Ndolo & another v Levi (Suing as the Administrator and Legal Representative of the Estate of Gideon Muo Muoso) & another (Civil Appeal 368 of 2019) [2024] KEHC 12610 (KLR) (Civil) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 368 OF 2019

CW MEOLI, J

OCTOBER 17, 2024

BETWEEN

JOEL NDOLO ..... 1ST APPLICANT

EKATI HAULERS LIMITED ..... 2ND APPLICANT

AND

BEATRICE KAMENE LEVI (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF GIDEON MUO MUOSO) ..... 1ST RESPONDENT

NATIONAL INDUSTRIAL CREDIT BANK LIMITED ..... 2ND RESPONDENT

RULING

1. For determination is the motion dated 08.03.2023 filed by Joel Ndolo and Ekati Haulers Ltd (hereafter the 1st & 2nd Applicant/Applicants) seeking *inter alia* that the Court be pleased to set aside and or vary its order made on 20.02.2023 dismissing the appeal; and that the Court be pleased to reinstate this appeal for hearing and determination on merit. The motion is expressed to be brought pursuant Section 3A & 63(e) of the *Civil Procedure Act* (CPA) and Order 51 Rule 1, 3 & 4 of the *Civil Procedure Rules* (CPR), among others. On the grounds on the face of the motion amplified in the supporting affidavit sworn by Jenipher Catherine Ombonya, counsel on record for the Applicants.

2. The gist of her affidavit is that the Applicants had fully complied with the Court's order issued on 07.10.2022 granting them forty-five (45) days to file and serve their supplementary record of appeal or in default the appeal would stand dismissed. That on 03.11.2022, when the appeal came up for mention before the Deputy Registrar (DR), the Applicants had filed and served their supplementary record of appeal upon counsel for Beatrice Kamene Levi (hereafter the 1st Respondent), the DR then

indicating that the registry would communicate the next Court date. She goes on to depose that on 22.11.2022, she received a notice pursuant to Order 42 Rule 13 of the *CPR*, that the appeal would be mentioned on 13.12.2022 for directions but on the said date the Court did not sit. That the matter was thereafter assigned another mention date on 30.01.2023, when once again the Court did not sit.

3. That subsequently on 20.02.2023 she wrote to the DR seeking a further mention date but on the very same date received a notification from Court that the appeal had been dismissed. Counsel asserts that she was not aware that the matter was to come up on the latter date and she believes that no such notice was issued by the Court in light of the Respondent's absence as well, on the said date. She concludes that the appeal ought to be reinstated for hearing given that the Applicants had duly complied with this Court's order made on 07.10.2022 prior to dismissal of the appeal.

4. The 1st Respondent opposes the motion by way of a replying affidavit dated 25.04.2024. She attacks the motion by asserting that notwithstanding the Applicants right of appeal, it is expected of the Applicant to progress expedite the appeal expeditiously and not be indolent in the manner giving rise to dates issued by the court. That the notice issued by the Court on 13.12.2022, clearly stipulated that parties were to log in at 10.00am in order to be allocated other dates, whereas counsel for the Applicants admits that she did not log in which shows the Applicant's lack of interest in prosecuting the appeal. She asserts that the Case Tracking System (CTS) automatically notifies parties via text message when a matter is allocated a new date, a fact equally acknowledged by counsel for the Applicants. Therefore, it goes without saying that the Applicants must have been notified of the date of 20.02.2023 and chose not to attend Court. Meanwhile, the 1st Respondent was not in Court because her erstwhile counsel representing her previously had since passed away at the time.

5. The deponent further swore that further, the CTS equally has a unique calendar that informs advocates of their matters, which goes to assist in situations of inadvertent failure to diarize dates. And the Applicants have failed to elaborate why they never utilized the calendar to apprise themselves of the latter date. She takes issue with Applicant's exhibited letter, as being suspect, on account its being dated on the same day the appeal was dismissed. To the deponent, the instant motion is a sham and an attempt to scuttle her efforts to enjoy the fruits of successful litigation. In summation, she deposes that equity aids the vigilant and not the indolent, hence the motion is a non-starter and ought to be dismissed with costs in order to save judicial time.

6. The motion was canvassed by way of written submissions. On the part of the Applicants, counsel reiterated her affidavit evidence and collated her arguments in support of the application as follows: - that from 07.10.2022 when the Notice to Show Cause (NTSC) came up until 20.02.2023 when the appeal was eventually dismissed, the Applicants did not occasion any delays in the matter; that the Applicants had no notice that the appeal was coming up on 20.02.2023 either from the Court or the 1st Respondent; that there was no second NTSC served upon the Applicants before the appeal was dismissed on 20.02.2023; that the Applicants are keen on prosecuting the appeal and are ready to dispose of the same through written submissions as may be directed and or permitted by the Court; and that the Applicants deposited security for the due performance of the decree so that the 1st Respondent's interests are catered for. In conclusion, counsel relied on the of-cited decision in *Patel v EA Cargo Handling Services* (1974) EA as quoted in *Nyamu v Mugambi* (Civil Case E005 of 2021) [2022] KEHC 405 (KLR) in urging the Court to allow the motion.

