Mwangi t/a Stemer Hardware & Pants v Apex Steel Limited (Civil Appeal 367 of 2018) [2023] KEHC 1440 (KLR) (Civ) (2 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1440 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 367 OF 2018

CW MEOLI, J

MARCH 2, 2023

BETWEEN

STEPHEN WAMBUGU MWANGI T/A STEMER HARDWARE & PANTS ..... APPLICANT

AND

APEX STEEL LIMITED ..... RESPONDENT

RULING

1. For determination is the motion dated April 22, 2022 by Stephen Wambugu Mwangi t/a Stemer Hardware & Paints (hereafter applicant) seeking *inter alia* that the order issued on March 24, 2022 by this court dismissing the appeal for want of prosecution be set aside and the appeal reinstated for hearing on its merits; and that the order issued on November 24, 2020 by this court staying execution on the judgment in Nairobi Milimani CMCC No 3476 of 2013 be reinstated pending the hearing and determination of the appeal.

2. The motion is expressed to be brought under article 48, 50 & 159 (2) (d) & (e) of the *Constitution*, section 1A, 1B & 3A of the *Civil Procedure Act* and order 12 rule 7 of the *Civil Procedure Rules*, *inter alia*, and premised on grounds on the face of the motion as amplified in the supporting affidavit sworn by Alfred Nyandieka, counsel on record for the Applicant. To the effect that his firm Nyandieka & Associates Advocates took over the matter from Messrs Kamau Mwangi & Company Advocates and obtained stay of execution pending appeal.

3. That thereafter efforts were made to obtain copies of proceedings in the lower court ; that his office assistant who had been following up on typing of proceedings informed him that the lower court file was missing and on April 14, 2022 it was brought to his attention that the instant matter was dismissed for want of prosecution on March 24, 2022. He contends that neither himself nor his client appeared on March 24, 2022 to show cause why the appeal should not be dismissed for want of prosecution as

they had no notice of the proceedings in respect of the notice to show cause (NTSC). That neither the respondent's advocate nor the applicant's former advocate brought to his firm's attention the NTSC.

4. He explains that delay by the lower court in typing proceedings which is beyond his control is the sole reason for delay in prosecuting the appeal and upon receipt of the proceedings, the appeal will be expedited. He asserts that the applicant has a meritorious appeal and is desirous of pursing it to its logical conclusion. That the dismissal of the appeal entitles the respondent to apply for release of the deposited decretal sum but it will not suffer prejudice if the appeal is reinstated while the security remains in the joint interest earning account pending determination of the appeal. In conclusion counsel asserts that the motion has been filed expeditiously thus ought to be allowed as prayed.

5. The respondent opposes the motion by way of a grounds of opposition dated May 6, 2022 and a replying affidavit dated May 17, 2022 by Rose Nang'ame, who describes herself as a legal officer of the respondent, well conversant with the facts of the matter. The respondent takes issue with the motion on grounds that there is no demonstration that the applicant or his advocate followed up in a bid to obtain the typed proceedings as alleged and that the only letter produced was sent more than three (3) months after the order of November 24, 2020 was made.

6. The grounds further state that since the appeal was dismissed pursuant to order 42 rule 35(2) of the *Civil Procedure Rules*, the applicant cannot apply to the same court as done here. That the application is erroneously grounded on order 12 rule 7, and the respondent stands to suffer prejudice if the appeal is reinstated; and that the application does not meet the threshold for setting aside/reviewing an order and is an abuse of the court process.

7. Rose Nang'ame on her part reiterates the above grounds and additionally swears that the firm of Kamau Mwangi & Company Advocates were notified of the date for the NTSC and the appeal was dismissed on March 24, 2022 on account of the applicant's failure to appear and show cause. She however withdraws some grounds of opposition regarding the asserted confirmation by this court (which is not on the record) that the proceedings in the lower court were ready by July 2021 and explains that this was due to a mix-up of two matters. She nevertheless states that the applicant has failed to demonstrate any evidence of following up on typed proceedings since March 2021. She reiterates that the respondent will be prejudiced if the appeal is reinstated.

8. In a rejoinder by way of a further affidavit counsel for the applicant swore that the respondent is not being candid and has deliberately attempted to mislead the court by concealing material facts. That having received the NTSC , counsel for the respondent failed to act in good faith and with intent to steal a match and served the notice to show cause upon Kamau Mwangi & Company Advocates while aware that the said firm of advocates was no longer on record for the applicant. Counsel further asserts that other than for the letter dated March 24, 2021, other letters dated February 12, 2021, March 22, 2021 and September 29, 2021 inquiring on the status of the typed proceedings and that his office assistant had sworn affidavit on efforts made in pursuance of the lower court proceedings.

9. The motion was canvassed by way of written submissions. Counsel for the applicant began by reiterating the contents of the affidavit material in support of the motion as part of his submissions. As to whether the instant motion is merited, counsel called to aid the decisions in *Joseph Kinyua v G.O Ombachi* [2019] eKLR, *Sang'anyi Tea Factory Co Ltd v Evans Ondieki Nyokwoyo* [2016] eKLR and *Key Freight Kenya Ltd v Mohamed Abdi* [2022] eKLR, to submit that the applicant has met the threshold for the exercise of the court's discretion. Primarily on the ground that the applicant and his counsel were not served with the NTSC and that the respondent failed to act in good faith in effecting service of the NTSC on the erstwhile advocate for the applicant, rather than the present advocates. In

conclusion it was submitted that it is in line with the overriding objectives and would serve substantive justice that the instant motion is allowed as prayed.

