



**Osoro & another v Kiriga (Civil Appeal E232 of 2021)
[2023] KEHC 1434 (KLR) (Civ) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1434 (KLR)

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

CIVIL

CIVIL APPEAL E232 OF 2021

CW MEOLI, J

MARCH 2, 2023

BETWEEN

CHARLES OSORO 1ST APPLICANT

PETER MWANGI 2ND APPLICANT

AND

MWANGI KIRIGA RESPONDENT

RULING

1. For determination is the motion dated 11.06.2021 by Charles Osoro and Peter Mwangi (hereafter the 1st and 2nd Applicant/Applicants, respectively) seeking inter alia that the order made on 10.06.2021 dismissing the motion dated 19.04.2021 be set aside, reviewed and or varied; and that the motion dated 19.04.2021 be reinstated. The motion is expressed to be brought under Article 50 (1), 159 (2) (a) (b) (d) & (e) of the Constitution, Section 1A, 1B & 3A of the Civil Procedure Act and Order 12 of the Civil Procedure Rules, *inter alia*. It is premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Peris Gichohi, counsel on record for the Applicants.
2. The affidavit is to the following effect. That the Applicants filed a motion dated 19.04.2021 seeking stay of execution pending hearing and determination of the appeal herein, which motion was unknown to counsel, scheduled for hearing on 10.06.2021. Because the matter was erroneously diarized for hearing on 11.06.2021 counsel did not attend court and that when she checked the cause list for 11.06.2021 she discovered that the matter was not listed. That upon consulting her office clerk, he confirmed that the matter was scheduled for 10.06.2021. That she thereafter engaged counsel for Mwangi Kiriga (hereafter the Respondent) who informed her that the application had been dismissed for non-attendance, prompting the instant motion for reinstatement.



3. She deposes further that the Applicants are intent on prosecuting the motion dated 19.04.2021 and counsel's non-attendance was not intentional and the Applicants ought not to be penalized for her inadvertent mistake. That it is just and expedient that the instant motion be allowed as the Applicants intended appeal has a high chance of success and any prejudice visited on the Respondent can be compensated by an award of costs.
4. The Respondent filed an affidavit in opposition to the Applicants motion. He pointed out that the motion dated 19.04.2021 sought to be reinstated was dismissed more than a year ago; that there has been inordinate and inexcusable delay in bringing the present motion; that no reasonable explanation has been given for the delay ; and that the Applicants are guilty of laches and their motion ought to be dismissed. The Respondent dismisses the explanation given by counsel for the Applicant for non-attendance for vagueness regarding the alleged misdiarization and that the application is without merit. The Respondent further took issue with the excerpt of the diary relied on by the Applicants on grounds that it does not indicate the year of the entry and excludes the excerpt for 10.06.2021, the latter which would aid the court to ascertain whether any entry was made in respect of the instant matter.
5. The deponent further states that the Applicants have not demonstrated efforts made to remedy the situation upon discovering that the matter had been heard on 10.06.2021 and that they have filed multiple applications aimed at delaying satisfaction of the decree, thereby denying the Respondent the fruits of successful litigation. He points out that the record of appeal has never been filed and hence the present motion ought to be dismissed with costs.
6. The motion was canvassed by way of written submissions. In supporting her submissions, counsel for the Applicant cited the provisions of Order 12 Rule 7 of the Civil Procedure Rules (CPR), and the decisions in Phillip Chemwolo & Another v Augustine Kubende [1982-88] KAR 103, Civil Appeal No. 9 of 1978 Belinda Murai & 9 Others v Amos Wainaina, Shah v Mbogo [1967] EA 166 and Patel v Cargo Handling Services Ltd [1974] EA 75. She reiterated her affidavit material in asserting that the mistake of counsel ought not to be visited upon the Applicants and that the Respondent will not suffer any prejudice that cannot be compensated by way of costs. Further calling to aid the decisions in Edward Juma Malovi v Peter Ndirangu [2006] eKLR and CMC Holdings Ltd v James Mumo Nzioka [2004] eKLR she reiterated the court's unfettered discretion to set aside a dismissal order to avoid a miscarriage of justice. The court was urged to allow the motion as prayed.
7. On behalf of the Respondent, counsel similarly rehashed the contents of replying affidavit. It was submitted that the motion is a sham as no evidence of misdiarization has been demonstrated and that there has been inexplicable and inordinate delay in prosecuting the instant motion. Counsel urged the court to decline attempts to deny the Respondent the fruits of successful litigation. In the alternative it was argued that if the court is inclined to allow the instant motion, it should require security for the performance of the decree as a way of cushioning the Respondent from likely prejudice.
8. The Court has considered the rival affidavit material and submissions in respect of the motion as well as the record herein. The court has been called upon to determine whether it ought to set aside, review and or vary the orders made on 10.06.2021 dismissing the motion dated 19.04.2021. The Applicants invoke *inter alia* this court's jurisdiction under Order 12 albeit without disclosing the particular Rule, which I believe to be Rule 7 of the [Civil Procedure Rules](#) (CPR). Order 12 Rule 7 of the CPR 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.



