



**Domitian & another v Mukiri & another (Suing as the administrator
of the Estate of the Late Anthony Munyiri Maina) (Civil Appeal
172 of 2016) [2023] KEHC 19157 (KLR) (Civ) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19157 (KLR)

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

CIVIL

CIVIL APPEAL 172 OF 2016

CW MEOLI, J

JUNE 12, 2023

BETWEEN

AUGUSTINE DOMITIAN 1ST APPLICANT

PATRICK MUREITHI MAINGI 2ND APPLICANT

AND

ROSE MUTHONI MUKIRI 1ST RESPONDENT

JOHN MAINA MUNYIRI 2ND RESPONDENT

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE
ANTHONY MUNYIRI MAINA**

RULING

1. Before the court for determination are two (2) motions dated November 1, 2022 and December 5, 2022. For ease of reference, the court will refer to them as the 1st and 2nd motion respectively. Augustine Domitian and Patrick Mureithi Maingi (hereafter the 1st and 2nd Applicant/Applicants) filed the 1st motion seeking inter alia that the firm of Kimondo Gachoka & Co Advocates be granted leave to come on record in place of the firm of Kairu McCourt & Co Advocates for the Applicants; and that this appeal be reinstated for hearing and determination. The motion is expressed to be brought among others under Section 1A, 1B & 3A of the [Civil Procedure Act](#) and Order 51 Rules 1 of the [Civil Procedure Rules](#).
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Victor Ng'ang'a, counsel on record for the Applicants. To the effect that the Applicants filed an appeal dated April 8, 2016 and that despite relentless efforts, prior to the instant motion, the Applicants were not



- able to obtain the proceedings from the lower court to enable them file their record of appeal as the lower court file could not be traced. That as a result of the foregoing the instant appeal was dismissed on December 2, 2021 for want of prosecution exposing the Applicants to imminent threat of execution as the decretal sum was deposited as security thus necessitating the instant motion.
3. Counsel goes on to depose that delay in filing the record of appeal was inadvertent and beyond the Applicants' control. Further that delay in prosecuting the appeal is not so unreasonable and or inordinate as to prejudice the John Maina Munyiri and Rose Muthoni Mukiri (hereafter the Respondents) in a manner that cannot be compensated by an award of damages or costs. He asserts that the Applicants stand to suffer irreparable loss, prejudice and harm unless the orders sought are granted emphasizing the Applicants' desire to prosecute the appeal. In conclusion, he deposes that the Applicants have an arguable appeal and it is in the interest of justice that the appeal be reinstated or re-admitted and the same be heard to its logical conclusion.
 4. The Respondents filed the 2nd motion seeking inter alia an order to direct and or order the Applicants' advocate on record, Kimondo Gachoka & Co Advocates, to execute the instruction letter to Commercial Bank of Africa (or its successor in title NCBA Bank Kenya PLC) Lavington Branch, authorizing the said bank to uplift the principal sum and interest accrued in the joint account number 7xxxxxxx7 and credit the account of the Respondents' advocates on record, namely, Hamilton Harris and Mathews, Client A/C Standard Chartered Bank Kenya Limited, Chiromo Branch, Account No. 01xxxxxxxx00 Bank Code -02 Branch Code -084 Swift Address: Scblkennxxxx with the proceeds; and that in default of compliance of the foregoing, within fourteen (14) days of the order being made or such other period as the court may fix, the Deputy Registrar of the Civil Division of this court, be authorized in place of the Applicants' advocates to execute the instruction letter to Commercial Bank of Africa (or its successor in title NCBA Bank Kenya PLC) Lavington Branch in that regard. The motion is expressed to be brought inter alia under Section 3A, 3B & 98 of the [Civil Procedure Act](#), and premised on grounds on the face of the motion, as amplified in the supporting sworn by Rose Muthoni Mukiri on behalf of the Respondents.
 5. To the effect that after the Applicants filed this appeal they deposited as security for the performance of the decree, the decretal sum in a joint interest earning account in the names of the parties' respective advocates pending hearing and determination of the appeal. That the Applicants were served with the notice show cause why the appeal should not be dismissed on November 11, 2021 which notice proceeded on December 2, 2021. She asserts that the Applicants failed to file any affidavit to demonstrate efforts made to prepare and file the record of appeal or set down the appeal for hearing. Hence the appeal was eventually dismissed.
 6. She particularly took issue with the fact that the 1st motion was filed more than ten (10) months after the dismissal of the appeal; that no explanation had been given for the delay; that no material has been exhibited to demonstrate any follow up efforts in respect of lower court proceedings; that the record of appeal has yet to be filed to date; and that Applicants have no interest in prosecuting the appeal. She contends that the funds in the joint account had been deposited as security for stay of execution pending appeal and should be released to the Respondents' advocate for onward transmission. In conclusion, she deposes that since delivery of the lower court judgment the Respondents' right to enjoy the fruits of judgment had been delayed and the court ought to decline to reinstate the appeal, especially given the age of the matter.
 7. The Applicants opposed the 2nd motion by way of a replying affidavit deposed by counsel. To the effect that the motion is opposed for the very reason that they filed the 1st motion seeking reinstatement of the appeal. That the release of the security would be premature and would essentially render the appeal nugatory. He reiterates that the Applicants are keen on prosecuting their appeal and plead that



