**Muita (Deceased) & another v Gitahi (Civil Appeal 748 of 2007)**
**[2024] KEHC 209 (KLR) (Civ) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 209 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL APPEAL 748 OF 2007**

**CW MEOLI, J**

**JANUARY 19, 2024**

**BETWEEN**

**THE ESTATE OF PAUL NJOROGE MUITA (DECEASED) ..... 1ST APPELLANT**

**WAINAINA KABUBI MUITA ..... 2ND APPELLANT**

**AND**

**FREDRICK ORESMUS GITAHI ..... RESPONDENT**

**RULING**

1. The Estate of Paul Njoroge Muita (Deceased) and Wainaina Kabubi Muita (hereafter the 1st and 2nd Applicants) filed the Notice of Motion (the Motion) dated 14th November 2022 seeking that the order made on 3rd March, 2017 dismissing the appeal herein be varied and or set aside, and that the appeal be reinstated. The Motion which is expressed to have been brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 12, Rule 7; and Order 51 of the *Civil Procedure Rules* (CPR) is premised on the grounds featured on its face and amplified in the supporting affidavits sworn separately by the 2nd Applicant and his advocate, Simiyu, J.W.

    1. The advocate stated that the matter was last in court on 3rd March, 2017 when the Applicants' erstwhile advocate was absent and which resulted in dismissal of the appeal for want of prosecution. The advocate further stated that the delay in prosecuting the appeal was unintentional and excusable, since the Applicants' erstwhile advocate failed to inform them of the intended dismissal and that the 2nd Applicant had been actively following up on the status of the file. That subsequently, Paul Njoroge Muita the lead litigant in the matter, died but that the 2nd Applicant is now ready to prosecute the appeal to finality. That unless the orders sought are granted, the Applicants will be greatly prejudiced since Fredrick Oresmus Gitahi (hereafter the Respondent) who defied court orders previously made on 14th February, 2008

for the maintenance of the status quo, will not be held to account. Hence, the advocate urged the court to exercise its discretion in favour of the Applicants.

2. The averments made in the affidavit of the 2nd Applicant echoed material contained in his advocate's affidavit and the court need not repeat them here.

3. The Respondent resisted the Motion by swearing a replying affidavit on 29th June, 2023. Therein, he deposed that the 2nd Applicant lacks capacity to bring the Motion on behalf of the 1st Applicant in the absence of the requisite grant of letters of administration. The Respondent further deposed that the dismissal order ought to be maintained since the Applicants were ultimately responsible for ensuring the progress of their appeal and cannot be heard to shift blame to their former advocate.

4. It was his further averment that failure on the part of the Applicants' former advocate to attend court for the notice to show cause is not sufficient ground to warrant the setting aside of the dismissal order and that there has been inordinate delay in bringing the instant Motion. Moreover, no material has been tendered to support the allegation that he had disobeyed the court order of 14th February, 2008. On the premise of those averments, the Respondent urged that the Motion be dismissed with costs.

5. The 2nd Applicant rejoined with a supplementary affidavit sworn on 12th April, 2023 and stating inter alia, that the estate of the deceased litigant, the 1st Applicant is yet to take out letters of administration. While it may be true that a suit ultimately belongs to the litigant, in the present instance the delay in bringing the Motion has been sufficiently explained. He further maintained that the Respondent had contravened the status quo order. That it would be in the interest of justice for the appeal to be reinstated for hearing.

6. The Motion was canvassed by way of written submissions. To support the Motion, counsel for the Applicants anchored his submissions on the decision in *Reynolds Construction Co (Nig) Ltd v Festus M'arithi M'mboroki* [2022] eKLR on the applicable test for reinstatement of a matter which stood dismissed. The counsel further cited Order 12, Rule 7 of the *CPR* on the discretionary power of the court to reinstate a suit. Counsel argued that the delay in pursuing reinstatement of the appeal was largely occasioned by the death of the lead litigant, following which his estate was embroiled in a family dispute, forcing the 2nd Applicant to move the court unofficially as the representative of the 1st Applicant.

7. Counsel further argued that while it is admitted that the 2nd Applicant ought to have acted in haste, the delay in the matter was mainly caused by his former advocate and the Applicants should not be punished for his errors, citing the decision in *Belinda Murai & 9 others v Amos Wainaina* [1978] eKLR. The court was therefore urged to allow the Motion as prayed.

8. The Respondent's counsel while citing the decision rendered in *Otieno v Ougo & another* [1986-1989] EALR 468 argued that the 2nd Applicant lacked the legal capacity to bring the Motion on behalf of the 1st Applicant, in the absence of letters of administration. On the merits of the Motion, the advocate anchored his submissions on the decisions in *Attorney General v Law Society of Kenya & another* [2013] eKLR on what constitutes sufficient cause; and *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS NO. 397 of 2002 regarding the legal principle that a case belongs to a litigant and not his/her advocate.

9. Counsel contended that no sufficient cause has been shown by the 2nd Applicant to warrant the exercise of the court's discretion in his favour and that this, coupled with the inordinate delay in the appeal and in bringing the Motion, are reason enough for the court to decline to grant the orders sought in the Motion.