9. The Applicants’ motion also invoked the provisions of Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA). 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 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

11. 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 to set aside as conferred on the court was spelt out in the case of *Shah -vs- Mbogo and Another* [1967] E.A 116:

“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 events leading to the dismissal order issued of 10.06.2021 are as follows. The Applicants filed the instant appeal on 05.10.2020. They thereafter moved the court some six (6) months later *vide* a motion under urgency dated 19.04.2021 seeking stay of execution pending hearing and determination of the instant appeal. Ex parte directions in respect of the motion were issued granting temporary stay of execution for thirty (30) days. A priority hearing date for the motion was to be fixed at the registry. The Applicants’ motion was fixed for hearing on 10.06.2021. During the intervening period the Applicant further moved the court under certificate of urgency seeking extension of the temporary stay orders. The matter thereafter came up for hearing on 10.06.2021 when the Applicants and their counsel were absent and upon representations by counsel for the Respondent, the court dismissed the motion dated 19.04.2021 for want of prosecution. These orders prompted the instant motion.

13. It was therefore incumbent upon the Applicants to demonstrate their explanation for non-attendance, having fixed the hearing date and served the Respondent. Counsel for the Applicants however claims that she did not know that the matter was coming up for hearing on 10.06.2021 as the same had been diarized for hearing on 11.06.2021 hence her failure to attend court. I agree with the Respondent that the sole excerpt of the diary marked annexure PG-1 does not tell the whole story in the absence of a copy of entries for 10.06.2021. Besides, the Applicants’ advocate has not disclosed how the mis-diarisation



of a date taken by the Applicants occurred and who was responsible. Such party ought to have sworn an affidavit.

14. It seems to me that the Applicants' conduct since filing the appeal and subsequently filing the motion dated 19.04.2021 has been lethargic. The explanation given by counsel for failing to attend court of on 10.06.2022 seems barely plausible. This court must not countenance a lethargic or dilatory litigant. However, generally, it is in the interest of justice that the mistake of counsel should not be visited on the innocent litigants. Apaloo, J.A. (as he then was) famously stated in *Phillip Kiptoo Chemwolo and 3 Anor. v Augustine Kubede* (1986) eKLR:-

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline....”

15. The foregoing however should not be a blanket excuse to immunize a party from any and every consequence of mistakes by his counsel. In its later decision the Court of *Appeal in Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio 3 Others*, [2015] eKLR no doubt adverted to the overriding objective in section 1A and 1B of the *Civil Procedure Act* made the following remarks:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side...”

16. In the same vein, the same Court restated in *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR the principle spelt out by its predecessor in *Shah v Mbogo (supra)*, 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.....

.....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 is embodied in our Constitution. In *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR the Court of Appeal had this to say in that regard:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystallized 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:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (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...”

18. The Applicants are entitled to be heard on the merits of their motion, even though the record reflects poorly on their conduct hitherto and which is not condoned by the court. Therefore, while allowing the instant motion, the court will attach conditions to spur the Applicants to move with expedition, while granting some form of compensation for the undoubted prejudice visited upon the Respondent due to the delay herein. The motion dated 11.06.2021 is allowed on condition that the Applicants shall prosecute the reinstated motion dated 19.04.2021 within 45 (forty-five) days of today’s date failing which it will stand automatically dismissed for want of prosecution, with costs to the Respondent. The costs of the motion dated 11.06.2021 are awarded to the Respondent in any event.

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

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: N/A

C/A: Carol

