Real People Kenya Limited v Kirongothi & 4 others (Civil Appeal E818 of 2021) [2024] KEHC 3959 (KLR) (Civ) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3959 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E818 OF 2021

CW MEOLI, J

APRIL 18, 2024

BETWEEN

REAL PEOPLE KENYA LIMITED ..... APPLICANT

AND

GRACE NYAKONYU KIRONGOTHI ..... 1ST RESPONDENT

JANE WANGARI KINUTHIA ..... 2ND RESPONDENT

REUBEN GICHURU GITONGA ..... 3RD RESPONDENT

ESTHER WANJIRU ..... 4TH RESPONDENT

STANLEY MWANIKI MTAI ..... 5TH RESPONDENT

RULING

1. For determination is the motion dated 27.06.2023 by Real People Kenya Limited (hereafter the Applicant) seeking inter alia that the court be pleased to vary and or set aside the order issued on 26.05.2023 directing the filing of the Record of Appeal (ROA) within 14 days failing which the appeal would stand dismissed; and that the court be pleased to reinstate the Applicant's appeal and extend the period for filing of the ROA within such period as the court shall direct. The motion is expressed to be brought pursuant to Article 159(2)(c) &(e) of *the Constitution*, Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 12 Rule 7, Order 17 and Order 51 Rule 1 of the Civil Procedure Rules (CPR), on the grounds amplified in the supporting affidavit sworn by Frashia Njeri, counsel on record for the Applicant.

2. The gist of her affidavit is that the Applicant being aggrieved with the judgment delivered in Nairobi Milimani CMCC No. 10913 of 2018 (hereafter lower court suit) on 19.11.2021, preferred an appeal. That she further proceeded to file a motion before the lower court seeking stay of execution pending

determination of the appeal, but the ruling was not delivered on several scheduled dates, the lower court eventually directing that the ruling would be delivered on notice. Initially she had written to the lower Court vide a letter dated 14.12.2021 requesting for a copy of typed proceedings and the judgment for purposes of appeal but due to the pending ruling the request has never been honored.

3. She further asserts that upon inquiry via a letter dated 07.06.2023 as to the delivery date of the lower Court ruling, she was informed that there was a mix up at the registry and the file in question could not be retrieved. Meanwhile, on 10.05.2023 the deponent's firm had been served with a Notice To Show Cause (NTSC) for 26.05.2023 to show cause why the appeal should not be dismissed for want on prosecution. She maintains that on the said date, she explained to the Court that the Applicant had been unable to prosecute the appeal , following which the Court directed the Applicant to file its ROA within 14 days failing which the appeal would stand dismissed. She concludes by deposing that delay in filing of the ROA and or prosecuting the appeal has been occasioned by the factors earlier highlighted and that it was in the interest of justice and fairness that the motion be allowed.

4. Grace Nyakonyu Kirongothi (hereafter the 1st Respondent) opposed the motion by way of a replying affidavit dated 24.07.2023 sworn by Nelson Kaburu, counsel on record for the 1st Respondent. Taking issue with the affidavit supporting the motion, he asserted that the deponent thereto had not expressed any authority by the Applicant to act or depose on its behalf. Further, that no efforts have been demonstrated in the said affidavit of any action taken towards the prosecution of the appeal since 14.12.2021 when it was filed until 10.05.2023 when the NTSC was issued. He asserts that the court very reluctantly exercised its discretion when it allowed the Applicant time to file its ROA; that to date there has been no compliance by the Applicant; that the present motion is res judicata and; that no cause for review of this Court's order has been shown by the Applicant hence the motion ought to be rejected with costs.

5. The motion was canvassed by way of written submissions. On the part of the Applicant, counsel reiterated the contents of her affidavit material to contend that delay in filing the ROA and or prosecute the appeal was not a frolic of the Applicant's making. Emphasizing that the pending stay ruling has yet to be delivered, the magistrate presiding over the matter having been transferred. Resulting in delay in the typing of proceedings to enable the Applicant to file its ROA and or prosecute the appeal. Counsel thus asserted that these reasons were sufficient to explain the delay in prosecuting the appeal.