10. The court has considered the rival affidavit material and the submissions filed together with the authorities cited therein. Concerning the preliminary issue raised regarding the legal authority of the 2nd Applicant to represent the deceased litigant's estate in the capacity of an 'unofficial legal representative,' the court upon perusal of the record and consideration of the averments made in the respective affidavit material, noted that while it was stated that the lead litigant is deceased, the date of death is unstated. That notwithstanding, the 2nd Applicant admitted that letters of administration are yet to be taken out in respect of his estate.

11. In view of all the foregoing circumstances, the court finds that the 2nd Applicant has no legal authority to act as the administrator/legal representative of the estate of the 1st Applicant. More so if, as he claims, the family of Paul Njoroge Muita is embroiled in an inheritance tussle. That said, since the 2nd Applicant is equally an appellant in the present appeal, the court will consider the merits of the Motion.

12. The orders sought are for the setting aside of the dismissal order made on 3rd March, 2017 and for the reinstatement of the appeal. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, that discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and Another* [1967] E.A 116:

> " The discretion to set aside an ex-part 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."

13. Order 17, Rule 2 of the *CPR* which was cited in the Motion and submissions filed on behalf of the 2nd Applicant applies to the setting aside of dismissal orders relating to suits. The applicable provisions on the setting aside of a dismissal order and the reinstatement of an appeal as in the present instance, are Order 42, Rule 35 of the *CPR* as read together with Section 3A of the *CPA*, the latter of 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."

14. Regarding the latter, the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

> " 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:
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> > " 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."
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> See also the Supreme Court decision in *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR

15. Order 42, Rule 35 of the *CPR* 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.

16. The events leading to the dismissal order made herein on 3rd March, 2017 are as follows. The Applicants filed the memorandum of appeal on 3rd September 2007 coupled with the record of appeal. However, it is apparent from the record that save for the correspondence dated 3rd June, 2016 addressed to the Deputy Registrar, Civil Appeals Division, by the Appellants' former advocates (the firm of Z.N. Gathaara & Co. Advocates), no further progressive action took place in the appeal. Hence the issuance of a notice to show cause (NTSC) on 14th February, 2017 requiring the parties to attend court on 3rd March, 2017 to show cause why the appeal should not be dismissed for want of prosecution.

17. When the matter came up for hearing on the date scheduled for the NTSC, none of the parties were in attendance, and the appeal was dismissed, pursuant to Order 42, Rule 35(2) *CPR*. Five years later, in November 2022, the present motion was filed.

18. The explanation for the failure to attend as given by the 2nd Applicant is that his former advocates had failed to inform him of the intended dismissal and hence, he should not be faulted for the mistake of counsel. While the court acknowledges the general legal principle that the mistake of an advocate should not be visited upon the client, this principle does not apply in an absolute sense. Ultimately a suit belongs to the litigant and not his advocate and it is therefore the litigant's duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim.

19. Apaloo, J.A. (as he then was) famously stated in *Phillip Kiptoo Chemwolo & Another v Augustine Kubede* (1986) eKLR:-

> " I think a distinguished equity judge has said:
>
> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit."
>
> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."

20. Recently, however the Court of Appeal in *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR restated the principles spelt out by its predecessor in Shah v Mbogo (supra) and considered the case of Phillip Cheptoo Chemwolo before stating that:

> " .....The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. "

21. The appeal herein had lain dormant for ten years by the date of dismissal, and it took another five years after dismissal for the Applicant to approach the court via the present motion. The delay is manifestly inordinate and not satisfactorily explained, as demonstrated below.

22. Claims made by the 2nd Applicant to the effect that he had made previous follow-ups with his former advocate on the status of the appeal, were not supported by way of credible material. Indeed, it is not clear what the outcomes and actions of the alleged follow ups were given the inaction in the matter. Notably, it is not clear why the 2nd Applicant could not have earlier instructed a new counsel to act in the matter as he has now done.

23. Other claims by the 2nd Applicant that the delay was caused by the death of the 1st Applicant and subsequent family wrangles were equally not substantiated. Nor was an explanation given for the 2nd Applicant's inaction, especially concerning the alleged breach of the court's status quo orders by the Respondent. The said Applicant was always after all a party in his own right in the appeal. Overall, the court's considered view is that the 2nd Applicant's explanation for the prolonged delay in progressing the appeal and in moving the court to set aside the dismissal order appear tenuous at best. Whatever the merits of a party's dismissed appeal, an appellant is required to bring forth sufficient reasons coupled with credible evidence or material to convince the court to exercise its discretion in his or her favor.

24. The Respondent should not be subjected to further obvious prejudice through litigation costs and delay so that an indolent appellant can be accommodated. Justice cuts both ways. At a time when courts are deluged with heavy workloads, they must firmly discharge their duty under the overriding objective. In that regard, the Court of Appeal stated in *Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 that: -

> " The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court".

See *Osho Chemicals Ltd v Tabitha Wanjiru Mwanik*i [2018] eKLR

25. In the court's considered opinion, the justice of the matter lies in disallowing the Notice of Motion dated 14th November 2022. The said Motion is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of

For the Applicant: Mr. Simiyu

For the Respondent: Mr. Omwenga