



Maweu & another v Kinyanjui (Suing as Legal Representative and Administrator of the Estate of the Late John Kinyanjui Muiru - Deceased) (Civil Appeal 329 of 2019) [2024] KEHC 8257 (KLR) (Civ) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8257 (KLR)

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

CIVIL

CIVIL APPEAL 329 OF 2019

CW MEOLI, J

JUNE 20, 2024

BETWEEN

JOSEPH MAKAU MAWEU 1ST APPELLANT

CALVIN IMODIA MUKURVI 2ND APPELLANT

AND

LUCY NJOKI KINYANJUI (SUING AS LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE JOHN KINYANJUI MUIRU - DECEASED) RESPONDENT

RULING

1. Joseph Makau Maweu and Calvin Imodia Mukurvi (hereafter the 1st and 2nd Applicants) filed the Notice of Motion dated 11th August, 2023 (the Motion) seeking that the court be pleased to set aside the order made on 26th May, 2023 dismissing the appeal owing to their failure in filing a supplementary appeal with 21 days, and that the appeal be reinstated for hearing. The Motion which is expressed to have been brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 10, Rule 11; and Order 22, Rule 22 of the *Civil Procedure Rules* (CPR). The Motion is premised on the grounds on its face as amplified in the supporting sworn by the Applicants' advocate, Sospeter Aming'a.
2. The advocate stated that the matter was last in court on 26th May, 2023 when the court directed the Applicants to file their supplementary record of appeal within 21 days, failing which the appeal would stand dismissed with costs. The advocate further stated that the delay in complying with the above directions was occasioned by unsuccessful attempts on the part of the Applicants' advocates in obtaining the decree from the lower court. Which was eventually issued on 23rd June, 2023 and thereafter the Applicants proceeded to file the supplementary record of appeal late, the appeal having



automatically been dismissed pursuant to the order made on 26th May, 2023. The advocate maintained that the Applicants were ready and willing to prosecute the appeal and thus urged the court to exercise its discretion in their favour.

3. Lucy Njoki Kinyanjui (Suing in her capacity as the legal representative and administrator of the estate of John Kinyanjui Muiru-Deceased) (hereafter the Respondent) resisted the Motion by swearing a replying affidavit on 23rd October, 2023. Therein, she deposed that pursuant to the order of 26th May, 2023 the timelines for filing a supplementary record of appeal lapsed on 16th June, 2023 and hence the filing of the supplementary record by the Applicants' advocates on 26th June, 2023 was out of time.
4. The Respondent further deposed that there has been a delay of over three (3) years in prosecuting the appeal, since its institution. Moreover, the Applicants have not demonstrated by way of evidence the follow-ups purportedly made in obtaining the relevant decree, and that their conduct overall violates the overriding objective of the *CPA*. According to the Respondent, she is entitled to enjoy the fruits of her judgment and hence the Motion should be dismissed with costs, for the reasons set out hereinabove.
5. The Motion was canvassed by way of written submissions. In supporting his submissions on the Motion, counsel for the Applicants relied on the decision in *Meme v Maroo* (Civil Appeal E024 of 2020) [2022] KEHC 15942 (KLR) (28 November 2022) (Ruling) on the applicable test for reinstatement of a matter which stood dismissed. Asserting that the delay in the present instance is neither inordinate nor inexcusable and that no prejudice will be suffered by the Respondent if the Motion is allowed as prayed. On those grounds, the court was urged to exercise its discretion in favour of the Applicants.
6. On the part of the Respondent, her counsel cited the decision rendered in *Salim Said & 2 others v Jedidah Wangui Gachie & another (legal administrator of the Estate of the Late Stephen Wangui Gachie)* [2021] eKLR to argue that the decision whether or not to reinstate an appeal is a matter of judicial discretion and which discretion ought to be exercised judiciously and on the basis of sufficient cause. The Respondent's counsel reiterated her earlier averments that the Applicants' herein have been indolent in the matter and that there has been an inordinate delay in prosecution of the appeal, which delay has not been reasonably explained.
7. Counsel contended that the delay has occasioned prejudice to the Respondent, who is yet to benefit from the fruits of her judgment. Counsel here citing the decision in *Aisha Motor Dealers Limited & Another v Wanza Kisuli & Peter Nzangi (Suing As A Legal Representatives of the Estate of Nthony Kisuli-Deceased)* [2020] eKLR. In counsel's view, the Applicants' conduct offends the overriding objective of the *CPA* as well as Articles 48 and 50 of the *Constitution* safeguarding the right of access to justice and to a fair hearing respectively, among others. Counsel therefore concluded by submitting that no sufficient cause has been shown by the Applicants to warrant the exercise of the court's discretion in their favour and that there is no overall reasonable basis for the court to grant the orders sought in the Motion.
8. The court has considered the rival affidavit material and the submissions filed plus the authorities cited therein. 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-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.”

9. The Applicants approached the court under Order 10, Rule 11 and Order 22, Rule 22 of the [CPR](#). The former provides that:

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

10. The latter Order 22, Rule 22 (*supra*) stipulates as follows:

- (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
- (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.
- (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

11. From a reading of both provisions cited hereinabove, it is clear that neither applies in the present circumstances. Whereas the former is concerned with the setting aside of a judgment entered in default of defence or on the basis of non-appearance or failure to serve; the latter provision relates to stay of execution.

