Equity Bank Limited v Mungai & 2 others (Civil Appeal 170 of 2019)
[2024] KEHC 2644 (KLR) (Civ) (8 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2644 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 170 OF 2019

CW MEOLI, J

MARCH 8, 2024

BETWEEN

EQUITY BANK LIMITED ..... APPLICANT

AND

SAMUEL STANLEY KIARIE MUNGAI ..... 1ST RESPONDENT

HON ATTORNEY GENERAL ..... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 3RD RESPONDENT

RULING

1. For determination is the motion dated 23.05.2023 by Equity Bank Limited (hereafter the Applicant) seeking that this honorable court be pleased to review, vary and or set aside the order made on 09.02.2023 and or 11.12.2021 dismissing the appeal; to reinstate the appeal for hearing and determination on merit; and to make any further orders and or directions as it may deem fit. The motion is expressed to be brought under article 50(1) & 159 (2)(a) & (b) of *the Constitution* of Kenya 2010, section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), order 12 rule 7 and order 51 rule 1 of the *Civil Procedure Rules* (CPR), inter alia, and premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Irene Mburu, counsel on record for the Applicant.

2. The affidavit is to the effect that being aggrieved by the judgment and decree in Nairobi Milimani CMCC No. 5609 of 2013 (hereafter lower court suit) the Applicant has preferred the instant appeal and subsequently applied for certified copy of proceedings. That on 06.12.2019, the Applicant complied with the court's directive on provision of security and thereafter she set out to obtain the certified copy of proceedings of lower court suit for purposes of preparing and filing the Record of Appeal (ROA). However, following delays occasioned by the lower court registry in tracing the lower court file, Samuel Stanley Kiarie Mungai (hereafter the 1st Respondent) proceeded to file an

application seeking to dismiss the appeal for want of prosecution. On 28.10.2021 the application was compromised on terms that the Applicant would file its ROA within 45 days and in default the appeal would stand dismissed. That in compliance with the order, counsel filed the ROA dated 10.11.2021 and Supplementary ROA dated 23.11.2021.

3. She further asserts to have made repeated attempts to fix the appeal for hearing since filing the supplementary ROA to no avail, and on 09.02.2023 this court proceeded to dismiss the appeal with effect from 12.12.2021. That at all material times she was aware that the order issued on 28.10.2021 related to filing of the ROA and not prosecution of the appeal which the Applicant has always been keen on prosecuting. She states that delay in prosecuting the appeal is due to no fault of the Applicant but rather the failure of the court registry to grant a hearing date and her mistake on construing the directions issued by the court on 28.10.2021.

4. She avers that unless the appeal is reinstated, the Applicant will be driven away from the seat of justice because of mistake of counsel which ought not be visited on the Applicant. In conclusion she states that no prejudice will be occasioned upon the Respondents if the orders sought herein are granted that it is in the interest of justice that the dismissal order in question be set aside, and the appeal be reinstated for hearing and determination on merit.

5. The 1st Respondent opposes the motion by way of a replying affidavit dated 11.07.2023. He accuses the Applicant of indolence in prosecuting the appeal as exemplified by the fact that the last request for a hearing date was on 30.05.2022 while the instant motion was filed on 24.05.2023. That the Applicant's affidavit material amounts to an admission of mistake by counsel and the registry is not to blame for non-prosecution of the appeal. He further asserts that the dismissal of the appeal arose from the order made by this court on 28.10.2021 which has never been appealed, reviewed, varied, or set aside. Responding to the question of prejudice he asserts that allowing the motion will continue to deprive him of the fruits of successful litigation and that it is in the interest of justice that the motion is dismissed with costs.

6. The motion was canvassed by way of written submissions. Addressing the court on the singular issue whether the appeal ought to be reinstated, counsel for the Applicant contended that sufficient reason has been advanced for reinstatement of the appeal. That despite attempts by counsel to fix the appeal for hearing on several occasions, the court registry was unresponsive. The decisions in *Pan African Paper Mills Limited v Silvester Nyarango Obwowcha* [2018] eKLR and *Wachira Karani v Bildad Wachira* [2016] eKLR were called to aid in respect of the foregoing.

