Jonathan v Njiwa Savings & Credit Co-operative Society (Civil Appeal 446 of 2016) [2023] KEHC 2130 (KLR) (Civ) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2130 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 446 OF 2016

CW MEOLI, J

MARCH 16, 2023

BETWEEN

NANZALA JONATHAN ..... APPLICANT

AND

NJIWA SAVINGS & CREDIT CO-OPERATIVE SOCIETY ..... RESPONDENT

RULING

1. For determination is the motion dated December 8, 2020 by Nanzala Jonathan (hereafter the applicant) seeking primarily that the order dismissing the appeal issued on February 7, 2020 be set aside and that the appeal be reinstated for hearing on merit. The motion is expressed to be brought under section 1A, 1B & 3A of the *Civil Procedure Act* and order 12 rule 7 of the *Civil Procedure Rules*, *inter alia*, on grounds on the face of the motion as amplified in the supporting affidavit sworn by Patrick Mulaku, counsel on record for the applicant.

2. The gist thereof is that the appeal was listed for notice to show cause (NTSC) why it should not be dismissed for want of prosecution on February 7, 2020. That under the honest belief that the court would sequentially handle matters on the day's cause list, counsel rushed to attend to another matter being Nairobi Milimani ACC No 5 of 2019 and that by the time he attended to the instant matter, he discovered that the appeal had already been randomly called out in the presence of counsel for Njiwa Savings & Credit Co-operative Society's (hereafter the respondent) and had been dismissed for want of prosecution. That his absence was not intentional and delay in prosecuting the appeal was occasioned by factors beyond the control of the parties herein. Because proceedings have never been typed nor advise thereon given by the subordinate court despite the appellant's efforts to follow up. He asserts that the applicant has been diligent and intent on prosecuting the appeal, and the respondent will suffer no prejudice that cannot be compensated by an award of costs if the motion is allowed.

3. The motion is opposed by way a replying affidavit deposed by Benjamin Mwikya Musyoki, counsel on record for the respondent. Counsel asserts that no good reasons have been advanced by the applicant to warrant reinstatement, that the motion is incompetent, a sham, devoid of merit and an abuse of the court process. That no evidence has been tendered to confirm claims that counsel for the applicant was absent because he was attending to another matter on the day of the hearing of the NTSC and besides, that contrary to his assertions, the court had handled the cause listed matters. Moreover that the present matter should take precedence over the other matter in the subordinate court that the applicant's counsel gave priority.

4. He points out that the applicant failed to file a response to the NTSC and thus did not demonstrate sufficient reason why the appeal ought not to be dismissed. Counsel contended the record herein demonstrates that the applicant is guilty of laches, lacks diligence and interest in prosecuting the appeal hence is undeserving of an order of reinstatement. In conclusion, counsel asserts that motion is an attempt to frustrate the Respondent's enjoyment of the fruits of successful litigation ought to be dismissed.

5. The motion was canvassed by way of written submissions. The applicant's counsel placed reliance on the provisions of section 3A of the *Civil Procedure Act* (CPA), order 12 rule 7 of the *Civil Procedure Rules* and several decisions including *Mbogo v Shah* EALR 1968, *John Nahashon Mwangi v Kenya Finance Bank Ltd* [2015] eKLR, *Philip Chemwolo & another v Augustine Kubende* (1982-88) KAR, and *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR in emphasizing the right to a fair hearing. That mistake of counsel ought not to be visited upon an innocent litigant hence the applicant ought to be granted an opportunity to present his case in accordance with article 50 of the *Constitution*.

6. On behalf of the respondent as a preliminary issue counsel cited the provisions of orders 17 and order 45 of the *Civil Procedure Rules*, and section 3A of the *Civil Procedure Act*, to contend that the appeal having been dismissed pursuant to a NTSC rather than non-attendance, the applicant's reliance on the provision of order 12 rule 7 of the Civil Procedure is misconceived. While calling to aid the decision in Habo Agencies Ltd v Wilfred Odhiambo Musingo [2016] eKLR counsel argued that the applicant is not wholly innocent as prosecution of the appeal does not solely lie with his counsel. And that the applicant failed to demonstrate any personal initiative to prosecute the appeal or to explain his non-attendance.