7. On behalf of the 1st Respondent, at the outset, counsel argued that the instant motion can only be construed as malicious and meant to occasion delay. Equally reiterating the 1st Respondent's affidavit material, counsel went on to rely on the decision in *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* [2014] eKLR to submit that it is over a year since the appeal was dismissed and the pendency

of the Applicants motion is demonstrative of the Applicant's indolence at the expense of the 1st Respondent. It was further argued that with the advent of the CTS, there is no reasonable explanation advanced by counsel for the Applicants, on failure to attend Court on 20.02.2023. That in totality of the foregoing, the Applicants have not approached the Court with clean hands and their indolence ought not be visited on the 1st Respondent who successfully litigated the matter before the trial Court. Counsel concluded by arguing that litigation must come to an end and therefore implored upon this Court to dismiss the Applicants motion with costs.

8. National Industrial Bank Limited (hereafter the 2nd Respondent) did not participate in the instant proceedings.

9. The Court has considered the respective material and submissions canvassed in respect of the Applicants motion. Alongside Section 63(e) of the *CPA*, the Applicants motion invokes *inter alia* the provisions of Section 3A of the *CPA*. The former provision providing that

> " In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed— (a)....., (b)....., (c)....., (d).....,(e) make such other interlocutory orders as may appear to the court to be just and convenient."

As to the latter provision, Section 3A 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 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."

10. Here, it is undisputed that the appeal was on 20.02.2023 affirmed as dismissed pursuant to the order of 7.10.2022 in circumstances to be addressed later in this ruling. Nevertheless, it is trite that the right and

opportunity to be heard is fundamental and Courts are enjoined to do substantive justice, including, by not condemning a party unheard. In doing so, this Court is empowered where necessary to invoke its inherent jurisdiction under Section 3A of the *CPA*, so that the ends of justice are met. 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.

11. In the case of *Shah –vs- Mbogo and 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."

12. 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, because the orders issued by this Court on 20.02.2023 effectively conclusively determining the appeal by way of a dismissal order.

13. A thorough review of the record leading up to the instant motion reveals that the appeal was filed on 28.06.2019. And since its filing, there appears to have been no activity in the matter up until it came up for NTSC on 07.10.2022. Then, upon the Court hearing representation by respective counsel appearing for the parties, issued a self-executing order in the following terms: -

> " Supplementary record of appeal be filed/served and matter listed for directions within 45 days failing which the appeal will stand dismissed for want of prosecution" (*sic*)

14. Thereafter, the matter was fixed by the registry on its own motion for mention before the DR on 03.11.2022. On the said date, counsel appearing for the Applicants, represented to the DR that she had since complied with earlier orders by filing the supplementary record of appeal and thus sought that the matter be placed before a Judge for directions while counsel appearing for 1st Respondent sought that he be served with the said supplementary record of appeal. The DR upon considering the representations directed as follows: -

> " 1. ROA to be served by close of business today
>
> 2. Matter to be placed before a Judge for directions which shall be communicated to the parties by the registry" (*sic*)

15. The record further reveals that the registry on its own motion proceeded to fix the matter for directions on 13.12.2022. However, on the latter date, the matter was further re-scheduled by the registry for directions on 30.01.2023, in the presence of a representative appearing on behalf of the Applicants and in the absence of the Respondent. Later, on 30.01.2023, the registry again re-scheduled the appeal for directions on 20.02.2023. On the latter date when the matter came up for directions, there was no appearance by either of the parties, and the Court proceeded to affirm the dismissal of the appeal based on its earlier orders issued on 07.10.2022.

16. Evidently, since filing the appeal, there was no attempt by the Applicants to prosecute their appeal hence the issuance of the NTSC and proceedings on 07.10.2022. The Court in its discretion directed the Applicants to file their supplementary record of appeal within forty-five (45) days (which period lapsed on or before 21.11.2022) in default of which the appeal would automatically stand dismissed. On a review of the CTS and annexure marked JCO1 there appears to have been compliance with this Court's orders issued on 07.10.2022 by way of filing the supplementary record of appeal as at 02.11.2022 and service upon the 1st Respondent's counsel on 03.11.2022 before the 21.11.2022 when the window allowed would have closed.