6. While calling to aid the provisions of Section 3A of the CPA and the decision in John Nahashon Mwangi v Kenya Finance Limited (in liquidation) [2015] eKLR, counsel asserted that interest of justice would dictate that the Applicant be allowed to take the appropriate steps to ensure the appeal is set down for directions and heard expeditiously. That the lower Court file has since been retrieved for purposes of taking directions in respect of the pending ruling. In conclusion the Court was urged to exercise its discretion and set aside its order of 26.05.2023 and to allow the Applicant to prosecute its appeal.

7. On behalf of the 1st Respondent, counsel began by addressing the preliminary issue raised in his response. Arguing that the Applicant is a body corporate, he said it could only act through natural persons duly authorized. That authority to act is mandatory, pointing out further that while the affidavit in support of the motion names the deponent as "Frashia Njeri" counsel for the Applicant, the jurat captures "Frashia Njuguna" as the the deponent. Further to the foregoing, counsel contended that although an adult of sound mind is competent to make an affidavit he cannot do so for another person without the other person's authority, as has been done in the instant matter. In his view, the omission raises serious matters of law.

8. Citing the decision in Microsoft Corporation v Mitsumi Computer Garage Ltd & Another [2001] eKLR, Mombasa Maize Millers v Museveni Nganga Mbogo [2011] eKLR and Morine Wairimu Chure & Another v Victor Ochieng Wesonga [2016] eKLR he maintained that without a deposition as to authority to depose by a body corporate, the impugned affidavit is inadmissible and must be struck out.

9. Concerning the merits of the motion, counsel contended that from the affidavit in support of the application, it is apparent that the Applicant only acted after being served with a NTSC and that despite this Court's orders on filing of the ROA there was no evidence of action on the part of Applicant. It was further submitted that there was no evidence of initiative by the Applicant even by way of filing an incomplete ROA, efforts made towards obtaining a copy of the lower court proceedings and reiterating that when the matter came up for NTSC, no good reason had been advanced for the delay. However, the Court was lenient enough to accord the Applicant an opportunity to prosecute its appeal. Counsel concluded by urging the Court to dismiss the motion with costs to the 1st Respondent.

10. In a brief rejoinder by way of further submissions, counsel for the Applicant took issue with the 1st Respondent preliminary contestation by arguing that "Frashia Njeri" and "Frashia Njuguna" are one and the same person as per the Advocates Search Engine and the issue ought not detract from the facts raised in the Applicant's motion. That it ought to be equally noted that the 1st Respondent's advocate equally deposed the response in opposition to the motion on behalf of his client therefore the affidavit in support of the motion does not offend Rule 9 of the Advocate Practice Rules. Counsel submitted that the depositions in the affidavit in support of the motion were facts well within the knowledge of the deponent and therefore the affidavit does not offend Order 19 Rule 1 of the CPR and Rule 9 of the Advocate Practice Rules. The decisions in Trinity Investments Bank Limited & Another v Guardian Bank Limited [2015] eKLR and John Muli & Another v Thomas Nzioka Wambua & Another (suing as administrator of the Estate of Michael Makau Nzioka (Deceased) [2021] eKLR were cited in that regard.

11. Jane Wangari Kinuthi, Reuben Gichuru Gitonga, Esther Wanjiru and Stanley Mwaniki Mtai (hereafter the 2nd, 3rd, 4th and 5th Respondent) did not participate in the instant proceedings by either filing a response or submissions.

12. The Court has considered the material canvassed in respect of the motion as well as the record herein. However, it would be pertinent to first dispose of the 1st Respondent's preliminary contestation on the competency of the affidavit in support of the motion. What can be gathered from the 1st Respondent's material filed in response to the motion is that the affidavit in support of the motion is incompetent for want of authority by the person deposing because the Applicant is a body corporate, that can only act through natural persons duly authorized or through a duly authorized person; and secondly given that the persons named as deposing and in the jurat, are different persons, and without appropriate authority. Counsel for the Applicant responded that the deponent and the jurat executant are one and the same person and that the facts deposed therein were well within the knowledge of the deponent. Therefore, the affidavit does not offend Order 19 Rule 1 of the CPR and Rule 9 of the Advocate Practice Rules.

13. The name of the Applicant in the pleadings is "Real People Kenya Limited". As described, the Applicant is evidently a body corporate with perpetual succession with power to sue and be sued in their corporate name pursuant to the provisions of Section 2, 5 & 19(b) of the *Companies Act*. In this regard, Order 9 Rule 2 (c) of the CPR provides concerning incorporated entities that: -

> " The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) .....;

(b) .....;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal."

14. The above provision is somewhat echoed in Order 4 Rule 1(4) of the CPR regarding persons who may swear a verifying affidavit on behalf of a corporation. The requirement in Order 9 Rule 2 CPR is that a person acting or deposing any affidavit on behalf of a body corporate should demonstrate that he is duly authorized to so act on behalf of the body corporate. See: - Court of Appeal decision in Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu [2019] eKLR. That said, the deponent of the affidavit in support of the motion in paragraph 1 and 2 states that: -

" 1. That I am an advocate of the High Court of Kenya, competent to swear this affidavit.

2. That I am counsel prosecuting this suit on behalf of the Appellant/Applicant conversant with the facts of the case base on the records within the firm's custody and hence competent to swear this affidavit" (sic)

15. The key question here is whether the deponent was duly authorized to swear the supporting affidavit on behalf of the Applicant and to act as she did in this matter. While it is true as held in Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another [2015] eKLR as cited with approval in Kenya Trypanosomiasis Research Institute (supra) that the provisions of Order 4 Rule 1(4) and Order 9 Rule 2 of the Civil Procedure Rules are not "intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized " it is imperative for the deponent to an affidavit sworn on behalf of a corporation to state that they were duly authorized to depose.

16. In this instance, the deponent does not expressly state that she has such authority to depose on behalf of the Applicant, but she merely states that by virtue of her position as counsel "prosecuting this suit on behalf of the Appellant/Applicant conversant with the facts of the case base on the records within the firm's custody" hence, competent to depose. Evidently, counsel is not a party to the proceedings. However, she has expressly stated that she has conduct of the matter on behalf of the Applicant.

17. No doubt counsel on record for the Applicant is privy to certain pertinent facts and would be able to depose to non-contentious issues. Rule 8 of the Advocate (Practice) Rules states: -

" No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."

18. As a matter of good practice, advocates ought to refrain from giving evidence in contentious matters, but this does not bar them from deposing affidavits in non-contentious matters. The rationale behind the rule is to bar and shield the advocate from entering the fray or arena of conflict between his client and adverse parties. See Nyamogo & Nyamogo Advocates v Kogo (2001) EA 174 and Simon Isaac

Ngugi v Overseas Courier Services (K) Ltd (1998) eKLR. Further Order 19 Rule 3(1) of the CPR states that:

> "(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove."

19. The Court of Appeal in Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR citing its decision in Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015, expressed the principle as follows:

> "As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 8 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters." (Emphasis added).

20. Equally in this case, counsel is not a stranger to the proceedings and a review of the affidavit material appears to relate to issues within her personal knowledge, and which strictly speaking, may not qualify as contentious. That however is not license for counsel to enter into the shoes of his client, on account of expediency. The issue of the names "Frashia Njeri" and "Frashia Njuguna" is neither here nor there, a limited search of the Advocates Search Engine - Public Portal settles the issue. Nevertheless, the Court is confounded that the Applicant's counsel opted to rejoin on the issue in her submissions rather than file a further affidavit to rebut contestation. Therefore, considering all the foregoing, this Court while upholding the exhortation that counsel ought to eschew swearing affidavits on behalf of their clients, is however not persuaded that in the circumstances of this case the affidavit of counsel is defective and for striking out.

21. Moving on to the substance of the motion, The Applicant sought, in addition to the prayer for varying and or setting aside this Court's order issued on 26.05.2023, the reinstatement of the appeal and to extend the period for filing of the ROA within such period as the court shall direct. The Applicant's 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 said provision and Order 17 as cited have no application in this matter. 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".

22. Regarding this power, 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
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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."

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].

