Njenga & 2 others v Prime Bank Limited (Civil Appeal 138 of 2020)
[2023] KEHC 1132 (KLR) (Civ) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 138 OF 2020

CW MEOLI, J

FEBRUARY 16, 2023

BETWEEN

JOHN KARANJA NJENGA ..... 1ST APPLICANT

PAUL BORO NJENGA ..... 2ND APPLICANT

PETER NJENGA KARINGE T/A PETMARK DISTRIBUTORS .... 3RD APPLICANT

AND

PRIME BANK LIMITED ..... RESPONDENT

RULING

1. For determination is the motion dated 16.06.2022 by John Karanja Njenga, Paul Boro Njenga and Peter Njenga Karinge t/a Petmark Distributors (hereafter 1st, 2nd & 3rd Applicant/Applicants) seeking inter alia that the order made on 08.06.2022 dismissing the motion dated 01.10.2021 be set aside; and that the said motion be reinstated and set down for hearing. The motion is expressed to be brought under Section 1B & 3A of the *Civil Procedure Act* (CPA), Order 12 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* (CPR), primarily and is based on the grounds thereon as amplified in the supporting affidavit sworn by Alex Lekiraya, counsel having conduct of the matter on behalf of the Applicants.

2. To the effect that the instant matter was scheduled to come up for mention for directions on 08.06.2022 and not for hearing. That due to technical hitches he was unable to join the virtual proceedings and when regained stable connectivity, the matter had already been called out and the motion dated 01.10.2021 dismissed. And the reason given was that the counsel for the Applicants had failed to appear on three prior occasions. That the Applicants' counsel had never missed a court session save for the

date of dismissal and the Applicants ought not to be punished. In conclusion he deposes that the Respondent will not suffer any loss or prejudice if the motion is allowed.

3. The Respondent opposes the motion by way of a replying affidavit deposed by George Mathui, who describes himself as the Legal Manager of the Respondent Company thus duly authorized and competent to swear the affidavit in response. He deposes that the motion is misleading, devoid of merit and ought to be dismissed. On grounds that the depositions by the Applicants' counsel are contrived, utterly misleading and wholly untrue; that the Applicants counsel purposely failed, neglected and or refused to log into the court's designated online platform despite being aware that the matter was coming up; and that any efforts made towards progression of the instant matter were solely made by the Respondent's counsel and not the Applicants.

4. The deponent views the explanation proffered by counsel on his failure to attend court on 08.06.2022 as an attempt by counsel to absolve himself and the Applicants from the dismissal of the matter. He goes on to depose that instant motion lacks candor and that there is inexcusable delay on the part of the Applicants to prosecute the dismissed motion, contrary to the overriding objectives and amounts to an abuse of the court process. He therefore urged the court to dismiss the Applicants' motion.

5. The motion was canvassed by way of written submissions. Counsel for the Applicants reiterated the affidavit material in support of the motion. He relied on the provisions of Article 50 & 159 of *the Constitution* of Kenya 2010 and Section 3A of the *Civil Procedure Act* to submit that the court has inherent power to make such orders as maybe necessary for the ends of justice to be met. Additionally, counsel called to aid the decisions in *Mbogo v Shah* [1968] EA 93, *John Nahashon Mwangi v Kenya Finance Bank Limited (in liquidation)* [2015] eKLR, *Ivita v Kyumbu* [1975] eKLR and *Joshua Chelelgo Kulei v Republic & 9 Others* [2014] eKLR in support of his submission that the Applicants have not in any way deliberately sought to obstruct or delay the course of justice, hence and the court should exercise its discretion to avoid injustice or any hardship resulting from inadvertence or excusable mistake or error of the counsel.

6. He further submitted that no prejudice will be suffered by the Respondent as the motion has been brought expeditiously. Counsel relied on the oft-cited dicta in *Phillip Keipto Chemwolo & Another v Augustine Kubende* [1986] eKLR that a party should not suffer the penalty of not having its case heard on merit due to an inadvertent mistake by his own counsel.

7. On behalf of the Respondent, counsel anchored his submissions on the provisions of Order 12 Rule 7 of the *Civil Procedure*, the decisions in *Shah v Mbogo* (*supra*) as cited in John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR, *Wachira Karani v Bildad Wachira* [2016] eKLR and *Caroline Mwirigi v African Wildlife Foundation* [2021] eKLR on the applicable threshold. Addressing the explanation proffered by the Applicants' counsel, he pointed out that the Applicants' conduct throughout these proceedings evinces laxity and their non-attendance was not was inexcusable. He cited the decision in *Sophia Chemasigen Kachuwai & Another v Union of Kenya Civil Servant & 2 Others* [2021] eKLR.

8. And citing Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR counsel asserted that the delay of eight days in filing the instant motion was inordinate and inexcusable. He asserted that reinstatement of the dismissed motion would severely prejudice the Respondent by denying him the fruits of successful litigation. The court was urged to dismiss the motion with costs.

9. The Court has considered the rival affidavit material and submissions in respect of the motion as well as the record herein. The court is called upon to determine whether it ought to exercise its discretion by setting aside orders issued on 08.06.2022. The Applicants' motion invoked inter alia the provisions

of Sections 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the Civil Procedure Rules. 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."

