strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:

"The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."

11. Before addressing the crux of the motion, it would be apt to place it in context. The appeal herein was filed on 14.05.2019. There was no activity in the matter for over two years, leading to issuance of the Notice to Show Cause why the suit should not be dismissed for want of prosecution (NTSC) scheduled for 06.10.2022. On the said date, no party appeared and Chepkwony, J. proceeded to dismiss the appeal for want of prosecution. The Applicant thereafter moved the Court vide the motion dated 04.04.2023 seeking to set aside the dismissal orders issued on 06.10.2022. When the said motion came up before me for hearing on 20.06.2023, it was compromised by consent in the following terms: -

" By consent the motion dated 4/4/2023 is allowed subject to the Applicant: -

a) Filing/serving the ROA in 21 days;

b) Prosecuting the appeal fully within 4 (four) months of today's date; and

c) In default of any of the above conditions, the motion dated 4/4/2023 will stand dismissed and dismissal order of 6.10.22 revived with costs to the Resp (Respondent)."

12. When the appeal came up for directions before the Deputy Registrar (DR) on 05.10.2023, upon hearing representations by counsel appearing in the matter, the DR expressed herself as follows: -

" The directions/order by the judge on 20/06/2023 were very clear that in default of any of the orders given on that date, the notice of motion dated 4/4/2022 will stand dismissed and the dismissal order of 6/10/2022 revived with costs to the Respondent. No evidence of service of ROA within 21 days has been proved and thus the Appellant is in default. The default clause has thus come alive. This appeal stands dismissed in accordance with the terms of the default clause issued on 20/06/2023." (sic)

13. This outcome prompted the motion dated 09.10.2023 in respect of which the Court gave directions on 16.04.2024 and rendered a ruling on 09.10.2024. I find it useful to quote relevant facets of the said ruling for the benefit of the parties' herein. Upon considering the motion, this Court proceeded to address itself as hereunder: -

" 13. It is evident from the record that the orders of this Court on 20.06.2023 were unambiguous, a fact acknowledged by the Deputy Registrar when she

pronounced herself on 05.10.2023. Equally, the orders were self-executing, and all the DR did by her directions was affirm that due to default in service of the ROA, the appeal stood dismissed, a second time. The DR did not issue the dismissal order as purported in the present motion.

14. The Applicant through the deponent of the affidavit in support of the motion, contends that the ROA was filed and duly served upon the 2nd Respondent's counsel on 03.07.2023 vide the email address cmmuoki@hotmail.com (annexure marked MM2), which was within the fourteen (14) day window as directed by the Court whereas despite requesting for a hearing date for the appeal, the Court registry could only issue a mention date for 21.09.2023 (annexure marked MM1). The deponent therefore contends that the 2nd Respondent's counsel's representation on 05.10.2023, that he had not been served with ROA was inaccurate. Hence, the Deputy Registrar's order dismissing the appeal for lack of non-service of the ROA, ought to be set aside ex-debito justitiae.

12. First, as earlier indicated the appeal was not dismissed by the DR; the DR merely formalized an event that had already occurred as a consequence of default by the Appellant in complying with the orders of this court of 20.06.2023 in full. Second, the Applicant fails to mention that both parties present before the DR on 5.10.2024 addressed the court on the contested issue of service, the Appellant's counsel, Ms. Wangui eventually conceding that there was no affidavit of service filed as proof of service of the ROA on the Respondent; a fact highlighted in the DR in her subsequent order.

12. Service of the ROA having been contested, the onus was on the Appellant to prove it by the conventional manner through an affidavit of service. No proof was tendered. The DR correctly found that there was no proof of service and no such proof has been proffered even in the present motion. Where is the misrepresentation now alleged by the Applicant? The terms of the consent order recorded on 20.06.2023 were explicit regarding the conditions attaching to the compromise of the reinstatement motion dated 04.04.2023. Inter alia, the ROA had to be filed and served on or before the 11.07.2023.

12. This appeal was filed almost five years ago, and the entire period of delay is relevant. It seems that, having filed the appeal, the Appellant went into slumber and only reappeared with the first application for reinstatement seven months after the initial dismissal of the appeal. When the reinstatement motion was granted, the Appellant was still unprepared to move with alacrity to file the ROA, taking almost the entire period allowed, and failing to comply fully with the terms of the consent order. Given the inordinate delay herein, which I daresay has not been satisfactorily explained, the lament by the Appellant that it will be condemned unheard if the motion is disallowed sounds hollow: the Applicant squandered its opportunity to be heard by its own indolence, and even when given a new chance to prosecute the appeal, floundered again.

