



REPUBLIC OF KENYA



**Musyoki & another v Orina (Civil Appeal 126 of 2018)
[2024] KEHC 3225 (KLR) (Civ) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3225 (KLR)

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

CIVIL

CIVIL APPEAL 126 OF 2018

CW MEOLI, J

APRIL 4, 2024

BETWEEN

MATHEW MWANIA MUSYOKI 1ST APPLICANT

KENYA SWEETS CO. LTD 2ND APPLICANT

AND

MOTANYA JOHN ORINA RESPONDENT

RULING

1. For determination is the motion dated 31.07.2023 by Mathew Mwanja Musyoki and Kenya Sweets Co. Ltd (hereafter the 1st and 2nd Applicant/Applicants) seeking that the court be pleased to set aside and or vary the order issued on 21.07.2023 dismissing their appeal for want of prosecution ; an order reinstating the appeal; that upon granting the foregoing prayer, the court be pleased to stay execution of the judgment delivered on 22nd February 2018 in Milimani CMCC No. 2626 of 2011 pending hearing and determination of the appeal; and that summons do issue to the Executive Officer of the Milimani Commercial Court, inter alia to produce the file and proceedings in Milimani CMCC No. 2626 of 2011 within a specified period.
2. The motion is expressed to be brought under Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 12 Rule 7 and Order 51 Rule 1 & 15 of the Civil Procedure Rules (CPR) and premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Eric Karuti, counsel on record for the Applicants.
3. The gist of his lengthy affidavit is that by a memorandum of appeal dated 07.03.2018, the Applicants filed an appeal against the judgment delivered on 22nd February 2018 in Milimani CMCC No. 2626 of 2011 and thereafter pursued certified copies of the typed proceedings of the impugned decision with the aim of filing their record of appeal. That the lower court registry informed them that the



lower court file could not be traced, culminating in various follow-ups through correspondence. That his firm received an initial Notice to Show Cause why the appeal should not be dismissed (NTSC) for 22.07.2021 and in response he filed a replying affidavit dated 19.07.2021. That on the foregoing date the court directed that the matter be mentioned before the Deputy Registrar for purposes of establishing the whereabouts of the lower court record. He further states that the matter was mentioned on diverse dates between 26.08.2021 and 17.02.2022 to no avail and resulting in the Deputy Registrar's order on 04.11.2021 summoning the Executive Officer of the subordinate court to attend court on 27.01.2022 to explain the failure to produce the lower court.

4. That the Executive Officer failed to attend court on the forestated date, as a consequence of which the appeal was mentioned before Seron, J. who directed that the Deputy Registrar liaise with the Chief Magistrate Court to call for the lower court file or to give a detailed explanation as to why the file could not be traced. He maintains that in the meantime he dispatched representatives to make visits to the registry on diverse dates which failed to yield a positive outcome as to the whereabouts of the lower court file. That it was not until 28.07.2023 that he received a letter from Motanya John Orina (hereafter the Respondent) advocate, informing him that the appeal had been dismissed for want of prosecution on 21.07.2023 and he thus sought the immediate release of the decretal sum of KShs 503,500/- deposited as security in the subordinate court.
5. He asserts that prior to the dismissal neither the Applicant nor counsel was served with the NTSC for 21.07.2023 as to why the appeal should not be dismissed. That consequently the Applicants were not accorded an opportunity to be heard and or show cause. He goes on to state that unless the reliefs sought are granted the Applicants will be face the risk of illegal or premature execution and that no prejudice will be occasioned to the Respondent in the event the application is allowed. In conclusion, he deposes that the motion has been brought without unreasonable delay and it is in the interest of justice, equity, and proportionality that the motion is allowed.
6. The Respondent opposes the motion by way of grounds of opposition dated 07.07.2023. He takes issue with the motion on grounds that the it is brought in bad faith and is calculated to deny the Respondent his rightful dues; that the orders sought in the instant motion are spurious and groundless; that the said appeal has never been set down for hearing the Applicants having failed to take any deliberate action to prosecute it since the 08.03.2018; that the Applicants are guilty of inordinate and inexcusable delay in prosecuting this appeal; that both parties herein were served with the NTSC dated 07.07.2023 and scheduled for the 21.07.2023 but the Applicants willfully and or deliberately failed to attend. Further that the under Order 42 Rule 35 of the CPR appeals can be dismissed for want of prosecution where (a) three months after issuance of directions no steps have been taken to prosecute the appeal, and (b) no steps have been taken to prosecute the appeal within one year after service of the memorandum of appeal.
7. Further the grounds state that more that (5) five years have lapsed since the Respondent was served with the memorandum of appeal dated 07.03.2018 and no steps had been taken by the Applicants whatsoever to prosecute the appeal; that the application lacks merit, is a blatant abuse of the court process; that it is trite law and in accordance with the principles of natural justice and our national laws that litigation must come to an end; and that the application should be dismissed with costs to the Respondent herein.
8. Despite directions on disposal of the motion by way of written submissions neither of the parties complied. 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." The said 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”.