10. On behalf of the respondent, counsel equally rehashed the contents of affidavit in opposition to the motion. As a preliminary issue on the court's jurisdiction to entertain the motion, counsel argued that the appeal having been dismissed pursuant to order 42 rule 35(2) of the *CPR* , the invocation of the jurisdiction under order 12 rule 7 of the CPR is erroneous. Addressing the court on whether the applicant has proffered sufficient reason to set aside the order of the court issued on March 24, 2022, counsel relied on the decisions in *DPL Festive Ltd & another v Kenya Power & Lighting Co Ltd & 2 others* [2021] eKLR and *Philomena Waithera Njoroge v Peter Munyambu Gitau* [2021] eKLR to submit that the applicant has not met the threshold for invoking the court's inherent power and discretion.

11. It was further submitted that the applicant has failed to demonstrate efforts made in pursuit of the lower court proceedings and that failure by the respondent to serve the NTSC does not excuse the applicant's lack of diligence in setting down the appeal for hearing. Counsel went on to contend that the allegations of non-disclosure by the respondent's advocate are misleading. Counsel called to aid the decision in *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission* [2017] eKLR and *DPL Festive Ltd* (supra) to submit that the respondent will be prejudiced if the appeal is reinstated as there is no justification in keeping the respondent out of the fruits of its judgment. In the alternative it was contended that if the court is inclined to allow the motion, costs ought to be awarded and direction given for the immediate hearing of the appeal. In conclusion, it was submitted that the motion lacks merit and ought to be dismissed with costs.

12. The court has considered the material canvassed 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 March 24, 2022 dismissing the appeal for want of prosecution and to reinstate the appeal for hearing on the merits. The applicants' motion invoked *inter alia* the provisions of section 1A, 1B & 3A of the *Civil Procedure Act* as well as order 7 rule 12 of the *Civil Procedure Rules*. 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. 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."

14. Order 12 rule 7 of the *CPR* also 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."

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

15. The appeal herein was dismissed under order 42 rule 35 of the *Civil Procedure Rules* (CPR) which states; -

> "(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.
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> (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."

16. An examination of the record reveals that this court through the Deputy Registrar issued a Notice to Show Cause (NTSC) for March 24, 2022 pursuant to order 42 rule 35(2) of the *Civil Procedure Rules*. The said NTSC, was specifically addressed to the firms of Messrs Kamau Mwangi & Co Advocates and Messrs Hamilton Harrison & Mathews and an affidavit of service by the court bailiff dated February 15, 2022 returned as proof of service of the NTSC. On March 24, 2022 when the matter came up for the NTSC, neither the applicant nor his counsel were present but counsel appearing for the respondent attended. Consequently, the appeal was dismissed.

17. Undeniably the NTSC was erroneously served on the applicant's erstwhile advocates Messrs. Kamau Mwangi & Company Advocates which fact was not brought to the notice of the court hence, contrary to the rules of natural justice, the applicant and his counsel were never heard on the NTSC before the dismissal order was made. Consequently, this court would be justified to invoke its inherent jurisdiction under section 3A of the *Civil Procedure Act* so that the ends of justice are met. The court's discretion to grant or refuse to set aside or vary an order is 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] E.A 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."

18. The principles enunciated in *Shah v Mbogo* (supra) were amplified further by Platt JA in *Bouchard International (Services) Ltd v M'Mwereria* [1987] KLR 193. The Court of Appeal in *Miarage Co Ltd v Mwichuiri Co Ltd* [2016] eKLR cited a passage from the latter decision as follows:

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an

initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. ..... The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction".

(emphasis added).

12. 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. Indeed, the dismissal order issued herein is equivalent to a judgment as it determined the appeal by way of dismissal. There is no dispute that the applicant herein was not served with the NTSC giving rise to the dismissal of the appeal. No party ought to be driven from the seat of justice without a hearing except where such action is properly justified upon facts and the law.

13. In emphasizing the right of 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 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
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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…"

12. In this case, the explanation by counsel for failing to prosecute the appeal appears plausible. However, the court hastens to add that although the challenge of obtaining proceedings in the lower court is a matter of notoriety, it was up to the applicant to consistently pursue the proceedings and to file the record of appeal in a timeous manner. At a time when courts are deluged with heavy caseloads, it is not enough for any party to merely blame the lower court while relying on copies of sporadic letters dispatched in pursuit of proceedings, without more; the pursuit must be shown to be consistent and vigorous.

13. 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 they too are ultimately responsible to ensure that their cases are progressed in a timely fashion. In this instance, an attempt has been made to explain, at the minimum, the efforts to follow up on proceedings. That same explanation cannot become the perennial reason for not expediting the appeal.

14. That said, the applicant is entitled to be heard on the merits of his appeal. In my considered view the applicant has proffered sufficient cause to justify the court's exercise of its discretion in his favour. In the end the motion dated April 22, 2022 is hereby allowed on condition that the appeal shall be fully prosecuted within 120 days (one hundred and twenty) of today's date failing which it will automatically stand dismissed for want of prosecution. The costs of the motion are awarded to the respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: Mr. Songok

C/A: Carol