Muya v Ndinguri (Civil Appeal 533 of 2014)
[2024] KEHC 12262 (KLR) (Civ) (9 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12262 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 533 OF 2014

CW MEOLI, J

OCTOBER 9, 2024

BETWEEN

BEATRICE WANJERI MUYA ..... APPLICANT

AND

PHYLLIS NJANJA NDINGURI ..... RESPONDENT

RULING

1. For determination is the motion dated 11.04.2024 by Beatrice Wanjeri Muya (hereinafter the Applicant) seeking inter alia that the Court be pleased to set aside its orders of 03.06.2022 dismissing the appeal herein for want of prosecution; and reinstate the appeal for hearing and determination on merit. The motion is expressed to be brought pursuant to Section 3A of the *Civil Procedure Act* (CPA), Order 17 Rule 2, Order 42 Rule 6, Order 51 Rule 1 & 15 of the *Civil Procedure Rules* (CPR), among others. On the grounds on the face of the motion as amplified in the supporting affidavit sworn by Applicant.

2. The gist of her affidavit is that by a ruling delivered in Nairobi Milimani CMCC No. 8448 of 2006 (hereafter lower Court suit) on 28.10.2014, the trial Court dismissed her application seeking to set aside judgment that had been entered in favour of Phyllis Njanja Ndiguri (hereafter the Respondent) on 12.09.2013. That being aggrieved with the said ruling she preferred the instant appeal while contemporaneously pursuing typed proceedings and applying to stay execution of the judgment before the lower Court. She goes on to depose that the motion for stay was allowed vide a ruling delivered on 03.12.2015, and the title deed in respect of the land parcel Laikipia Daiga Ethi Block 2/902 ordered held as security until. That despite several visits to the offices of erstwhile counsel for updates on the appeal were unfruitful, the specific advocate who was handling the matter at the erstwhile law firm on record informing her that she had since left employment in the said firm.

3. She swears further that in February 2024 she received a decree and letter from the Respondent requesting her to settle the decretal sum, yet she was under the impression that the stay of execution order was still in place pending determination of the appeal. That attempts to get an update from erstwhile counsel bore no fruit, prompting her to instruct counsel presently on record to establish the status of the matter. Following several his correspondence and registry visits, the counsel on record informed her on 05.04.2024 that the appeal had been dismissed for want of prosecution, her erstwhile counsel not having taken steps towards filing a record of appeal or prosecuting the appeal. That the notice to show cause why the appeal should not be dismissed for want of prosecution (NTSC) issued by the Court for 03.06.2022 was never brought to her attention by the Court.

4. Further, she attributes failure to prosecute the appeal and or attend Court on 03.06.2022 to mistake of erstwhile counsel on record and by the lower Court to timeously avail typed proceedings, all of which ought not to be visited on her. She further deposes that the dismissal was irregular and contrary to Section 79B of the CPA and Order 42 Rule 12 of the CPR therefore if the orders sought are not granted, she stands to suffer irreparably through being condemned unheard. In conclusion, she asserts that she is ready to abide by any conditions attached to reinstatement of the appeal, and that any prejudice that may be occasioned to the Respondent may be mitigated by an award of costs.

5. Despite directions being taken on disposal of the Applicant's motion by way of affidavit material, the Respondent offered no response to the Applicant's motion. Nevertheless, the Respondent's failure to file a response does not accord the Applicant free reign and, the Court will to proceed to consider the merits of the motion on the basis of the affidavit material in support thereof and the record before the Court.

6. The Applicant's motion invokes inter alia the provisions of Section 3A of the CPA as well as Order 17 Rule 2 of the CPR. Notably, the latter provision addresses "Notice to show cause why suit should not be dismissed." Plainly, Order 17 Rule 2 as cited has no application in this matter, given that before the Court was an appeal that was dismissed and not a suit. 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". Regarding the said provision, 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
>
> "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 fromthe *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].

7. At this juncture it would be appropriate to note that what is before the court is a skeleton file. That said, from the brief record, the Applicant's affidavit material and a further review of the Case Tracking System (CTS), the Court observes that the appeal herein was dismissed on 03.06.2022. By the instant motion, the Applicant seeks to set aside the dismissal order in a bid to inject life to the right to be heard, on his appeal. It is trite that the right and opportunity to be heard is a fundamental principle of law and Courts are enjoined to do substantive justice. Accordingly, by dint of Section 3A of the CPA this Court would in an appropriate case be justified in invoking its inherent jurisdiction so that the ends of justice are met.