9. 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 versus 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 and another versus 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].

10. Here, it is undisputed that the Applicants appeal was dismissed in circumstances to be addressed later in this ruling. For now, it would seem upon a perfunctory perusal of the reliefs sought, provisions and grounds relied on, that the court’s jurisdiction is invoked pursuant to Section 3A of the CPA.

11. 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 –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 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 force in this matter, considering that the orders issued by this court on 21.07.2023 conclusively determined the appeal by way of a dismissal order.

13. A perusal of the entirety of record before the court reveals the history of this appeal is as follows. The appeal was filed on 08.03.2018. On 26.09.2019 the lower court filed was noted as received by this court. However, on the face of the said forwarding letter was endorsed the words “file brought without



lower court proceedings”. There is no indication whether this endorsement was an official entry or notification by the court in respect of the lower court proceedings. The Deputy Registrar of this court thereafter issued a notice dated 06.12.2019 to the Applicant’s advocate to file their record of appeal. It appears that despite issuance of the said notice there was no activity in the matter up until a NTSC was issued for 22.07.2021. On the latter date, parties appeared before Chitembwe, J. (as he then was) who directed that the matter be mentioned before the Deputy Registrar on 26.08.2021.

14. Parties subsequently appeared before the Deputy Registrar on the latter date, and thereafter on 04.11.2021, 27.01.2022 and 17.02.2022. Despite summons issued to the Executive Officer of the lower court, he/she failed to appear before the Deputy Registrar and in turn the latter directed that the matter be mentioned before a judge on 23.03.2022 for directions in respect of the issue. On the forestated date parties appeared before Sergon, J. whom upon hearing counsel for the Applicants ordered as follows; -

“The Deputy Registrar is directed to liaise with the Chief Magistrate to bring to this court the trial court file and or give a detailed explanation why the filed cannot be presented to this court. Mention on 24.05.2022.” (sic)

15. It appears from the record that there were no subsequent proceedings in respect of the mention date appointed by Sergon, J or follow up by the Applicants in that regard. Nevertheless, the lower court file seems to have been forwarded vide a letter dated 30.05.2022 and received by the High Court on 06.06.2022. Following which, the Deputy Registrar promptly issued a notice dated 21.07.2022 requiring the Applicants to file their record of appeal, but to no avail.
16. On 24.03.2023 counsel for the Respondent wrote to this court requesting that the appeal be dismissed pursuant to Order 42 Rule 35(2) of the CPR. When the said letter was referred to the Deputy Registrar for directions, she made the following comment on the face of the letter; - “the L.C.F (lower court file) has been missing but it has now been availed, the matter is coming up before Judge on 24.05.2023 counsel to make an application before a Judge on that date”. The record does not seem to capture any proceedings in respect of the latter date, and no steps were taken by the Applicants in the matter. The date cited by the Deputy Registrar in her direction must be an erroneous reference to the date earlier fixed for the further mention of the matter on 24.05.2022 by Sergon J.
17. Be that as it may, the Deputy Registrar subsequently proceeded to issue a NTSC for 21.07.2023 and from the affidavit of service of the Court Process Server attached thereto, the NTSC appears to have been served upon both parties in the matter through their respective registered postal addresses. On 21.07.2023 when the matter came up for the NTSC, the court upon hearing counsel for the Respondent proceeded to dismiss the appeal for want of prosecution. The lower court file was subsequently returned to the lower court vide the letter dated 18.09.2023 and received in the lower court on 2.10.2023. It appears that the Applicant’s motion was prompted by the letter by the Respondent dated 28.07.2023 informing them about the dismissal of the appeal.
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 upon filing of the memorandum of appeal there was a challenge faced by the Applicants in procuring the Lower Court File up until Sergon, J’s orders issued on 23.03.2022, following which the lower court record was forwarded vide a letter dated 30.05.2022 and received by the High Court on 06.06.2022.
19. The Applicants affidavit material is however deficient of attempts to prosecute the appeal after the above date and despite the notice issued by the Deputy Registrar on 21.07.2022 requiring them to file



the record of appeal. Up until the appeal was dismissed on 21.07.2023 the record of appeal had not been filed. Further, the NTSC for 21.07.2023 from the record appears to have been properly served; the Applicants' counsel has not disputed the postal address indicated in the NTSC and in the return of service prepared by the court process server. Therefore, for all intents and purposes the NTSC was duly served upon the Applicants counsel who inexplicably failed to attend the court for the NTSC.

20. The court also takes a dim view of the conduct of the Applicants regarding the present motion. It exemplifies the tardiness observed regarding the conduct of the entire appeal. Besides not filing submissions in support of their own motion, the Applicants seem not to have even bothered to peruse the court file to confirm relevant events after the mention before Seron J on 23.03.2022. Thus, they appear unaware that the lower court file had been forwarded and received by this court in June 2022, hence their misplaced prayers regarding that matter as contained in the instant motion. Evidently, they did not make any follow up earlier. They are silent about notices dispatched to their advocates requiring the filing of the record of appeal. The repeated claims concerning the lower court file being missing earlier are of no moment here; the Applicants, had they been diligent, should have presented the prayers in the present motion in that regard much earlier, or better still applied for the reconstruction of the lower court file between 2019 and 2022.
21. Other than the stated earlier attempts by counsel for the Applicants, resting with correspondence in 2019, in pursuit of the lower court file (see annexure KKE-2 and KKE-5 of the Applicants affidavit material), the inaction since March 2022 and despite the notice dated 21.07.2022 to file their record of appeal is unexplained by the Applicants. This court did its part in ensuring that the lower court file was obtained by June 2022. The Applicants despite notices did not file the record of appeal or follow up, for over a year since 23.03.2022, the date of the last mention before Seron J. Apparently, the Applicants went into slumber, and were only woken up by the Respondent's letter in July 2023 informing them of the dismissal of the case and seeking release of monies deposited as security.
22. Patently, the delay herein is inordinate, unexplained and runs afoul of the overriding objective encapsulated in section 1 A and 1 B of the *Civil Procedure Act*. Section 3A invoked by the Applicants in this motion cannot be used both as a sword and shield; the jurisdiction donated therein is for the furthering of "the ends of justice or to prevent abuse of the process of the court".
23. While the Applicants are entitled to be heard on the merits of their case, that cannot be at their leisure, on their 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. As at the time of this ruling, the appeal was 6 years old, and the lower court suit instituted more the 13 years ago. The likelihood of prejudice to the Respondent seems obvious.
24. In view of the totality of the foregoing, it would be inimical to the interests of justice for the court to allow the Applicants' motion dated 31.07.2023, which is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Gathua

For the Respondent: N/A



C/A: Erick

