



REPUBLIC OF KENYA



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**In re JC & JKC (MInors) (Children's Appeal Case E038 of 2024)
[2024] KEHC 12955 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CHILDREN'S APPEAL CASE E038 OF 2024
RN NYAKUNDI, J
OCTOBER 25, 2024
IN THE MATTER OF JC & JKC (MINORS)**

BETWEEN

JCK APPLICANT

AND

EC RESPONDENT

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 4th June 2024 premised upon Section 1A, 3 & 3A, 63(e) of the *Civil Procedure Act*, Order 12 Rule 7, Order 51 Rule 1, Order 51 Rule 15 of the *Civil Procedure Rules* and Article 159(2)(d) of the *Constitution* of Kenya 2010 where the Applicant is seeking the following orders:
 - a. Spent.
 - b. That the orders issued by the Honourable Judge R. Nyakundi J. made on the 14th May 2024 dismissing the appeal filed herein as well as the Appellant's Application dated 20/3/2024 together with all other consequential orders be set aside and/or vacated.
 - c. That the Honourable Court be pleased to reinstate the Appeal herein for hearing and determination on merit.
 - d. That the Honourable Court be pleased to reinstate the Appellant/Applicant's application dated 20/3/2024 for hearing and determination.
 - e. That the costs of this application be provided for.
2. The Application is based on the grounds on the face of it among others:
 - a. That this suit was dismissed on 14/5/2024 for want of prosecution.



- b. That the non-appearance of the Appellant/Applicant's Counsel before the Honourable Court on the material day was not intentional as Counsel had logged in the virtual Court session. However, Counsel did not hear her case being called out.
 - c. That Counsel was logged in up to 4.40 PM via account number Mamwacha Advocate when the Honourable Court suddenly muted and left the virtual session and since it was almost late in the evening, Counsel had the impression that the court had completed its session since at that time there were only 3 advocates remaining on the platform.
 - d. That counsel immediately inquired from the Respondent's Counsel who was also logged in up to 4.40 PM to inquire if he had also heard the case being called out and it turned out that both counsels didn't hear the case being called out throughout the session as the Respondent's Counsel also left the platform.
 - e. That at that juncture the Applicant's counsel was thrown into an array of confusion since she could not tell whether the case was called out or not.
 - f. That the failure to prosecute the Appeal and the Application herein was not intentional.
 - g. That the mistake of Counsel should not be visited upon an innocent litigant i.e. the Appellant/Applicant herein.
 - h. That the Applicant is keen and very desirous of prosecuting the Appeal herein as well as the Application since he is aggrieved by the decision of the trial Magistrate.
 - i. That the Applicant prays for a chance to prosecute the suit herein and/or argue its case before this Honourable Court.
 - j. That no prejudice shall be suffered by the Respondent should the application herein be allowed.
 - k. That this application has been made without unreasonable and/or undue delay.
 - l. That it is in the interest of justice that this application be allowed.
 - m. That in the interest of justice, the said order ought to be set aside and both the Appeal and the Application dated 20/3/2024 herein, be reinstated for hearing and determination.
3. The Application is supported by the annexed affidavit dated 4th June 2024 sworn by Josphat Cheruiyot Kirui, the Appellant/Applicant herein where he avers as follows:
- a. That I am the Appellant/Applicant herein well versed with the facts of this case hence competent to swear this Affidavit.
 - b. That I have instructed the firm of Mercy Ogendi & Co. Advocates to represent me in this case.
 - c. That I am aware that this matter was coming up on 14.5.2024 for hearing of my application dated 20/3/2024 for stay pending appeal.
 - d. That since I have a lawyer on record with my full instructions to represent me, I am confident that she would make the necessary attendances as required.
 - e. That I am aware that my counsel on record usually updates me on what has transpired in each court session.



