



**Mutura v Mariri (Civil Appeal 535 of 2016)
[2023] KEHC 1100 (KLR) (Civ) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1100 (KLR)

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

CIVIL

CIVIL APPEAL 535 OF 2016

CW MEOLI, J

FEBRUARY 16, 2023

BETWEEN

LEONARD MUTURA APPELLANT

AND

PETER GATHEYA MARIRI RESPONDENT

RULING

1. The motion dated May 5, 2022 by Peter Gathenya Mariri (hereafter the Applicant) is seeking that the appeal herein be dismissed with costs on the higher scale for want of prosecution; and that the decretal sum of Kshs 1,271,053.30/- held in an Escrow Account No 1004997xxxx in NCBA Bank City Centre Branch, together with all accrued interest from September 27, 2017 be released to the Applicant unconditionally. The motion is expressed to be brought under Section 1, 1A, 1B, 2, 3 & 3A of the *Civil Procedure Act* (CPA), Order 42 Rule 35 and Order 51 of the *Civil Procedure Rules* (CPR) *inter alia* and is premised on the grounds on the face thereof as amplified in the affidavit of Applicant.
2. The gist of his affidavit is that the appeal herein was filed by Leonard Mutura (hereafter the Respondent) on August 12, 2016 and had not been prosecuted by July 2018, prompting the Applicant to move the court vide a motion dated July 2, 2018 seeking to have it dismissed for want of prosecution. That the motion was disallowed by a ruling delivered on May 24, 2019 but the court ordered the Respondent to file his record of appeal within forty five (45) days, which was done. However, thereafter the Respondent went into slumber and failed to prosecute the appeal. That the cause of action herein arose in 2010 and it has been over six (6) years since the appeal was filed. That the Respondent ought not to be allowed to continue stalling the matter, and that it is meet, just, and in the interest of justice that the appeal herein be dismissed with costs.
3. The motion is opposed by way of a replying affidavit sworn by Kelvin Ngure dated September 8, 2022. He describes himself as the deputy claims manager at Directline Assurance Company Limited,



- at whose instance the instant appeal was preferred ; that he is conversant with the facts, competent and duly authorized to depose. He asserts that by dint of the insurer's right of subrogation it is entitled to defend and or prosecute any claim in the insured's name. He views the motion as misconceived and premised on misapprehension of the law and facts.
4. In setting out the history of the matter, he confirms that after the appeal was filed on August 12, 2016 the motion seeking stay of execution pending determination of the appeal was filed , following which the court allowed stay of execution on condition that the decretal sum of Kshs 1,271,053/- be deposited in a joint interest earning account; that thereafter a record of appeal was filed. He states that various requests for a hearing date in respect of the appeal never elicited any response from court; that delay in prosecuting the appeal was further perpetuated by the previous law firm on record for the Respondent ; that the Respondent is still interested in prosecuting the appeal and ought to be accorded the final chance to do so. He asserts that the delay herein is not unreasonable or inordinate or prejudicial to the Applicant and can be reasonably compensated by an award of costs.
 5. The deponent views the motion as premature directions on the appeal not having been taken and hence only the Deputy Registrar could act by listing the appeal for dismissal under Order 42 Rule 35(2) of the *Civil Procedure Rules*. In conclusion he states that the court has unfettered discretion to ensure the just and expeditious disposal of matters; that the Respondent has a viable appeal and stands to suffer prejudice if the appeal is dismissed.
 6. The motion was canvassed by way of written submissions. For the Applicant, counsel reiterated the affidavit material and underscored the fact that it is now more than three (3) years since the Respondent took any steps to prosecute the appeal and has failed to satisfactorily explain the delay in prosecuting the appeal. It was further argued that the court ought to frown on the Respondent's blatant abuse of the court process which has occasioned a miscarriage of justice upon the Applicant. Counsel particularly took issue with the decisions relied on by the Respondent by submitting that they are irrelevant to the instant matter. In conclusion the court was urged not to reward the Respondent's lethargy but to dismiss the appeal for want of prosecution with costs and order release of the funds held in escrow account.
 7. On the part of the Respondent, it was argued that the Applicant has not demonstrated the prejudice that he is likely to suffer if the Respondent is given more time to prosecute his appeal and that the Respondent will lose his right of appeal if the same is dismissed. Counsel asserted that the appeal is meritorious and that the court ought to strike a balance between the competing rights of the rival parties. While placing reliance on several decisions including *Njai Stephen v Christine Khatiala Andika* [2019] eKLR, *Jurgne Paul Flach v Jane Akoth Flach*, Nakuru Civil Appeal No 119 of 2012, and *Allan Otiemo Osula v Gurdev Engineering & Construction Ltd* [2015] eKLR counsel for the Respondent submitted that every person is entitled to a fair trial and that because directions have not been issued the appeal cannot be dismissed for want of prosecution.
 8. That in view of the foregoing the hardship and prejudice likely to be occasioned to the Respondent if the appeal is dismissed is greater than the hardship that would be occasioned to the Applicant, as the Respondent's appeal would not have been determined on the merits.
 9. The court has considered the material canvassed in the present motion. The Applicant has primarily invoked Order 42 Rule 35 which specifically provides for dismissal of an appeal for want of prosecution and Section 3A of the *Civil Procedure Act*.



10. Order 42 Rule 35 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.”

11. On the other hand, section 3A of the *Civil Procedure Act* provides that;-

“Nothing in this Act shall limit or otherwise affect 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.”

12. As to the nature of the inherent jurisdiction of the court under the above section, the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR rendered itself as follows;-

“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.”

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.”

