Wambugu v Sava Industries Limited (Civil Appeal 523 of 2012) [2024] KEHC 3758 (KLR) (Civ) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3758 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 523 OF 2012

CW MEOLI, J

APRIL 4, 2024

BETWEEN

JOSEPH MWANIKI WAMBUGU .... APPELLANT

AND

SAVA INDUSTRIES LIMITED .... RESPONDENT

RULING

1. Joseph Mwaniki Wambugu (hereafter the Applicant) brought the Notice of Motion (the Motion) dated 16th August, 2016 seeking that the order made on 27th June, 2016 dismissing the appeal be set aside and the appeal be reinstated. The Motion which is expressed to have been brought under Section 3A of the *Civil Procedure Act* (CPA); and Orders 42 and 51 of the *Civil Procedure Rules* (CPR) is premised on the grounds featured on its face and amplified in the supporting affidavit sworn by the Applicant's advocate, Simon Kamere.

2. Therein, the advocate stated that his client being aggrieved by the ruling rendered by the trial court on 21st May, 2009 in Milimani CMCC No. 755 of 2007, instructed his firm to lodge the present appeal vide the memorandum of appeal dated 4th October, 2012. The advocate stated that he subsequently wrote to the Deputy Registrar by way of the letters dated 15th January, 2013 and 30th August, 2013 inquiring whether the lower court file had been forwarded to the High Court, and whether the appeal had consequently been admitted for hearing. That no response was forthcoming.

3. Upon following up with the Executive Officer on status of the lower court file, he received a letter dated 23rd September, 2015 informing him that the certified copies of the judgment and proceedings were ready for collection. That subsequently, the Deputy Registrar wrote to the lower court, requesting for the lower court file. That upon further following up on the status of the appeal, he was informed that it had been dismissed for want of prosecution. It was the advocate's assertion that he was never served

with a notice to show cause preceding the dismissal order and in view of all the foregoing, it would be in the interest of justice for the reinstatement order sought to be granted.

4. The Motion was canvassed by way of written submissions. To support the Motion, counsel for the Applicant anchored his submissions on the decisions rendered in *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR and *Grace Njeri Theuri v John Mburu Wainaina* [2022] eKLR on the applicable principles. Counsel reiterated the earlier averments in the supporting affidavit regarding the steps taken in the appeal, as well as the non-service of the notice to show cause. Counsel submitted that the delay in prosecuting the appeal cannot therefore be attributed to the Applicant. In the premises, the court was therefore urged to allow the Motion as prayed.

5. At the time of writing this ruling, the court noted that Sava Industries Limited (hereafter the Respondent) had neither put in a response nor filed written submissions, despite having been represented by able counsel at all material times and having been granted an opportunity to comply accordingly.

6. The court has considered the material on record in respect of the instant Motion. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and Another* [1967] E.A 116:

> " 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."

7. The applicable provisions for the setting aside of a dismissal order and the reinstatement of an appeal as in the present instance, are Order 42, Rule 35 of the CPR as read together with Section 3A of the *Civil Procedure Act*, the latter of which 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." The Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

> " 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 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."

8. 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." (sic)

9. Order 42, Rule 35 (*supra*) provides that:

   1. Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

   2. If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

10. Rule 13(1) hereinabove was deleted by the *Civil Procedure (Amendment) Rules*, 2020, and a new rule substituted therefor in the following terms:

    13 (1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.

11. The events leading to the dismissal order issued of 27th June, 2016 are as follows. The Applicant filed the present appeal on 9th October, 2012 followed by the filing of the record of appeal sometime on 16th January, 2013. However, it is apparent from the record that no further progressive action took place in the appeal, resulting in the issuance of the notice to show cause why the appeal should not be dismissed for want of prosecution (NTSC). It is apparent from the record that when the NTSC came up for hearing on 27th June 2016, none of the parties were in attendance. The appeal was dismissed.

12. The explanation offered here for the non-attendance is that the NTSC was not served upon the advocate. The court upon perusing the record could inexplicably not locate a copy of the NTSC or affidavit of service making it difficult to ascertain whether the parties were indeed served. In the circumstances, the court will give the benefit of doubt to the Applicant. The Court noted that the Applicant did not swear an affidavit, choosing to remain in the shadows. This being ultimately his appeal, it was not too much to expect the Applicant to bring his own interest to bear by filling an affidavit in support of the motion.

13. As regards efforts by his advocate, there are on record, copies of the letters dated 15th January 2013 and 30th August, 2013 annexed to the supporting affidavit and marked as "SK 2" and "SK 3" and addressed to the Deputy Registrar of this Court. By these letters, the Applicant's advocate sought confirmation whether the lower court file had been forwarded to the High Court and whether the appeal had been admitted for hearing. It appears that the said letters did not elicit a response. The Applicant's advocate also annexed as "SK 4" being a copy of the letter dated 8th June, 2015 and addressed to the Chief Magistrate's Court, Milimani, requesting for forwarding of the lower court file to the High Court.

14. The record shows that it was not until 7th September 2020 that the lower court file was forwarded to the High Court and received on 9th September 2020 respectively. This was followed by the erroneous admission of the appeal on 26th January, 2021 long after the appeal had been dismissed. Clearly, there were missteps on the part of this court and the lower court in the perfection of the appeal. This notwithstanding, it may be said from all the relevant events that the Applicant's advocate made some attempts, albeit sporadic, in pursuit of the appeal. And while he also timeously filed the instant motion, there can be no justification for his delay in prosecuting the motion, which is almost eight years old today.

15. That said, the right of a litigant to be heard though not absolute occupies a central place in *the Constitution*. In *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR the Court of Appeal had this to say in that regard:-

> "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:
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> (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
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> (ii) the right to be heard is a valued right; and
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> (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..."

16. The Applicant while entitled to a reasonable opportunity to prosecute his appeal to conclusion is under a duty to actively expedite the appeal which has been pending for 12 years. That is the command in sections 1A and 1B of the *Civil Procedure Act* encapsulating the overriding objective. In view of the foregoing considerations, the Court is persuaded to exercise its discretion in favour of the Applicant, on conditions. The Court will allow the Notice of Motion dated 16th August, 2016 by setting aside the dismissal order of 27th June 2016 and reinstating the appeal. The Motion is granted subject to the condition that the Applicant shall fully prosecute the appeal within 45 (forty-five) days of this date, failing which the appeal will stand automatically dismissed for want of prosecution, with costs to the Respondent.

17. Pursuant to the above, the Court will hereafter proceed to issue directions on the appeal. There will be no order on costs regarding the Motion.

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

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Mwangi

For the Respondent: N/A

C/A: Erick