- f. That on that day in the evening, my advocate informed that she had logged in court but did not hear my case being called out and we agreed she follows up on the same to ascertain the status and make any necessary steps if need be.
- g. That upon making several follow ups with the registry, I was informed that my appeal and the application dated 20.3.2024 were dismissed for want of prosecution.
- h. That the delay in prosecuting the suit herein was not intentional but for the reason stated herein above.
- i. That I am desirous of pursuing the claim herein to conclusion.
- j. That I therefore humbly pray for a chance to be heard by the Honourable court.
- k. That I believe my appeal and Application dated 20/3/2024 raise triable issues with high chances of success.
- l. That for the stated reasons, I humbly pray to this Honourable court be pleased to set aside its orders of 14.5.2024 and reinstate the claim herein.
- m. That I stand to suffer injustice should the dismissal order not be set aside.
- n. That I am duly advised that mistake of counsel should not be visited upon me by denying me a chance to be heard.
- o. That this application has been made without unreasonable and/or undue delay since the discovery of the dismissal.
- p. That no prejudice shall be suffered by the Respondent should the application herein be allowed. The respondent will also have a chance to defend the claim.

Analysis and Determination

- 4. I have carefully considered the application, the averments in the Affidavit sworn in support and in rebuttal of the same. I have too considered the parties' written submissions. The main issue for determination is;

Whether the application is merited

- 5. 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.”

- 6. Order 12, Rule 7 of the CPR which was cited in the Motion relates to the setting aside/varying of judgments/orders made in suits. The applicable provisions on the setting aside of a dismissal order and the reinstatement of an appeal as in the present case, are Order 42, Rule 35 of the CPR as read together with Section 3A of the CPA, the latter 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.”



7. The Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated 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 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.”

8. The Supreme Court in *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, added 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. The events leading to the dismissal of this suit on 14/5/2024 for want of prosecution are as follows: that the non-appearance of the Appellant/Applicant's Counsel before the Honourable Court on the material day was not intentional as Counsel had logged in the virtual Court session and However, Counsel did not hear her case being called out; that Counsel was logged in up to 4.40 PM vide account number Mamwacha Advocate when the Honourable Court suddenly muted and left the virtual session and since it was almost late in the evening, Counsel had the impression that the court had completed its session since at that time there were only 3 advocates remaining on the platform; that counsel immediately inquired from the Respondent's Counsel who was also logged in up to 4.40 PM to inquire if he had also heard the case being called out and it turned out that both counsels didn't hear the case being called out throughout the session as the Respondent's Counsel also left the platform and that at that juncture the Applicant's counsel was thrown into an array of confusion since she could not tell whether the case was called out or not.

11. It is the litigant's duty to pursue or otherwise take proactive steps to ensure the timely prosecution of his or her claim.



12. The foregoing position was spelt out by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR when it held thus:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

13. Moreover, the Court of Appeal stated in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR that:

“While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in *Mwangi v Kariuki* [1999] LLR 2632 (CAK)) Shah, JA. ruled that “mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.” The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.”

14. In the present instance, upon perusal of the record, the court observed that the delay in prosecuting the suit herein was not intentional but for the reason stated herein above.

15. The reasons for this delay have been furnished beyond the bare assertion that the current advocates were the ones who discovered that the appeal had been dismissed. Hence the court is satisfied that reasonable or sufficient explanation has been given for the prolonged delay in prosecuting the appeal, to warrant setting aside the dismissal order and reinstatement of the appeal.

16. In closing, it is well to add that the court is duty bound to further the overriding objective. As stated in *Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR the court bears the duty imposed by Section 1B & 1A of the *Civil Procedure Act*, to further the overriding objective in Section 1 of the *Civil Procedure Act* which states:

“1A

- (1) the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;
- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
- (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

17. Consequently, the Application herein is merited and the same is allowed as prayed. The costs shall be in the cause. it is so ordered.

DATED AND SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF OCTOBER, 2024



In the Presence of
Ogendi for the Appellant

.....

R. NYAKUNDI

JUDGE

