Haraka Enterprises Limited v Chege & another (Civil Appeal 266 of 2020) [2024] KEHC 5256 (KLR) (Civ) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5256 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 266 OF 2020

CW MEOLI, J

MAY 13, 2024

BETWEEN

HARAKA ENTERPRISES LIMITED .... APPLICANT

AND

GABRIEL M. CHEGE .... 1ST RESPONDENT

AGNES MATHAI .... 2ND RESPONDENT

RULING

1. For determination is the motion dated 30.05.2023 by Haraka Enterprises Limited (hereafter the Applicant) seeking inter alia to set aside the order of 12.05.2023 dismissing the appeal for want of prosecution and reinstatement thereof. The motion is expressed to be brought pursuant Section 3A of the *Civil Procedure Act* (CPA) and Order 12 Rule 7 of the Civil Procedure Rules (CPR). On the grounds amplified in the supporting affidavit sworn by Marceline Sande Okumu, counsel on record for the Applicant.

2. The gist of her affidavit is that the Applicant filed the record of appeal on 13.11.2020, having earlier filed an appeal on 01.07.2020. That she caused the said record to be served upon Grace M. Chege and Agnes Mathai (hereafter 1st and 2nd Respondent/Respondents) through their erstwhile counsel on record on 17.11.2020. Thereafter between 09.09.2021 and 09.11.2021, she followed up through correspondence to the Deputy Registrar requesting for a date for directions on the appeal, the court declining because the registry had not received the certified copy of the order and decree of the lower Court, as the court file was missing. That, despite persistent follow ups. And that on 12.05.2023 she discovered the appeal had been dismissed for want of prosecution without service of the notice to show cause (NTSC) from the Court. She deposes that it is in the interest of justice that the appeal be reinstated so that it can be heard on merit. In conclusion, she states that the Appellant has always been

intent and desirous of prosecuting the appeal and should not be condemned unheard on account of the advocate's action or inaction.

3. The Respondents oppose the motion by way of a replying affidavit dated 14.07.2023 sworn by 1st Respondent, who asserts being duly authorized to depose on behalf of the 2nd Respondent. She views the motion as frivolous and an abuse of the Court process meanwhile. Dismissing the affidavit in support as amounting to perjury and liable to be expunged from the record. She takes issue with the fact that from the Case Tracking System (CTS), the appeal was filed five (5) months from the date judgment of the lower Court on 17.06.2020, therefore, out of time and without leave and a nullity ab initio. That the Applicant has further not filed a complete Record of Appeal as purported and has failed to furnish proof of service thereof upon the Respondents.

4. She states that since the alleged date of filing the appeal, there has been inordinate delay in prosecuting the same which delay has not been adequately explained. She further deposes that counsel for the Applicant has always been on record since the lower Court and hence by dint of Order 42 Rule 13(4) of the CPR, the Applicant was not barred from filing a Record of Appeal and seeking admission of the appeal. In summation, she states that the appeal was dismissed upon this Court being satisfied that the Notice to Show Cause (NTSC) was duly served therefore the instant motion ought to be dismissed with costs.

5. In a brief rejoinder by way of a further affidavit, counsel for the Applicant maintains that the appeal was filed on 01.07.2020 and the Memorandum of Appeal duly served on the Respondent's erstwhile counsel.

6. The motion was canvassed by way of written submissions. On the part of the Applicant, counsel condensed her submission around two issues. On whether the Court ought to reinstate the appeal, invoking Section 3A of the CPA, Order 42 Rule 6 of the CPR, the decision in Shah v Mbogo & Anor (1967) EA 116 as cited in Bilha Ngonyo Isaacc v Kembu Farm Ltd & Anor [2018] eKLR and Ivita v Kyumbu (1984) KLR 441 counsel submitted that reinstatement of an appeal is at the discretion of the Court which discretion ought to be exercised judicially. That delay in prosecuting the appeal was not willful, deliberate and neither did the Appellant seek to obstruct justice. That moreover, the delay has been satisfactorily explained and hence excusable and no prejudice shall be suffered by the Respondents if the appeal is reinstated. Concerning whether the appeal was properly filed, it was summarily asserted that the judgment of the lower Court was delivered on 17.06.2020 and the Memorandum of Appeal filed on 01.07.2020 and served upon the Respondent's erstwhile counsel. That subsequently the Record of Appeal was filed on 12.11.2020. Therefore the Respondents' challenge on the competency of the appeal lacks merit. The Court was urged to allow the motion as prayed.

7. On behalf of the Respondents, counsel anchored his submissions on the provisions of Order 17 Rule 2(1) & (3) of the CPR and the decision in Investments Limited v G4S Security Services Limited [2015] eKLR. Addressing the merit of the motion, counsel reiterated the Respondents' affidavit material and relied on the decision in Mobile Kitale Service Station v Mobil Oil Kenya Limited [2004] eKLR to summarily contend that the appeal is incompetent having been filed out of time. Further that the Applicant has failed to give sufficient reasons why the dismissal order should be reversed as the delay in prosecuting the appeal was prolonged and inexcusable. Counsel thus urged the Court to dismiss the motion with costs.