8. It cannot be gainsaid 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 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."

9. The principles enunciated in *Shah v 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 03.06.2022 had the effect of conclusively determining the appeal by way of a dismissal order.

10. Undoubtedly, the appeal herein was filed in 2014. From the Applicant's own deposition, it appears that since filing the appeal, the same remained dormant until it was dismissed by Chepkwony. J on 03.06.2022. As stated, the record before the Court is limited but what can be gathered therefrom is that the instant appeal was dismissed on 03.06.2022 and it was not until 11.04.2024 that the Applicant moved this Court seeking to reinstate it. The Applicant's explanation on delay in prosecuting the appeal is three (3) pronged: - firstly, attempts to get an update from erstwhile counsel bore no fruit until a demand to settle the decretal sum prompted her to instruct counsel presently on record to establish the status of the matter; secondly, the notice issued by the Court requiring her to show cause on 03.06.2022 was never brought to her attention by the Court: and thirdly delay by the lower Court to timeously avail typed proceedings. Therefore, the failure to prosecute the appeal and or attend Court on 03.06.2022 was occasioned by erstwhile counsel which mistake ought not to be visited upon her.

11. On the first issue, the Applicant's affidavit is deficient of material evincing her attempts to get an update from erstwhile counsel and or Messrs. Kamunye Gichigi & Co. Advocates. On the second issue, it has not been disputed that Messrs. Kamunye Gichigi & Co. Advocates was at all material times up until 11.04.2024, counsel on record for the Applicant. Therefore, any NTSC in respect of the appeal were invariably served upon counsel on record at the time, with no obligation upon the Court or Respondent to personally serve the same upon the Applicant. (See Order 9 of the CPR). Further, the Applicant has either by design or default failed to evince any affidavit material from erstwhile counsel, demonstrative of the fact that there was no service of NTSC leading to the dismissal of the

appeal on 03.06.2022. Finally, as to alleged attempts to obtain the lower court proceedings, the earliest letter requesting for typed proceedings exhibited before the Court was on 28.11.2014, resting with the request dated 06.02.2015 (See Anexure BWM-6). There is no demonstration of any efforts made between the latter date and 03.06.2022 when the appeal was eventually dismissed by Chepkwony. J.

12. The period of delay in prosecuting the appeal and between dismissal of the appeal and filing the instant motion appears inordinate, and without a cogent explanation, beyond asserted mistake of counsel. It is trite that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the Court's discretion only. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR succinctly addressed the argument of delay as follows....."The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....".

13. Further the sound legal principle that the mistake of an advocate should not be visited upon the client, has no blanket application. An action before a Court of law ultimately belongs to the litigant and not the advocate. Thus, it is the litigant's duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim. This position was fortified 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."

See also *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR

14. Moreover, the Court of Appeal in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR held 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."

15. As correctly observed in *Shah v Mbogo* (*supra*), this Court's discretion ".....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.". At a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute cases at leisure. It is ten years since the appeal was filed, and the Applicant cannot be heard to heap blame on her erstwhile counsel when she herself literally went into slumber upon obtaining stay orders, only to be jolted years later when the decree holder came knocking for his dues. Such cynical disregard for timeliness must be frowned upon.

16. 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. Moreover, at the risk of repetition cases belong to parties, and they too are ultimately responsible to ensure that their cases are progressed in a timely fashion. It is equally not lost on the Court that the right of the Applicant to be heard on the merits of her appeal is a constitutional right that ought to be given effect as much as possible. Corollary to that, however, is the Respondent's right to have the appeal to which they have been dragged determined expeditiously. See:- *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR.

17. The Applicant's reliance on Section 79B of the CPA and Order 42 Rule 12 of the CPR to argue that the dismissal was irregular does not aid her cause. This Court has held time without number that a Court confronted with dismissal of an appeal, prior to directions thereon, is not hamstrung. And where circumstances demand, may invoke its inherent power to give meaning to the overriding objective and principles. This notwithstanding, the absence of an express provision for the dismissal of an appeal which has not been set down for directions. Therefore, an indolent appellant cannot be allowed to use the provisions of Section 79B of the CPA and Order 42 of the CPR, as both a sword and a shield. Considering all the foregoing, the Court is of the firm view that the justice of the matter lies in dismissing the Applicant's motion dated April 11, 2024 with no order as to costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Opole

For the Respondent: N/A

C/A: Erick