Cheli & Peacock Management Ltd & another v Kamau (Civil Appeal 614 of 2011) [2024] KEHC 730 (KLR) (Civ) (1 February 2024) (Ruling)

Neutral citation: [2024] KEHC 730 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 614 OF 2011

JN MULWA, J

FEBRUARY 1, 2024

BETWEEN

CHELI & PEACOCK MANAGEMENT LTD ..... 1ST APPELLANT

NOAH MUYA ADIRA ..... 2ND APPELLANT

AND

DANIEL KIMANI KAMAU ..... RESPONDENT

RULING

1. This ruling is in respect of the Application dated 17/4/2023 brought by the Appellants/Applicants premised upon provisions of Article 159(2)(d) of the *Constitution of Kenya* 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 17, Rule 2, Order 35, Rule 3(2) and other enabling legal provisions.

2. The Applicant seeks that the orders issued dismissing this Appeal for want of prosecution on 20/01/2023 be set aside and the Appeal be reinstated for hearing on its merits. The grounds advanced by the Applicants are that they were not aware of the date when the appeal was listed for Notice to Show Cause as the Notice had not been served upon them. That Applicants depose that they have not managed to have the appeal heard as the Court proceedings for the trial court have not been made available by the court for the purposes of preparing the Record of Appeal and that they cannot be faulted in the failure to have this appeal heard since it is not the custodian of the lower court file.

3. In opposing the Application, the Respondent relied on his Replying affidavit stating that the appeal had been pending for the last ten years and no action had been taken by the Applicants to prosecute it and has been due to the fact that they enjoyed stay orders which stood discharged by the dismissal of the appeal. The Respondent further averred that the Applicants claim not to have been aware of the date when the appeal was listed for Notice to show cause is, in fact false, ill-conceived and goes against

the tenets of professional practice as with the judiciary having employed the e-filling system, notice need not be by way of physical hearing. Indeed, there is annexed to the Replying Affidavit an email notification sent to the two parties Advocates from the court on the hearing date of the NTSC on the 20/1/2023, the date the appeal was dismissed in absence of the Appellants. That mode of service of court process is well acceptable as per amendments 2020, to the civil procedure rules in respect of service.

4. The court also notes that the Applicants have not explained the over ten years delay in prosecuting the Appeal, and continued to enjoy the stay orders to the prejudice of the Respondent. The orders issued by Thuranira J on 25/6/2020 did not give the Applicants blanket permission not to make follow ups with the court registry of the trial court proceedings. I find it disturbing that since the above orders were issued, three years thereafter the applicants have not shown what action if any they took to find out whether the proceedings were ready for their collection, or as they state, the court file had been traced. Mere averments without any proof remain as such.

5. The conditional stay orders pending hearing of the Appeal lapsed at the dismissal of the Appeal. The appellants having had ten years plus to prosecute the Appeal, their inaction in the circumstances cannot persuade this court to rule in their favour. The Respondent ought to be allowed to enjoy the fruits of his judgment.

6. Section 1A and 1B of the *Civil Procedure Act* comes to play provides-

   Section 1A states -

   > " the overriding objective of this *Act* and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the *Act.*"

   Section 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 purposes of attaining the following:
      a. the just determination of proceedings.
      b. the efficient disposal of the business of the court.
      c. the efficient use of available judicial and administrative resources.

7. As held in the case *Ivita v Kyumbu* (1984) KLR, justice is justice to both parties. It is trite that a case or appeal belongs to the party instituting the case/appeal. It is its duty to follow up with the court through self or their advocates for status, along the way, up to conclusion.

8. Having rendered as above, I come to the inevitable conclusion that the Appellant's Application dated 17/04/2023 lacks merit, was brought in bad faith and must be dismissed with costs to the Respondent.

   Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE