



**Ndungu & another v Wottoh (Civil Appeal 481 of 2016)  
[2024] KEHC 3657 (KLR) (Civ) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3657 (KLR)

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

**CIVIL**

**CIVIL APPEAL 481 OF 2016**

**CW MEOLI, J**

**APRIL 11, 2024**

**BETWEEN**

**LUCAS NJUGUNA NDUNGU ..... 1<sup>ST</sup> APPLICANT**

**JANE WANGUI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MARGARET NJERI WOTTOH ..... RESPONDENT**

**RULING**

1. For determination is the motion dated 25.09.2023 by Lucas Njuguna Ndungu and Jane Wangui (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicant/Applicants) seeking inter alia reinstatement of the application dated 16.02.2022 seeking reinstatement of the appeal. The motion is expressed to be brought pursuant to Section 1A, 1B, 3A & 95 of the *Civil Procedure Act* (CPA), Order 22 Rule 22 & 52, Order 42 Rule 6 & 21, Order 45 Rule 1 and Order 50 Rule 6 of the *CPR*.
2. The motion is premised on grounds thereon, as amplified in the supporting affidavit sworn by Lawrence Njuguna, counsel having conduct of the matter on behalf of the Applicants. To the effect that the appeal herein arose from the judgment delivered on 24.06.2016 in Milimani CMCC 6537 of 2013 (hereafter lower court suit). That the appeal was dismissed on 02.12.2021 and an application seeking to reinstate the same was filed on 16.02.2022. He states that the application was listed for mention on 21.09.2023 when it was dismissed; that the advocate had logged into the virtual platform to attend to HCCA E447 of 2021 before the same court, and was not aware the present matter was scheduled for mention until the Judge mentioned the firm of Kimondo Gachoka & Co. Advocates who represent the Applicants. He goes on to assert that before he could address the court on the matter, his device had a technical failure rendering it impossible to address the court and upon subsequently logging into the virtual platform again, learned that the Applicants' motion had been dismissed.



3. He maintains that failure to address Court on the said date was due to unforeseeable event which ought not to bar the Applicants from accessing justice based on the merits of their case. That it is therefore in the interest of justice that the instant motion be allowed to facilitate the hearing of the appeal to its logical conclusion. He further states that allowing the motion will not occasion any prejudice to Margaret Njeri Wottoh (hereafter the Respondent), as she can be compensated by any award of costs. In conclusion he deposes that the dismissal of the appeal exposes the Applicants to execution proceedings by the Respondent.
4. The Respondent opposes the motion by way of a replying affidavit dated 27.09.2023, and deposed by Morris J. Kisia, counsel on record for the Respondent. He views the motion as frivolous and an abuse of the Court process. And asserts that since filing the motion dated 16.02.2022, the Applicants went to slumber and had never taken steps to prosecute the said motion. In exemplifying this he cited several occasions when the motion was slated for hearing on 11.05.2022, 14.06.2022, 18.07.2022 and 21.09.2023, and failure by the Applicants to attend court or show interest by taking a hearing date for the said application. That the Applicants had not been keen in prosecuting the dismissed application and the Court on its own motion had to take steps to fix dates in respect of the motion and thereafter notified parties through the Judiciary SMS system and update on the Case Tracking System (CTS) portal. Therefore, the Applicants cannot allege that they were not aware since the Court portal and causelist indicated that the matter had been fixed for 21.09.2023. He concludes by deposing that the motion is Res Judicata and an abuse of the court process, and should be dismissed with costs to the Respondent.
5. Parties opted to rely on their respective affidavit material rather than file submissions on the motion.
6. The Court has considered the material canvassed in affidavits with respect of the motion as well as the record herein. The motion contains several prayers, which stand or fall upon the outcome in respect of the prayer seeking re-instatement of the application dated 16.02.2022. The motion invokes a raft of provisions inter alia Section 3A of the CPA as well as Order 45 Rule1 of the CPR. The latter provision provides that

“ 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.”

Plainly, the provision has no bearing to the instant matter given that the Applicants have not specifically sought for review of an order issued by this Court.



7. As to the former provision, which appears to be more relevant to the matter at hand, 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”.
8. Regarding Section 3A of the CPA, 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:  
  
“ 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.”
9. Here, it is undisputed that the Applicants motion dated 16.02.2022 was dismissed on 21.09.2023, in circumstances to be addressed later in this ruling. Evidently, the Court’s jurisdiction is primarily invoked by the Applicants pursuant to Section 3A of the CPA in their bid to set aside the Court’s order of 21.09.2023 and reinstatement of the Applicants’ motion dated 16.02.2022. 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.
10. In the case of Shah v Mbogo & Another [1967] EA 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.”
11. 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 where, dismissal orders issued by this Court on 21.09.2023 conclusively determined the matter.
12. The events leading to dismissal, from the record before the Court, are as follows. The appeal herein was filed on 21.07.2016 and no steps had been taken therein. On 08.05.2019 the Respondent filed a motion dated 07.05.2019 seeking the dismissal of the appeal for want of prosecution. On 11.07.2019,



the parties appeared before Githua, J. A consent order was recorded by the parties in the following terms; -

