



REPUBLIC OF KENYA



KENYA LAW
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**Wafula & another v Kamau (Civil Appeal 393 of 2017)
[2023] KEHC 1743 (KLR) (Civ) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1743 (KLR)

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

CIVIL

CIVIL APPEAL 393 OF 2017

CW MEOLI, J

MARCH 2, 2023

BETWEEN

WILLIAM WAFULA 1ST APPLICANT

KENYA WATER INSTITUTE 2ND APPLICANT

AND

SYLVESTER MUTINDA KAMAU RESPONDENT

RULING

1. For determination is the motion dated May 17, 2022 by William Wafula and The Kenya Water Institute (hereafter the 1st and 2nd applicant/applicants) seeking that the court be pleased to set aside the order made on 17.03.2022 dismissing the appeal for want of prosecution and reinstate the appeal ; stay of execution of the judgment of 17.07.2017, pending the hearing and determination of the appeal; and to grant leave to the applicants to file supplementary record of appeal. The motion is expressed to be brought under article 159 (1) (d) of *the Constitution* of Kenya 2010, Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 12 Rule 7, Order 42 Rule 6 and order 51 rule 1 of the *Civil Procedure Rules*, inter alia, and premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Paul Gacheru, counsel on record for the Applicants.
2. The affidavit is to the effect that being aggrieved by the judgment and decree in Nairobi Milimani CMCC No. 3350 of 2015 the Applicants preferred the instant appeal; that despite the Applicants providing security by depositing the entire decretal sum in court, the Respondent had proceeded to proclaim and attach the Applicants goods and will sell them if the orders sought are not granted; that the record of appeal was filed on 12.06.2019 and thereafter served upon the Respondent ; and that the failure to prosecute the appeal was occasioned by the fact that counsel previously handling the matter



left the firm of Messrs. Kangethe & Mola Advocates in 2021 having inadvertently filed away the matter without a proper handover hence the dismissal order of 17.03.2022.

3. The deponent further swore that the appeal is arguable with a reasonable chance of success and the present motion was timeously filed and any prejudice visited on Sylvester Mutinda Kamau (hereafter the Respondent) can be easily compensated by an award of costs whereas the Applicants' right to appeal is at risk, portending irreparable loss and damage. In conclusion counsel states that it is only fair and just that the instant motion is allowed by setting aside the orders issued on 17.05.2022 and reinstating the appeal to be heard and determined on merit.
4. The Respondent opposed the motion by way of a notice of preliminary objection dated 26.05.2022 and a replying affidavit of even date deposited by Nelson Kaburu, counsel for the Respondent. The gist of the preliminary objection is that the court is functus officio as the appeal was dismissed under order 42 rule 35 (2); that the Civil Procedure Act and the Civil Procedure Rules do not confer jurisdiction to reinstate an appeal dismissed under order 42 rule 35(2) of the Civil Procedure Rules; that the remedy is to appeal the dismissal order under order 43 rule 1(1)(w); that reinstatement of a dismissed appeal is limited to appeals dismissed for non-attendance under order 42 rule 20 & 21 Civil Procedure Rules; and that the appeal was dismissed upon a notice to show cause (NTSC) why the same should not be dismissed for want of prosecution and not at the hearing of the appeal.
5. Counsel for the Respondent swore that the appeal was dismissed on 17.03.2022 after the court rejected the reasons advanced by counsel appearing for the Appellant; that the court cannot revisit a decision it has made upon hearing the parties, as that would be tantamount to sitting on appeal from its own order; that the Respondent has commenced execution as no appeal was subsisting whereas the sums deposited in court have been consumed by interest and in any event the security does belong to either party. He asserts that there was no basis for staying execution.
6. The motion was canvassed by way of written submissions. Counsel for the Applicants in addressing the preliminary objection raised by the Respondent, counsel cited the provision of order 42 rule 35 (2) of the Civil Procedure Rules, and several decisions including Murtaza Hussein Bandali t/a Shimoni Enterprises v P. A Willis [1991] KLR 469, Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR, and Eastern Produce (K) Limited v Patrick Juma Maina [2016] eKLR. He contended that the Respondent was yet to tax his costs hence the court was not functus officio; that order 42 rule 35(2) of the Civil Procedure Rules neither expressly bars the court from reviewing its own orders nor ousts the inherent jurisdiction of the court to do justice; and that the court is enjoined by Article 159 of the Constitution and Section 1A & 1B of the Civil Procedure Act to do substantial justice to the parties. He posited that statute cannot possibly cover every situation and the court has implied jurisdiction and inherent discretion to entertain and grant the instant motion by reinstating the dismissed appeal.
7. Submitting on the merits of the motion before this court counsel anchored his submissions on the decision in Richard Ncharpi Leiyagu (supra), Belinda Murai & Others v Amoi Wainaina (1978) KLR 2782, Phillip Chemwolo & Another v Augustine Kubede (1982-88) KLR, and Banco Arab Espanol v Bank of Uganda [1999] EA 22 inter alia to submit that a reasonable explanation having been tendered for failure to prosecute the appeal on time, dismissing the instant motion would be tantamount to removing the Appellant from the seat of justice without granting them an opportunity to be heard. Counsel further contended that the Respondent has not demonstrated the prejudice he will suffer if the appeal is reinstated and determined on merit. In conclusion the court was urged to exercise its discretion and allow the motion as prayed in the interest of substantive justice.