12. The overriding objective obligates parties and their advocates to progress their matters with expedition. The courts, currently deluged with heavy caseloads can ill afford indulgence towards indolent parties, such as the Applicant, who take no responsibility for their cases and deflect blame onto others when such

cases suffer dismissal. It is certainly not the object of the discretion for setting aside to aid dilatory parties, as clearly stated in Shah –vs- Mbogo and Another [1967] E.A 116. Justice cuts both ways and litigation must come to an end; the Respondents who were dragged to court deserve closure.

12. I think I have said enough to demonstrate that the application dated 9.10.2023 is without merit and must be dismissed. It is so ordered. As the Respondents did not file any response in respect of the motion, there will be no order as to the costs of the motion. However, the costs of the dismissed appeal are awarded to the Respondents." (sic)

14. The current review motion is premised on the ground of error or mistake apparent on the face of the record, based on a purported compromise of the motion dated 09.10.2023, allegedly prior to the court's ruling of 9.10.2024. The question therefore is whether the Applicant by its present motion has demonstrated the asserted error or mistake apparent on the face of the record. First, drawing guidance from the dicta in National Bank of Kenya Ltd (supra), it is evident that the question surrounding the consent dated 02.05.2024 and filed on 07.05.2024 was not an issue for consideration before the Court in the ruling delivered on 09.10.2024.

15. Secondly, the purported consent was filed after 16.04.2024 when parties took directions on disposal of the motion dated 09.10.2023. And most significantly, there are no proceedings on record indicating the adoption of the said consent as an order of the court. The record shows that counsel for the Applicant attended before the DR on 06.05.2024 and on 18.07.2024 before this Court, all prior to delivery of this Court's ruling on the Applicant's motion on 09.10.2024. The proceedings before the DR and this court do not contain any reference by counsel to the alleged consent, or the alleged directions by the DR to counsel to avail a physical copy of the consent for ''administrative'' adoption. In any event, a perusal of the Case Tracking System (CTS) reveals that the consent had not been lodged in the system as of 6.05.2024, but was filed on 7.05.2024, one day after the proceedings before the DR.

16. What however is on record before the DR are directions issued on the appeal, most probably initiated by the court with the intention of perfecting the appeal, together with others identified by the court, in readiness for the Civil Division RRI exercise scheduled later in the year. These directions are clearly erroneous because, they presume a subsisting appeal, whereas no consent to revive the appeal had by 6.05.2024 been filed, adopted or recorded. Subsequently on 29.05.2024 when the appeal was presented before me in chambers for admission, I declined to admit it noting that from the record, the appeal stood dismissed for want of prosecution. It was not until the delivery of the ruling of 9.10.2024 and subsequently on 16.10.2024 that counsel for the Applicant first raised the matter of the parties' consent.

17. A consent filed into court is not a court order, but merely a mutual proposition by the parties concerning a matter. It requires adoption by the court to gain the force of a court order; indeed, consents filed or proposed by parties are adopted at the discretion of the court, depending on the facts of the matter. A court is not bound to accept any and every consent presented by parties. Further, it is the duty of counsel to pursue the formal adoption of consents by the court as court orders, and not to presume on the court, as appears to be the case here. The consent now cited by the Applicant did not obtain court sanction, as required, and hence transform from a mere proposition to a court order.

18. Thus, by the date of the ruling delivered on 9.10.2024, the appeal still stood dismissed pursuant to the earlier dismissal order by Chepkwony J on 6.10.2022 and the Applicant's subsequent default regarding the terms of the consent recorded on 20.06.2023 reviving the appeal for the first time. Given the history of this matter as outlined in the ruling of 9.10.2024, the adoption of the consent, even

if brought to the court's attention prior to the ruling cannot be presumed an automatic affair as the Applicant now appears to suggest. The court cannot condone contumacious delay by parties through indolent collusion, indifference or consents whose effect is to indefinitely prolong the pendency of a matter. Here the Applicants must take responsibility for their lethargic prosecution of the appeal, but Respondents, as earlier observed, are equally guilty.

19. That said, the Court's decision delivered on 09.10.2024 not having been preceded by an adopted consent on reinstatement of the appeal cannot be said to amount to an error or mistake apparent on the face of the record. Therefore, it is the Court's firm finding that the asserted ground of error or mistake apparent on the face of the record has not been demonstrated.

20. In any event, if the Applicant was aggrieved with the merits of the ruling delivered on 9.10.2024, an appeal rather than a review would have been appropriate. Recently, the Court of Appeal in Solacher v Romantic Hotels Limited & another (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR) cited with approval the decision of Bennett J in Abasi Belinda v Frederick Kangwamu and Another [1963] EA p.557 to the effect that:

> " A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal."

21. In the result, the Court's considered view is that the Applicant's motion dated 18.10.2024 is without merit, and it is hereby dismissed with no orders as to costs.

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 Respondents:

C/A: Erick