“By consent the N/motion dated 7.5.2019 is hereby withdrawn on condition that the Appellants will pay the Respondent throw away costs in the sum of Kshs. 10,000 within the next 14 days and that the Appellants will file and serve their record of appeal within 60 days from today’s date.” (*sic*)

13. Despite the consent, the Applicants took no steps towards progressing the appeal. Prompting the Deputy Registrar of this Court to issue a Notice to Show Cause (NTSC) for 02.12.2021 for the Applicants to appear and show cause why the appeal should not be dismissed for want of prosecution. On the latter date there was no appearance from counsel for the Applicants, and as a result the court ordered that;-

“Notice having been given to show cause why this appeal should not be dismissed and there being no satisfactory response, the appeal is hereby dismissed under Order 42 Rule 35(2) of the Civil Procedure Rules with costs” (*sic*)

14. This order prompted the Applicants to file the reinstatement motion dated 16.02.2022 that was subsequently fixed for hearing on 11.05.2022. The record reveals that on the latter date the matter was not heard but rescheduled for 14.06.2022 and later to 18.07.2022. Counsel for the Respondent was the only party present on 11.05.2022 and 14.06.2022. The matter eventually came up on 18.07.2022 before Nyagah, J. Once more, only counsel for the Respondent was present and the court directed that the matter be placed before Meoli, J. The record further reveals that the matter was fixed for mention on 19.09.2023 and then 21.09.2023.
15. On the latter date, the court upon hearing counsel for the Respondent in the absence of counsel for the Applicants, dismissed the application dated 16.02.2022 with costs to the Respondent, the Applicant being absent. This dismissal prompted the present motion.
16. 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 from the record that having filed the memorandum of appeal and subsequent motion dated 16.02.2022, with the exception of fixing the motion for hearing on 11.05.2022, the Applicants showed no interest in prosecuting both. On 11.05.2022 and 14.06.2022 when motion did not proceed, only counsel for the Respondent was present and was the one who took the initiative of fixing the motion for hearing on 14.06.2022 and serving the further hearing date of 18.07.2022 upon the Applicants’ counsel. Despite service of the latter date upon the Applicants counsel, he still failed to appear in court, and was absent on 21.09.2023.
17. The Applicants’ explanation through counsel for failure to attend Court on the latter date is two (2) pronged; that he was not aware the matter was scheduled on the said date as he was appearing before this Court on a separate matter; and secondly, that a technical failure of his device hindered his ability to address the Court on the matter. As concerns the latter explanation, the court takes judicial notice of the vagaries of technology and hence the explanation may be plausible given that the record indicates that, counsel for the Applicants logged into the virtual platform later at 9:42am, when the court read out its earlier orders dismissing the motion dated 16.02.2022. With respect to the former explanation, a review of the Case Tracking System (CTS) reveals that indeed the matter was initially scheduled for 19.09.2023. However, the court was not sitting on the said date, and as such, the matter was re-scheduled for 21.09.2023 and appropriate court notices issued. Counsel for the Respondent told the



Court that he got a notice by way of a CTS alert concerning the date and alluded to the fact that the Applicants equally ought to have received a similar alert.

18. The Applicants' conduct since filing the appeal and motion sought to be reinstated reveals total lethargy towards prosecution of both. Had they been following up with their matter, they would have discovered the scheduled dates of their motion. They sat back, leaving the progress of their motion to the court and the Respondent, as they had done with the appeal itself. Considering their conduct, the Applicants' explanation that they had no notice of the date of 21.09.2023 merely confirms and is consistent with the pattern of demonstrated disinterest in their appeal and application. The Applicants did not even deem it necessary to explain why they had taken no steps to prosecute the dismissed motion one year and seven months since filing.
19. Such inordinate and unexplained delay runs afoul of the overriding objective. While the Applicants are entitled to be heard on the merits of its 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. The likely hood of prejudice being meted on the Respondent is real.
20. Parties and counsel are equally duty bound to co-operate with the court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the *Civil Procedure Act*. In *Karuturi Networks Ltd & Anor. v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 of the Court of Appeal had this to say concerning the application of the overriding objective in Section 1A and 1B of the *Civil Procedure Act*:  

“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”.
21. The prayer to reinstate the dismissed motion must fail, and with it the entire motion dated 25.09.2023, which is without merit, and borders on an abuse of the court process. The motion is dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:-

For the Applicants: Ms. Nanjira

For the Respondent: Mr. Kisia

C/A: Erick