8. On behalf of the Respondent, counsel began his submissions by rehashing the contents of affidavit in opposition of the motion. On the preliminary objection counsel argued that having already heard and considered during the hearing of the NTSC the same reasons now being canvassed by the Applicants, this court cannot sit on appeal from its own decision and is functus officio. That Order 42 of the Civil Procedure Rules does not grant this court authority to reinstate an appeal dismissed under rule 35 (2) and the only reinstatement envisaged in the order is under Rule 20 and 21 where an appeal has been dismissed for non-attendance, which is not the case herein. Counsel asserted that a court cannot assume jurisdiction that has not been conferred by statute and in this instance the only remedy available to the Applicants is an appeal pursuant to Order 43 Rule 1(1) w of the Civil Procedure Rules (CPR) . Counsel reiterated that it is more than four (4) years since the appeal was filed and based on the dismissal order, the issues raised in the instant motion are res judicata and the motion should be dismissed.
9. The court has considered the rival affidavit material and submissions in respect of the motion as well as the record herein. This court has been primarily called upon to determine whether it ought to set aside its order made on 17.03.2022 dismissing the appeal for want of prosecution. The Applicants’ motion invoked inter alia the provisions of Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), the latter which reserves “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”. The Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated 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 the 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 Malolm 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.” (Emphasis added).
10. The key question arising here is whether in the absence of an express provision for reinstatement of an appeal dismissed under Order 42 Rule 35(2) CPR in the presence of both parties, the court’s inherent jurisdiction under Section 3A of the CPA and the provisions of Order 7 Rule 12 of the CPR can be properly invoked. Or in other words, whether the court has the requisite jurisdiction to entertain the motion before it. The appeal herein was dismissed under the provisions of Order 42 Rule 35(2) CPR, upon which the Respondent has premised his objection, together with Order 43 Rule 1(1)w of the CPR. Order 42 Rule 35 of the CPR 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. An examination of the record herein discloses that the appeal was filed on 02.08.2017 and on 03.08.2018 the Applicants moved the court vide a motion of even date relating to stay of execution, which was determined vide a ruling delivered on 21.02.2019. Beyond filing the record of appeal on 12.06.2019, no further step was taken by the Appellant to progress the appeal. Subsequently, on 17.01.2022 the Deputy Registrar issued a Notice to Show Cause (NTSC) pursuant to Order 42 Rule 35(2) of the Civil Procedure Rules for 17.03.2022. The NTSC was addressed to Messrs. Kangethe & Mola Advocates and Messrs. Nelson Kaburu Advocates the respective parties’ advocates and an affidavit of service by the court process server filed as proof of service.
 12. On 17.03.2022 when the matter came up for the NTSC, Mr. Gacheru appeared for the Applicants while Mr. Kaburu appeared for the Respondent. The proceedings of that date read as follows; -

“Mr. Gacheru: Matter handled by one Patricia who left the firm in 2020 and file not reallocated. Record of appeal already filed. Proceedings not yet received. Pending certification. We will file supplementary record of appeal in 7 days.

Mr. Kaburu: This appeal filed in 2017. No steps taken to perfect it. It is too late to be talking of proceedings. Let the appeal be dismissed. File was available even if colleague left firm of advocates.

Court: No good cause shown. Appeal dismissed with costs.”
 13. The appeal was therefore dismissed under Order 42 Rule 35(2) of the CPR. That being the case, the provisions of Order 12 Rule 7 of the Civil Procedure Rules, do not apply here. That provision relates to reinstatement of suits dismissed under Order 12 CPR on the date scheduled for hearing, for various reasons, including non-attendance by the plaintiff. Had the appeal been listed for hearing on 17.03.2021 and dismissed, the Applicants could have applied to the court pursuant to Order 42 Rule 20(1) & 21 of the Civil Procedure Rules to have the orders set aside.
 14. Pursuant to the NTSC, the Applicants were required on 17.03.2022 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. The Applicants herein opted to orally address the court in deflecting the NTSC rather than file such affidavit. The Applicants were therefore given the opportunity to be heard in their bid to salvage the appeal, and the Respondent was also heard. In its brief ruling, the court found the reasons advanced by the Applicants to be unsatisfactory . The same reasons are again being canvassed in the present motion. The court having made a finding thereon cannot revisit its own decision save by way of review.
 15. There is no jurisdiction under Order 42 Rule 35(2) CPR or under section 3A of the CPA for the court to purport to set aside its own orders of dismissal in the present situation. The absence of an express provision regarding an important matter such as the reinstatement of an appeal dismissed under Order 42 Rule 35(2) of the CPR cannot be assumed to be accidental and the court’s inherent jurisdiction cannot be invoked to cloth the court with jurisdiction, as argued by the Applicants. In my view, this is not the kind of situation for which the inherent jurisdiction of the court, properly understood, can



be invoked; this court is functus officio. This is a matter of jurisdiction and not technicality, as the Applicants' appear to suggest.

16. The Supreme Court of Kenya in expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

17. The Supreme Court also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that;

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors, nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available." (Emphasis added).

18. Upon pronouncing itself pursuant to the NTSC proceedings before it, this court could not thereafter re-open the issues already determined. It matters not that the taxation of costs may be pending. In my reading of the Civil Procedure Rules, a dismissal order issued pursuant to Order 42 Rule 35(2) of the Civil Procedure Rule may only be challenged through the avenue of appeal or review, and Order 43 Rule 1 (1)(w) provides that an appeal shall lie as of right from an order made pursuant to Order 42, rules 3, 14, 21, 23 and 35 of the Civil Procedure Rules. The Court therefore agrees with the Respondent's submission in support of the preliminary objection. The objection is upheld, and consequently, the motion dated 17.05.2022 is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF MARCH 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr.Gacheru

For the Respondent: Mr.Kaburu

C/A: Carol