7. Counsel relied on *Key Freight Kenya Limited v Mohammed Abdi* [2020] eKLR and *Chemwolo & Anor v Kubende* [1986] eKLR to assert that the court's concern is to do justice, and that it has wide powers to set aside the orders in question on terms that are just so as to avoid any injustice or hardship resulting from inadvertence or excusable mistake by counsel. That mistake by counsel in construing the court's directions issued on 28.10.2021 ought not be visited on the Applicant which has demonstrated that it has always been keen in prosecuting the appeal would be prejudiced by being driven from the seat of justice if the application is rejected. Conversely, it was contended, that no prejudice would be visited on the 1st Respondent if the motion is allowed.

8. The 1st Respondent opened his submissions by contending that the appeal should not be reinstated as the Applicant is guilty of indolence and has shown little interest in prosecuting it. Placing reliance on the decision in *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & Another* [2014] eKLR counsel submitted that the Applicant was jolted to action nearly one and a half years after the appeal stood dismissed and reinstating the appeal in such circumstances would amount to injustice and an abuse of the court process. Citing several decisions including *Rupa Savings & Credit Co-operative*

Society v Violet Shidogo [2022] eKLR regarding what constitutes a bona fide mistake by counsel, the Respondent's counsel dismissed the Applicant's assertions as inexcusable and negligent inaction that does not warrant this court to exercise its discretion by allowing the motion. Counsel submitting further that the Applicant's unwillingness to prosecute the appeal and filing the instant motion amounts to denial of the 1st Respondent right to the fruits of successful litigation, hence prejudice. The decision in *Bilha Ngonyo Issac v Kembu Farm Ltd & Another* [2018] eKLR was relied on. In summation, the court was urged not to exercise its discretion in favour of the Applicant and thus proceed to dismiss the motion with costs.

9. The Attorney General and Director of Public Prosecution (hereafter the 2nd & 3rd Respondent, respectively) did not participate in the instant proceedings.

The court has considered the rival affidavit material and submissions in respect of the motion as well as the record herein. This court has been primarily called upon to determine whether it ought to review, vary and or set aside the order made on 09.02.2023 and or 11.12.2021 dismissing the appeal and consequently reinstate the same for hearing and determination on merit.

10. The Applicants' motion invokes inter alia the provisions of Section 1A, 1B & 3A of the *CPA* as well as Order 12 Rule 7 of the *CPR*. The latter provision provides that "where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just." Plainly, the provision has no application in this matter as it manifestly applies to suits and not to appeals. As to the former provisions, Section 3A of the *CPA* 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".

11. In relation thereto 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 the 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
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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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> The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another v Malcolm 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." [Emphasis mine].

12. Here, it is undisputed that the Applicant's appeal was dismissed in circumstances to be addressed later in this ruling. For now, it would seem upon a perfunctory perusal of the reliefs, provisions and grounds

relied on that, the court's jurisdiction is invoked pursuant to Section 3A of the *CPA* in seeking the varying and or setting aside of the court's order dismissing the appeal herein for want of prosecution. Rather than the review of the said order.

13. It is settled that the discretion of the court to set aside a dismissal order is unfettered and that 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 their favor. In the case of *Shah v Mbogo and Another* [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

> " 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."

14. The principles enunciated in Shah v Mbogo (supra) were amplified further by Platt JA in *Bouchard International (Services) Ltd v 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 force in this matter, considering that the orders issued by this court on 28.10.2021 and formalized or perfected by the Deputy Registrar on 09.02.2023 conclusively determined the appeal by way of a dismissal order.

15. The history of this appeal is as follows. The appeal was filed on 27.03.2019. The Applicant thereafter moved this court vide a motion dated 28.03.2019 seeking stay of execution of the judgment of the lower court suit pending hearing and determination of the appeal. Mbogholi. J, (as he then was) in a ruling delivered in 07.11.2019 allowed the Applicant's motion on condition that it deposits the decretal sum in an interest earning account in the name of both advocates on record within 30 days of the said ruling. It appears from the Applicant's affidavit material in support of the instant motion, that it complied with the foregoing order. (See annexure IM-2).