8. 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 Respondent's preliminary contestation on the competency of the dismissed appeal. It is trite that competency of an appeal goes to the jurisdiction of the appellate Court to entertain proceedings before it. The locus classicus on the question of

jurisdiction is the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

> " I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

9. The gist to the Respondent's contestation is anchored on the provisions of Section 79G of the CPA, which provides that:

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order".

10. The erroneous invocation of this Court's appellate jurisdiction is not a mere technicality that is curable under the provisions of Section 3A of the *Civil Procedure Act* or Article 159(2)(d) of *the Constitution*. See; - Peter Nyaga Muvake -v- Joseph Mutunga [2015] eKLR.

11. The Respondents contend that the appeal was filed five (5) months from the date judgment of the lower Court on 17.06.2020 therefore the appeal having being filed out of time and without leave is a nullity ab initio. In rebuttal the Applicant asserts that the appeal was filed on 01.07.2020 with the Memorandum of Appeal being duly served on the Respondents erstwhile counsel. The record before the Court and annexures marked MSO5 & MSO6, reveal that the lower court's decision was delivered on 17.06.2020 and the appeal herein was filed on 01.07.2020 and served upon erstwhile counsel on 06.07.2020. The appeal was manifestly filed within the duration provided for in Section 79G.

12. Moving on to the substance of the motion, the Applicant invokes inter alia the provisions of Section 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, Order 17 as cited has no application in this matter. As to the former provision, 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".

13. Regarding the foregoing, 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].

14. Here, it is undisputed that the 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. 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. That said, 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.

15. 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."

16. 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 12.05.2023 had the effect of conclusively determined the appeal by way of a dismissal order.

17. A perusal of the brief record before the Court reveals the history of this appeal as follows. The appeal was filed on 01.07.2020. It appears that since then, there was no activity in the matter up until a NTSC was issued. In respect of the latter, it is undisputed that the appeal was dismissed on 12.05.2023 pursuant to the NTSC. On the said date, there was no appearance by either of the parties and this Court in a brief ruling proceeded to order as follows;-

> " Notice having been given to show cause why this appeal should be dismissed and there being no satisfactory response, the appeal is hereby dismissed under Order 42 Rule 35(2) of the Civil Procedure Rules" (sic)

18. What is perplexing is that the record upon which the court made the above findings is now in disarray. The return of service dated 02.05.2023 indicates that the NTSC was dated 27.03.2023 and was

dispatched on 14.04.2023 by way of registered mail to the parties. However, the copy of the NTSC now attached (stapled) to the affidavit of service is incongruous with the former. First, the NTSC is dated 27.07.2020, just 20 days since the appeal was filed. Secondly, and most incredibly, the document indicates that the date for the hearing of the NTSC is 12.07.2020, a past date! Upon closer scrutiny of this document, it bears some alterations in the dates, while there is clear evidence of interference on the top left corner of the affidavit of service arising from being separated from what was evidently the correct NTSC seen by this court and earlier stapled together with the affidavit.

19. The court, having seen both these documents was satisfied of due service, hence issued the dismissal order. The NTSC dated 27.07.2020 is a false document introduced surreptitiously after 12.05.2023. Interestingly, the Applicant while asserting non-service of the NTSC was reticent about the clearly dubious details on the copy of the NTSC on the record. Besides, counsel has not disputed the postal address to which the NTSC was sent and was merely content to deny service. That aside, since the filing of the appeal, the next Court activity was when the matter came up for the NTSC. There was evident delay in prosecution of the appeal, and explanations offered by the Applicant appear more of an attempt to blame both this and the lower court for the Appellant's inaction in a period of almost three years.

20. 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 manifest that upon filing of the memorandum of appeal there was no further activity in in progressing the appeal since November 2020. 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 and prosecute the appeal promptly. Besides, the purported record of appeal filed on the CTS appears to be incomplete.

21. At a time when Courts are deluged with heavy caseloads, it is not enough for any party to merely attribute blame on auxiliary factors, without demonstrating consistent and vigor on its part. Parties and counsel are 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. Cases belong to parties, and they are ultimately responsible for ensuring that their cases are progressed in a timely fashion. The right to be heard is not absolute, and by his own conduct, a party may disentitle himself to such a right, more so where, by the tardiness of such litigant, the party dragged to court is exposed to prejudice through delay.

22. Reviewing the circumstances of this case, the court is not satisfied to exercise its discretion in the Applicant's favour. Consequently, the motion dated 30.05.2023 is dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: N/A

For the Respondent: Ms. Akinyi h/b for Mr. Mutinda

C/A: Erick