17. From the annexures marked JCO2, JCO3 & JCO5 - (being causelists and notices from the Court), despite the court's initiative to fix the matter for directions in compliance with the DR's orders on 03.11.2022, directions could not be taken either on 13.12.2022 or 30.01.2023 as the Court was not sitting. Obviously, the Applicants were not to blame for the failure by the court to sit but would have been appraised of the dates by following up if they failed, as stated by the 1st Respondent, to log into the link provided for fixing new dates as in accordance with the court notices in question. On 30.01.2023 the Applicants were absent, and the registry proceeded to fix the appeal for directions on 20.02.2023. They were absent on the latter date, when the appeal was confirmed as dismissed, 45 days having long lapsed since 7.10.2022.

18. The Applicants through counsel have contended that they were unaware of the date of 20.02.2023 because no notice was issued by the Court. The Applicants could have, but did not follow up to find out what dates had been given on the last date when the court did not sit, especially having failed to use the link provided for fresh date taking, as advised in the court's daily cause list notice. The 1st Respondent has correctly pointed out that the Applicants counsel ought to have taken advantage of the CTS calendar and that the system automatically notifies parties via text messages when a new date is scheduled. Which means that the Applicants must have received a text message notification concerning the date of 20.02.2023, and for whatever reason did not to attend the court. Counsel was silent on this question, choosing to deflect the blame to the court. However, among the Applicant's annexures is a document marked CO7 being the text message notification from the court indicating that the appeal had been dismissed on 20.02.2023, which issued on the same date. The Applicant appears selective when she disputes other similar and critical text messages from the CTS concerning notice related to 20.02.2023.

19. It is common knowledge that at the onset of the Covid-19 Pandemic, the Judiciary leadership promptly transitioned Court business onto the CTS system, that equally incorporates text messaging services to parties. Thus, in all probability the parties herein received notifications via text message on the CTS such as the admitted annexure marked JCO7 regarding the scheduled date of 20.03.2023. Either that, or if diligent enough in view of earlier orders, the Applicant ought to have followed up on the fate of the appeal between 30.01.2023 and 20.02.2023 when the appeal was dismissed.

20. The failure by the Applicant to follow up, or ignoring the text message notifications of the next date must be viewed in context. This appeal is five years old, and prior to the order of 7.10.2022 had lain dormant only for the court to arouse the Applicant from slumber through the NTSC. In view of the orders of 7.10.2023, it behoved the Applicant to follow up the matter with even greater keenness and diligence. The court may not have sat on two scheduled dates, but that did not mean the Applicant could not log into the system to take fresh dates as per the court's notice, or failing, to follow up on the next scheduled date.

21. The delay between dismissal of the appeal and filing the instant motion, may not be lengthy, but the total delay in the appeal is more than inordinate and the grounds now advanced by the Applicant sound more like excuses, rather than reasons. As observed in *Shah –vs- Mbogo* (*supra*), the 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."

22. Here, the Applicants despite complying partially with the order of 7.10.2022 (I say so because they merely filed but had not served the supplementary record of appeal by 3.11.2022) failed to act diligently to ensure full compliance with other limbs of the order concerning taking of directions. They now blame the court for not serving them with the notice for 20.02.2023. They could have but did not attend date fixing on 30.01.2023 as notified in the day's cause list, or subsequently pay attention to the text message notification sent out by the CTS or inquire from the registry of the next scheduled date. Yet, they knew that their appeal was at risk of automatic dismissal.

23. I agree with the 1st Respondent that the Applicants have been indolent in progressing the appeal, and in the circumstances of this case, find it difficult to justify delaying further the 1st Respondent's entitlement to enjoy the fruits of her judgment. This appeal emanated from a fatal accident claim filed in the lower court in 2014 in respect of a road accident which occurred in 2013. Having filed the appeal in 2019, the Applicants merely sat back, and taking no steps whatsoever in progressing the appeal for over three years. 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*.

24. Under the latter provisions, a lethargic party must contend with the consequences, sooner or later through dismissal of his cause, as courts are ever more vigilant to ensure that no party litigates at leisure. While the right of the Applicants to be heard on the merits of their appeal is constitutionally guaranteed, the right is not absolute; the 1st Respondent is also entitled to a speedy resolution of the appeal to which she was dragged, almost five years ago. The maxim that justice delayed is justice denied still rings true.

25. Reviewing all relevant matters, the court is persuaded that the justice of the matter lies in rejecting the Applicant's motion dated 8.03.2023, which is hereby with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 17TH DAY OF OCTOBER 2024.

C. MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Wachira

For the 1st Respondent: Ms. Mugambi h/b for Mr. Keya

C/A: Erick