16. Subsequently, there was no further progress in the matter prompting the 1st Respondent to file a motion dated 23.08.2021 seeking the dismissal of the appeal for want of prosecution. On 28.10.2021, parties when appeared before this court for hearing of the said motion, a compromise was reached, and a consent order recorded in the following terms: -

> " By consent the ROA to be filed within 45 days, failing which the appeal will stand dismissed for want of prosecution. Motion dated 23.08.2021 compromised on these terms".

17. This meant that the Applicant was required to file its ROA on or before 12.12.2021. It appears that the file was placed before the Deputy Registrar on 09.02.2023 who in turn formalized a dismissal by an order as follows; -

> " The Hon lady Justice Meoli on the 28th October 2021 ordered the Appellant to prosecute the appeal within 45 days with effect from 28.10.2021 failure to which the appeal stands automatically dismissed for want of prosecution.
>
> The Appellant failed to comply with the said orders by the Hon. Judge. The period expired on 11.12.2021.
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> This appeal automatically stands dismissed with effect from 12.12.2021 the date the period expired. The file is hereby marked as closed."

18. As earlier observed, setting aside a dismissal order involves exercise of discretion of which is "intended to avoid injustice or hardship resulting from accident, inadvertency 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" Here, it is evident that the court's order issued on 28.10.2021 was specific and or limited to filing of the ROA within 45 days and not prosecution of the appeal as stated by the Deputy Registrar. A perusal of the Case Tracking System (CTS) reveals that the Applicant filed its ROA on 11.11.2021 and Supplementary ROA on 23.11.2021 and therefore there was compliance with this court's order as time for compliance was to lapse on 12.12.2021.

19. Respectfully, the formal order issued by the Deputy Registrar on 09.02.2023 was erroneous. The Applicant's advocates assertions of mistake by misconstruing the directions issued by this court on 28.10.2021 does not arise; therefore, the requirement was on filing the ROA of appeal and not prosecution of the appeal. Thus, the appeal ought not to have been marked as dismissed.

20. Nevertheless, it would be remiss of the court not to address the manifest delay in prosecution of the appeal since the Applicant filed its ROA. The Applicant through counsel has attempted to explain the delay by stating that various attempts to fix the appeal for hearing were unsuccessful. Thus, blaming the court registry. The 1st Respondent vehemently challenged this position by contending that Applicant has been indolent in prosecuting the appeal as the last request for a hearing date was on 30.05.2022 while the instant motion was filed on 24.05.2023.

21. The CTS reveals that since filing the ROA and Supplementary ROA the Applicant did not take any steps to progress the matter. The requests for hearing dates for the appeal (See annexure IM-5) exhibited in the affidavit in support of the motion do not equally appear in the record herein while the emails themselves do not appear to have been copied to other counsel in the matter. The veracity of the annexures is doubtful, and even if believed the purported last request for a hearing date for the appeal per annexure IM-5 was on 30.05.2022. Patently, the delay herein is inordinate and unexplained notwithstanding the Deputy Registrar's erroneous order of 09.02.2023.

22. Delay runs afoul of the overriding objective. While the Applicant is entitled to be heard on the merits of its case, that cannot be at their leisure, on its own terms, to the detriment of the parties they dragged to court, and in blatant violation of the overriding objective. At a time when courts are deluged with heavy caseloads, they cannot allow such luxury to any party. At the time of this ruling, the appeal was 5 years old, and the lower court suit instituted more the 10 years ago in respect of a cause of action arising close to 14 years ago. The likely hood of prejudice being meted on the 1st Respondent does not appear far-fetched.

23. That said, the court is alive to the overarching need for parties to be heard on the merits of their cases. As the Court of Appeal reiterated in *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR:

> " The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there would be proportionality."

24. Consequently, the motion dated 23.05.2023 is allowed, but on condition that the appeal shall be fully prosecuted within 120 (One Hundred and Twenty) days of today's date, failing which, it shall stand dismissed for want of prosecution with costs to the Respondents. To expedite the matter, the Court

will hereafter give appropriate directions on the appeal. The costs of the motion will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8Th DAY OF MARCH 2024.

C.MEOLI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

For the Applicants: Ms.Mbiro h/b for Ms. Mburu

For the 1st Respondent: Ms. Gatuhi

C/A: Carol