7. Counsel reiterated that it was not enough for the applicant to rely on the error of his counsel in urging his motion and that no explanation was offered for delayed prosecution of the appeal. He cited Omwoyo v African Highlands & Produce Co Ltd [2002] KLR 698 in support of the foregoing. It was therefore the Respondent's position that the Applicant had not met the threshold for the grant of orders sought and urged the court to dismiss the motion with costs.

8. 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 set aside and or discharge its order issued on February 7, 2020 dismissing the appeal for want of prosecution and to reinstate the appeal for hearing on the merit. The applicants' motion invoked inter alia the provisions of section 1A, 1B & 3A of the *Civil Procedure Act* as well as order 12 rule 7 of the *Civil Procedure Rules*.

9. First, order 12 rule 7 of the*CPR* invoked by the applicant 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."

10. Plainly, this provision has no application in this matter as it clearly does not apply to appeals, but to suits. It is erroneously invoked in the motion as the *Civil Procedure Rules* provides specifically for appeals.

11. The appeal herein was dismissed by way of a NTSC issued pursuant order 42 rule 35(2) of the *Civil Procedure Rules* which provides as follows:-

> "(1) ...
>
> (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."

12. Evidently, order 42 of the *Civil Procedure Rules* does not contain a provision for reinstatement of an appeal dismissed under rule 35(2) therein. Often, parties whose appeals have been dismissed under the rule will approach the court via section 3A of the *Civil Procedure Act* which 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."

13. In *Rose Njoki King'au & Another v Shaba Trustees Limited & another* [2018] eKLR the Court of Appeal stated of the court's inherent jurisdiction 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
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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."

14. There is no dispute that neither the appellant nor his counsel attended the NTSC but counsel blames the court's handling of the cause list of the day for his troubles. That is disingenuous as counsel was not in court at the material time and has neither otherwise demonstrated his claims nor shown that he was engaged before another court. Or that he eventually attended this court at all on the date of the NTSC. Upon being served with the NTSC, the applicant was required to place before the court detailed and cogent reasons why the court ought not to dismiss the appeal. A good practice that has developed over time is that appellants served with a NTSC usually file an affidavit in that regard. As rightly argued by the respondent the applicant herein failed to file any affidavit material to deflect the NTSC and allegedly opted to attend to another matter first. Counsel ought to take responsibility for his errors instead of shifting the blame upon the court.

15. The appellant cannot hide behind his counsel either. Ultimately, the appeal belongs to him and in this instance, he has not demonstrated his own efforts in progressing the same. As for the reasons given for the delay of close to four years since filing the appeal until dismissal, nothing has been placed before

the court to demonstrate the alleged lower court's failure to supply proceedings and efforts made by the appellant in that regard. It is no longer acceptable for an indolent party to plead that as an innocent litigant he should not bear the consequences of the mistakes and missteps of his counsel, invoking the adage that the mistake of counsel should not be visited on the client.

16. The Court of Appeal in *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR while considering the comparable 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 –vs- Mbogo and another* [1967] EA 116 and also commented on the adage above as follows:

> " The discretion under order 12 rule 7 is exercised so as to avoid injustice as a result of inadvertent or excusable mistakes and errors. Therefore, a court needs to satisfy itself as to whether the reason given by the appellant was excusable.....
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> ....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. "

17. That said, the right to a fair hearing should only be denied to a party as a last resort. In emphasizing the right of appeal, synonymous to 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 the following:

> " 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 vs IEBC & 2 others (*supra*); Mbaki & others vs Macharia & another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & another vs 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
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> (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..."

18. Consequently, the court will reluctantly invoke its inherent jurisdiction under section 3A of the *Civil Procedure Act* in favour of the applicant so that the ends of justice are met. In the court's view, the respondent will not be unduly prejudiced as the court can impose conditions for the expedition of the appeal while consoling them by way of an award of costs. The court allows the motion dated December 8, 2020 with costs awarded to the respondent in any event, on the following conditions: -

a. The applicant shall file and serve the record of appeal within 14 days of today's date.

b. The applicant shall fully prosecute the appeal within 120 (one hundred and twenty) days of today's date.

c. In default of either of the conditions above, the appeal will stand automatically dismissed with costs to the respondent.

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

C.MEOLI

JUDGE

In the presence of:

For the Applicant: MS. Nyakoa h/b for Mr. Namada

For the Respondent: Mr. Kassimu

C/A: Carol