13. For all intents and purposes, section 3A of the *Civil Procedure Act* echoes the injunction in Article 159(2) of the *Constitution* which provides that;-

“

- “(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
- (a) justice shall be done to all, irrespective of status;



- (b) justice shall not be delayed;
- (c) ...
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.”

See also the overriding objective in Section 1A and 1B of the [Civil Procedure Act](#).

14. The courts are commanded to dispense substantive justice expeditiously without being encumbered by procedural technicalities. The Court of Appeal recently stated in [Pereira v Nation Media Group & 2 Others](#) (Civil Appeal 122 of 2016) [2021] KECA 135 (KLR) regarding Article 159 (2) (d) that;-

“Case law on the invocation and application of the above principle now form a well-trodden path. We take it from the cases of *Jaldesa Tuke Dabelo vs IEBC & Another* [2015]eKLR; *Raila Odinga and 5 Others vs IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others* [2014]eKLR; *Patricia Cherotich Sawe vs IEBC & 4 Others* [2015]eKLR. The principles enunciated therein and which we find prudent to highlight are as follows: Rules of procedure are handmaidens of justice; a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case; the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice also that Article 159 (2) (d) of the Constitution is not a panacea for all procedural ills.”

15. The court proceeded to discuss the import of the overriding objective in Section 1A and 1B of the [Civil Procedure Act](#) by stating that;

“Principles that guide the Court in the application of the above overriding objective principle also now form a well-trodden path. We take it from the case of *Hunter Trading Company Ltd vs. Elf Oil Kenya Limited*, Civil Application No NAI 6 of 2010, stated *inter alia* as follows:

“It seems to us that in the exercise of our powers under the “02 principle” what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “02” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “02 principle” could easily become an unruly horse.”

Further in *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs Orient Commercial Bank Limited* Civil Appeal No Nai 302 of 2008 (UR No 199 of 2008) (unreported) the Court reiterated that:

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists



litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

16. Section 1B of the [Civil Procedure Act](#) of also invoked in the motion states that; -

“(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”

17. The history of this matter is well documented. It is undisputed that the Respondent filed the present appeal on August 12, 2016 and eleven months later the Respondent moved the court vide a motion dated July 31, 2017 seeking stay of execution pending hearing and determination of the appeal. The said motion was compromised on September 18, 2017 and by consent conditional stay was granted. The Respondent thereafter took no steps to prosecute the appeal and the Applicant moved the court by a motion dated July 2, 2018 seeking to dismiss the appeal for want of prosecution.

18. The foregoing motion was heard and determined in a ruling delivered on May 24, 2019 by which the court inter alia ordered that the Respondent to file its record of appeal within forty five (45) days. The Respondent complied by filing the record of appeal on June 11, 2019 and thereafter took no further action to progress the appeal hence the present motion before the court

19. It beyond disputing that Order 42 Rule 35 (1) of the [Civil Procedure Rules](#) is the only express provision permitting a respondent to seek the dismissal of an appeal for want of prosecution. And the provision only applies after directions have been given under Rule 13. In this case, and from the record of proceedings, Rule 13 has not yet been applied, the Respondent not having moved the court as required, at the time of the filing of the instant application.

20. As held in [Haron E Ongechi Nyaberi vs British American Insurance Co Ltd](#) HCCA No 110 of 2001, the duty of moving the court in terms of Order 42 Rule 11 & 13 of the [Civil Procedure Rules](#) lies with the appellant. What option then is available to a respondent when the appellant goes into slumber after filing the appeal? Is the respondent without recourse? In my own view, such a party is not without options and may prod the Deputy Registrar to move under 42 rule 35(2) of the [Civil Procedure Rules](#). Equally, such a party is not barred from seeking the court’s intervention under sections 1A, 1B & 3A of the [Civil Procedure Act](#).



21. It was stated in *Osbo Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR that 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.”
22. A court confronted with an application such as the present one is not hamstrung, and where circumstances demand, may invoke its inherent power to give meaning to the overriding objective principle, notwithstanding the absence of an express provision for the dismissal of an appeal which has not been set down for directions. An indolent appellant cannot be allowed to use the provisions of Order 42 Rule 35 (1) both as a sword and shield.
23. The court has considered the explanations proffered by the Respondent. However, a perusal of the record of proceedings and affidavit material reveals that the Respondent has not taken any steps to prosecute the appeal after the determination of the Applicant’s dismissal application dated July 6, 2018. A diligent party would thereafter have taken cue and moved with alacrity to prosecute his appeal.
24. Even if believed, it is not enough or useful for an appellant to write letters to the court seeking a hearing date in respect of an appeal in which no directions have issued. It seems to me that the Respondent reverted to slumber after the dismissal motion passed. I say so because the letters allegedly written to the court by the Respondent have not been exhibited before this court and no such letters are to be found on the record. Thus, the repeated assertion that the Respondent was and is still interested in prosecuting the appeal rings hollow.
25. There can be no justification in the circumstances for the inordinate delay in prosecuting the appeal. Evidently, the prolonged pendency of the appeal is prejudicial to the Applicant who continues to be denied the fruits of his judgment. The Respondents, rather than admit their own tardiness have chosen the easier road of heaping blame on previous counsel and the court as well as raising technicalities to deflect their imminent karma. Litigation must come to an end. In the interest of justice, the delay in this case must be ended by allowing the Applicant’s motion as prayed, with costs on the usual scale. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2023

C.MEOLI

JUDGE

In the presence of:

For the Respondent/ Applicant: Mr. Gaturu



For the Appellant/Respondent: Ms. Chichi

C/A: Carol