23. Here, it is undisputed that the Applicant's appeal was dismissed pursuant to a NTSC issued pursuant to Order 42 Rule 35(2) CPR in circumstances to be addressed later in this ruling. This court has held on separate occasions that there is no jurisdiction under Order 42 Rule 35(2) CPR for the court to purport to set aside its own orders of dismissal in a situation before it. The absence of an express provision regarding an important matter such as the reinstatement of an appeal dismissed under Order 42 Rule 35(2) of the CPR cannot be presumed to be accidental. The right and opportunity to be heard is a fundamental principle of law and courts are enjoined to do substantive justice. Consequently, this Court would in appropriate cases be justified in invoking its inherent jurisdiction under Section 3A of the CPA so that the ends of justice are met.

24. 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. The discretion must also be exercised judicially and justly. 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-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."

25. 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 26.05.2023 had the effect of conclusively determined the appeal by way of a dismissal order at an effective later date.

26. A perusal of the brief record before the Court reveals the history of this appeal as follows. The appeal was filed on 14.12.2021 with an amended memorandum of appeal being filed on 21.12.2021. It appears that since then, there was no activity in the matter up until a NTSC was issued for 26.05.2023 for the Applicant to show cause why the appeal should not be dismissed for want of prosecution. When parties appeared before this Court, counsel for the Applicant while addressing the court from the bar essentially advanced the same explanation asserted in support of the instant motion. On his part,

counsel for the 1st Respondent contended that there was no affidavit before Court in response to the NTSC. The Court thereafter proceeded to order as follows; -

> " ROA be filed/served within 14 days failing which the appeal will stand dismissed for want of prosecution with costs." (sic)

27. As there was no compliance, the Deputy Registrar affirmed the said order on 26.06.2023, certifying that the appeal stood dismissed as of 10.06.2023 pursuant to the Court's order issued on 26.05.2023.

28. 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 amended memorandum of appeal there was no activity in the matter. The Applicant's affidavit is reticent on attempts made to prosecute the appeal since its institution save for a letter post dismissal, dated 07.06.2023 addressed to the Milimani Chief Magistrate's Court (Annexure FN-1). Ordinarily, pursuant to the NTSC, the Applicant was required on 26.05.2023 to place before the Court detailed and cogent reasons why the Court should not dismiss the appeal. A good practice that has developed over time is that appellants served with a NTSC usually file an affidavit in that regard. That was not done in this case.

29. Evidently, counsel failed to tender any tangible reasons why it failed to prosecute its appeal and averments blaming the lower court appear lame excuses. As rightly, argued by the counsel for the 1st Respondent, there was no evidence of initiative by the Applicant by way of filing an incomplete ROA, efforts made towards obtaining a copy of the lower court proceedings, whether typed or handwritten and at the hearing of the NTSC no good reason was advanced for the delay. Despite the letter being annexure marked FN-2, from the Court Administrator Milimani Magistrate's Court, confirming the mix up in respect of the lower court file, there has been obvious lethargy on the part of the Applicant in progressing the appeal.

30. Although the challenge of obtaining proceedings in the lower court is a matter of notoriety, it was up to the Applicant to consistently pursue the proceedings and to file the record of appeal in a timeous manner. At a time when courts are deluged with heavy caseloads, it is not enough for any party to merely blame the lower Court, without more; the pursuit of proceedings must be shown to be consistent and vigorous.

31. 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 CPA. Moreover, cases belong to parties, and they too are ultimately responsible to ensure that their cases are progressed in a timely fashion.

32. That said, no party ought to be driven from the seat of justice without a hearing except where such action is properly justified upon facts and the law. This appeal has been pending for three years and can be expedited through appropriate directions while an award of costs would adequately compensate the 1st Respondent. In emphasizing the right of appeal, the Court of Appeal in Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited [2020] eKLR stated the following:

> " Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia that:

(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;

(ii) the right to be heard is a valued right; and

(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice…"

12. Consequently, the court will most reluctantly exercise its discretion in the Applicant's favour by setting aside the default dismissal order in respect of the appeal and reinstating the appeal. On condition that the appeal shall be fully prosecuted within 90 days of today's date, failing which it will stand dismissed for want of prosecution with costs. The costs of the motion are awarded to the 1st Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Akisa h/b for Mr. Maundu

For the 1st Respondents: Mr. Kaburu

C/A: Erick