



**Robert & another v Afwande (Civil Appeal E013 of 2021)
[2024] KEHC 8238 (KLR) (Civ) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8238 (KLR)

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

CIVIL

CIVIL APPEAL E013 OF 2021

CW MEOLI, J

JUNE 20, 2024

BETWEEN

TANUI ROBERT 1ST APPLICANT

JONAH KIBET RONO 2ND APPLICANT

AND

JESSICA ADIKINYI AFWANDE RESPONDENT

RULING

1. For determination is the motion dated 28.12.2023 by Tanui Robert and Jonah Kibet Rono (hereafter the Applicants) seeking inter alia that pending the hearing and determination of the appeal herein there be an order of stay of execution of the judgment in Nairobi Milimani CMCC No. 282 of 2015 (hereinafter the 'lower Court suit'); and that the honorable Court does reinstate HCCA No. E013 of 2021 (hereafter 'the appeal'). The motion is expressed to be brought pursuant inter alia to Section 1A, 1B, 3A, 94 and 95 of the *Civil Procedure Rules* (CPA), Order 42 Rules 6 & 21, Order 45 Rule 1, and Order 51 Rule 1 of the *Civil Procedure Rules* (CPR). It is premised on grounds amplified in the supporting affidavit of Lawrence Njuguna, counsel on record for the Applicants.
2. To the effect that the appeal arose from the decision delivered in lower Court suit, and that the Applicants deposited Kshs. 1,500,000/- as security pending the hearing and determination of the appeal which was however dismissed on 26.10.2023 in default of the Applicants filing their Record of Appeal (ROA). He deposes that the Applicants are yet to obtain the certified copy of the decree, proceedings and judgment to enable them to prepare the ROA despite requests to the lower Court registry. Which failure by the lower Court registry should not be visited upon the Applicants by denying them from pursuing the appeal and exposing them to execution. He goes on to assert that it is in the interest of justice that the appeal be reinstated and that Jessica Kibet Rono (hereinafter the Respondent) will not be prejudiced, as security earlier deposited in a joint interest earning account



has since been released to the Respondent. In conclusion, he deposes that the motion has been made without unreasonable or inordinate delay.

3. The Respondent opposes that motion by a replying affidavit dated 29.01.2024, sworn by Nicholas Malonza, counsel on record for the Respondent. He disputes that the Applicants had applied to the lower court for proceedings and judgment as of 14.04.2023, when the Respondent filed its motion seeking dismissal of the appeal for want of prosecution and that as of 26.10.2023 when the Court dismissed the appeal for want of prosecution, no proceedings had been obtained by the Applicants. Pointing out that the request for proceedings and judgment was only made on 28.12.2023. And no explanation had been proffered for the delay. That the Applicants conduct since filing their appeal on 15.01.2021 until its dismissal on 26.10.2023, demonstrates indolence and lethargy in the prosecution of the appeal. Asserting further that the Applicants went into slumber for over two (2) years since filing their Memorandum of Appeal and were only awakened by the dismissal order and threat of execution. In summation, counsel deposes that there is no merit to the motion and the same ought to be dismissed with costs.
4. On 17.04.2024, parties appeared before this Court and agreed that the motion be disposed of by way of the parties' respective affidavit material on record.
5. The Court has considered the material canvassed in respect of the motion. The Applicants seek the reinstatement of the instant appeal and an order to stay execution of the lower Court judgment pending hearing and determination of the appeal. The motion stands and falls on the outcome of the prayer seeking re-instatement of the appeal. The application invokes a raft of provisions inter alia Section 3A of the [CPA](#) as well as Order 45 Rule 1 of the [CPR](#).
6. 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.”

7. Plainly, the provision has no bearing to the matter at hand. 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””.

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.”

8. The appeal was dismissed on 26.10.2023 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*. 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.
9. 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-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.”

10. 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 ex-parte judgments, the principles pronounced therein apply with equal force in this matter where, orders issued by this Court on 26.10.2023 conclusively determined the instant appeal.
11. That said, it would be apposite to set out the pertinent events leading to the dismissal of the appeal. The appeal herein was lodged on 15.01.2021 and followed by a motion dated 19.02.2021 seeking to stay execution pending determination of the appeal. The Court vide a ruling delivered on 02.12.2021 allowed the motion “on condition that the Applicants deposit into an interest earning account in the joint names of the parties’ advocates the sum of Kshs. 1,500,000/- (one million five hundred thousand) within 45 days” of the date of the ruling. The Applicants thereafter moved the Court by a motion dated 14.01.2022 seeking to enlarge time within which to comply with the order by a further period of 21 days.
12. When parties eventually appeared before this Court on 08.03.2023 in respect of the latter motion, the Court upon a review of the record and hearing counsel ruled as follows: -

“The Applicant did not attend the first date, 08.02.2022, assigned for the hearing of the application and one year later have neither served the Respondent nor taken steps to have the motion heard. Today’s date was fixed by the registry. It seems that the Applicants lost interest in their motion dated 14.01.2022. The same is dismissed for want of prosecution.” (*sic*)

13. Subsequently, the Respondent moved the Court by the motion dated 14.04.2023 seeking that the appeal be dismissed for want of prosecution; and for the sum of Kshs. 1,500,000/- (together with the interest thereon) held in joint interest account in the name of both advocates on record, to be released



to the Respondent's counsel. When the latter motion eventually came up for hearing on 26.10.2023, the Applicants counsel on record was absent despite service. The Court proceeded to order that; -

“The Respondent being absent at 9:35am, the Court allows the motion dated 14.04.2023” (*sic*)

14. As earlier observed, setting aside of 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 14.01.2022, the Applicants showed no interest in prosecuting both.

15. The Applicants affidavit material is devoid of an explanation for the failed Court attendances in respect of the Respondent's motion dated 14.04.2023. However, in an attempt to explain failure to prosecute the appeal the Applicants claim that they were hindered by non-supply of the certified copy proceedings and judgment by the lower court. Countered by the Respondent citing the sole exhibited request for proceedings dated on 28.12.2023 - See Annexure LN-1. This request coming almost three years since filing of the appeal. While the appeal was dismissed on 26.10.2023 it took the Applicants two (2) months to move this Court, which delay has not been explained.

16. The Applicants' conduct in the appeal is lethargic; they sat back, leaving the progress of their appeal and subsequent motions to the Court and the Respondent. The lower court cannot be blamed for this apathy. 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.

17. The likelihood of prejudice being visited on the Respondent is real. It cannot be gainsaid that 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 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”.

18. The prayer to reinstate the dismissed appeal must fail, and with it the prayer seeking stay of execution. In sum, the entire motion dated 28.12.2023 is without merit, and is 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: Ms. Kalaine

For the Respondent: Mr. Malonza

C/A: Erick