10. As to what constitutes inherent jurisdiction of the court, 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 v West Link Mbo Limited [2013], eKLR*, Musinga, JA stated inter alia, that, by "inherent power" it means that
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> "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."
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> The Supreme Court went further in Board of Governors, *Moi High School Kabarak and another v Malolm Bell [2013] eKLR*, to add the following:-
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> "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)

11. Meanwhile, Order 12 Rule 7 of the *Civil Procedure Rules* provides that;

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

12. 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 conferred upon the court to set aside its orders was spelt out in the case of *Shah v Mbogo and Another* [1967] EA 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."

13. The undisputed events leading to the order issued on 08.06.2022 are as follows. The Applicants lodged this appeal on 12.03.2020. They thereafter moved the court some nineteen months later vide a motion under certificate of urgency dated 01.10.2021 seeking stay of execution pending hearing and determination of the instant appeal. The court set down the motion for *inter partes* hearing on 15.11.2021. The Applicants and or their counsel were absent when the motion came up on that date

and the court graciously rescheduled the matter for mention on 14.12.2021. Further examination of reveals that the court was not sitting on the latter date. However the Respondent on three (3) separation occasions on 14.12.2021, 14.02.2022 and 28.04.2022 took the initiative by fixing mention dates in respect of the matter.

14. Eventually, the matter was listed for mention on 08.06.2022. On that date, the Applicants and their counsel were equally absent and upon hearing counsel for the Respondent, the court dismissed the Applicants motion dated 01.10.2021 on account of the foregoing chronology of events. The Applicants counsel later joined the virtual platform and this court read out to him its earlier orders. This prompted the instant motion.

15. The delay in prosecuting the said motion during the period is unexplained even though the court takes judicial notice of the fact that the appeal was filed just before the onset of the Covid-19 pandemic in the country, slowing down court activities but which was mitigated by introduction of online filing and migration to virtual court proceedings. However, the Applicants and or their counsel failed to appear when the dismissed motion initially came up for inter partes hearing on 15.11.2021 and have not bothered to explain their absence then or on the three subsequent occasions on the 14.12.2021, 14.02.2022 and 28.04.2022, when the Respondent took the initiative of progressing matter by fixing mention dates in the absence of the Applicants counsel. While it is not apparent whether the mention dates were served upon the Applicants' counsel, the burden was always on the Applicants and or their counsel to keep up with the status of the appeal and their motion dated 01.10.2021.

16. Concerning the proceedings before this court on 08.06.2022, counsel for the Applicants emphasizes the fact that the matter was scheduled for mention for directions and not for hearing, hence taking issue with the dismissal. That is of no consequence in this instance where the motion had lain dormant for almost six months and was being progressed by the Respondent as the Applicants seemingly slumbered. Although the Respondent ought properly to have fixed the pending motion for hearing rather than mention, a party who files an application and fails to prosecute it for months cannot escape the consequences of their indolence by faulting the adverse party who attempted to take some action thereon. And certainly, the court cannot be hamstrung by such indolent party.

17. It seems to me that the Applicants' conduct since filing the appeal and subsequently filing the motion dated 01.10.2021 has been lethargic and indolent. Nevertheless, regarding the proceedings of 8.06.2022, the explanation given by the Applicants' counsel for failing to attend court appears plausible given his subsequent appearance, albeit late, on the virtual platform. Besides, the right to a hearing is a fundamental right that ought not to be taken away except in proper and justifiable cases.

18. In emphasizing the right, (to be heard on appeal) the Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone* (2006) Limited (2020) eKLR stated that:

> "Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of *Richard Ncharpi Leiyagu v IEBC & 2 Others (supra); Mbaki & Others v Macharia & Another [2005] 2EA 206*; and the Tanzanian case of Abbas Sherally & Another v Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia that:
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> (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
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> (ii) the right to be heard is a valued right; and

(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice..."

19. That said, 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 *Civil Procedure Act*. Moreover, cases belong to parties and ultimately, the parties are responsible to ensure that their cases are progressed in a timely fashion. In this instance, none of the Applicants deemed it necessary to swear an affidavit in support of the motion to explain, at the minimum, their efforts to follow up with their lawyer and their interest in prosecuting the application and appeal.

20. 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".

21. The same court in *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR while considering the discretion of the Court under the provisions of Order 12 Rule 7 of the *Civil Procedure Rules* restated the principle spelt out by its predecessor in *Shah v Mbogo* (*supra*), but added the rider that:

> " The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. "

22. Reviewing all the foregoing matters, the court is persuaded that the justice of the matter lies in allowing the motion dated 16.06.2022, with costs awarded to the Respondent in any event. Accordingly, the motion dated 01.10.2021 is reinstated and shall be prosecuted within three (3) months of today's date, failing which it will stand dismissed for want of prosecution.

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

C.MEOLI

JUDGE

In the presence of:

Ms. Odhiambo h/b for Mr. Mbuthia for the Applicants

Ms. Okina for the Respondent

C/A: Carol