12. That said, an applicable provision here would be Section 3A of the [CPA](#), 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

“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.”



13. 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)
14. The events leading to the order made on 26th May, 2023 are as follows. The Applicants filed their memorandum of appeal sometime on or about 12th June, 2019 followed by the record of appeal which was filed on 26th February, 2021. The record shows that the appeal was eventually admitted on 8th July, 2021. Soon thereafter, the Respondent herein filed an application dated 9th August, 2021 seeking to have the record of appeal struck out with costs for failure on the part of the Applicants to include a certified copy of the decree issued by the trial court.
15. The application was eventually determined before Serگون, J who by the ruling delivered on 16th December, 2022, dismissed it and granted the Applicants leave of 21 days within which to file a supplementary record of appeal including the certified copy of the lower court decree. The Applicants did not comply and the court eventually issued a Notice To Show Cause (NTSC) why the appeal should not be dismissed for want of prosecution. The NTSC was scheduled for 26th May 2023.
16. The record shows that when the parties attended the court on 26th May, 2023 the Applicants’ advocate claimed that he had been unable to file a supplementary record of appeal due to challenges in obtaining the decree, despite having written several letters to the Chief Magistrate’s Court. In opposition, counsel for the Respondent argued that no such evidence had been tendered. Upon considering the counsels’ respective positions, this court directed that a supplementary record of appeal be filed within 21 days thereof, failing which the appeal would stand dismissed for want of prosecution. There being no compliance, the suit stood dismissed upon the expiry of 21 days of the order, prompting the Motion filed in August 2023.
17. Regarding the explanation by the Applicants to the effect that the delay was primarily occasioned by the time taken in obtaining a certified copy of the decree despite several follow-ups, there was no material presented in the Motion to prove the claims. On the record however, is a letter dated 30th May, 2023 addressed to the Deputy Registrar, Civil Division, requesting that the lower court file be returned to the Chief Magistrate’s Court-Milimani Commercial Courts, for purposes of extracting the decree. This letter was clearly prompted by orders made at the hearing of the NTSC.
18. The record shows that the said letter was followed by correspondence by the Deputy Registrar and addressed to the Chief Magistrate’s Court, Milimani Commercial Courts, returning the lower court record for the stated purpose. The record also contains an undated letter addressed to the Chief Magistrate’s Court by the Applicants’ advocates, similarly requesting for certified copies of the decree.
19. It is also apparent from the record that subsequently, via a letter dated 23rd June, 2023 addressed to the Deputy Registrar, the lower court forwarded the original record accompanied by the trial proceedings and other requisite documents, including a certified copy of the decree which was issued on 22nd June, 2023. Which suggests that the Applicants could have, had they been diligent, obtained copies of the decree well before the NTSC. The Applicants eventually filed their supplementary record of appeal dated 23rd June, 2023 outside the timelines stipulated in the court order made on 26th May, 2023, resulting in the automatic dismissal of the appeal.



20. Be that as it may, the Applicants did not tender any evidence or correspondence for that matter, to demonstrate the active steps, if any, taken in the pursuit of a certified copy of the decree prior to issuance of the order by this court on 26th May, 2023. Between the two (2)-year period dating back to the year 2019 when the appeal was filed and the time of filing of the Respondent's application dated 9th August, 2021, there is no material tendered to demonstrate attempts on the part of the Applicants at following up on the decree.
21. The record shows that Chitembwe J (as he then was) who was initially seized of the application dated 9th August 2021 was thereafter suspended and the application remained in abeyance until Serگون J took it up and rendered a ruling on 16.12.2022. Nothing barred the Applicants from filing the supplementary record of appeal during this long hiatus, which failure can only be ascribed to the Applicants' apathy, given that the pending motion was based on the selfsame failure by the Applicants. The Applicants had already been put on notice by the Respondent's application to file the supplementary record of appeal to complete the record.
22. Even after the ruling of 16.12.2022 giving them a chance to file the supplementary record, the Applicants took no steps in compliance. Instead going into slumber until woken up by the NTSC leading to the orders of 26.05.2023 by this court. As already observed, the Applicants failed to comply and only filed the present Motion two months after dismissal of the appeal. At a time when courts are deluged with heavy caseloads, they cannot allow any party to litigate at leisure at the expense of those they have dragged to court. This appeal emanates from a suit filed in the lower court in 2018 in respect of a cause of action arising in 2015 concerning an accident in which three members of a family lost their lives. The delay in this case is not just inordinate; it is inexcusable.
23. The court is not satisfied that the explanation given adequately accounts for the Applicants' inordinate delay of over four (4) years in seeking the lower court decree since the time of institution of the appeal in the year 2019. And which explanation does not effectively account for the Applicants' failure to timeously comply firstly, with the court order made by Serگون, J on 16th December, 2022 followed by the order made by this court on 26th May, 2023 so as to justify the setting aside of the dismissal order.
24. In the court's view, to allow the reinstatement of the appeal in the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act*. The Court of Appeal stated the following in *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09:

“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.”
25. The prejudice to the Respondent through the delay is obvious; she has been held back from enjoying the fruits of her judgment, all due to the indolence of the Applicants which ought not to be further indulged. Litigation must come to an end.
26. In the result, the court finds no merit in the Notice of Motion dated 11th August, 2023 which is hereby dismissed, with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF JUNE 2024.



C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Opondo

For the Respondent: Mr. Amoshe

C/A: Erick