they should not be ousted from the seat of justice as they have an arguable appeal that ought to be determined on the merits and they are willing to abide by any orders of this court. The court was urged to dismiss the 2nd motion with costs.

8. On February 22, 2023 when parties took directions on the two motions, counsel for the Respondent elected to rely on the affidavit in support of the 2nd motion as a response to the Applicants' motion.
9. The applications were canvassed by way of written submissions. Counsel for the Applicants reiterated his affidavit material emphasizing the fact that the Applicants are yet to obtain the lower court proceedings in order to compile the record of appeal. That they stand to suffer prejudice in the event the appeal is not heard on its merit, as such eventuality would deny them their constitutional right of appeal. While calling to aid a raft of decisions among them being *Njai Stephen v Christine Khatiala Andika* [2019] eKLR, *Kirinyaga General Machinery v Hezekiel Mureithi Ireri* [2007] eKLR, *Allan Orieno Osula v Gurlev Engineering & Construction Ltd* [2015] eKLR and *Elem Investment Limited v John Mokora Otwoma* [2015] eKLR counsel submitted that every person is entitled to a fair trial pursuant to Article 50 of the *Constitution of Kenya*.
10. Further that, where directions have yet to be issued in respect of an appeal, dismissal for want of prosecution cannot be granted. Counsel went on to contend that the hardship and prejudice likely to be occasioned to the Applicants in this matter is greater than the hardship that would be visited upon the Respondents if the appeal were not to be reinstated. The court was urged to allow the 1st motion and dismiss the 2nd motion.
11. On behalf of the Respondents, counsel began by restating the reasons advanced in opposition to the 1st motion, placing reliance on the decision in *James Yanga Yeswa v Bob Morgan Services Limited* [2019] eKLR to assert that the Applicants have not met the test to warrant reinstatement of their appeal. That the Applicants are guilty of inordinate and unexplained delay and prejudice likely to be visited on the Respondents is greater, as the lower court suit was in respect of fatal road accident and the beneficiaries of the deceased's estate are yet to enjoy the fruits of the judgment. That the prejudice is further compounded by the fact that there has been no effort by the Applicants to perfect the appeal for hearing.
12. Finally, it was pointed out that the Respondents have been keen on having the appeal prosecuted, while the Applicants have lost interest in the appeal. Hence, the 1st motion ought to be dismissed. Concerning the 2nd motion it was submitted that if the appeal is not reinstated the funds in the joint account ought to be released to the Respondents' advocates. The court was thus urged to allow the 2nd motion as prayed.
13. The court has considered the rival affidavit material and submissions in respect of the two motions as well as the record herein. The court proposes to simultaneously address both motions presented for determination. The Applicants motion invoked inter alia the provisions of Section 1A, 1B & 3A of the *Civil Procedure Act*. 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.”



14. 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.”

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

“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.”

16. To contextualize the motions, it is apposite to revisit the history of the appeal as captured on the record. The appeal herein was filed on April 11, 2016 and thereafter the decretal sum was deposited in a joint account in the name of the advocates on record for the respective parties. The Applicants' next action through counsel was a letter dated 23.09.2018 addressed to the Executive Officer of the lower court and copied to the Deputy Registrar of this court seeking certified copy of proceedings, judgment and decree to enable counsel to prepare the record of appeal.

17. As of December 7, 2020 the original lower court record together with certified copies of proceedings, ruling and judgment had been forwarded to this court for purposes. The notification accompanying the record was duly copied to the respective counsel appearing for the parties. Thereafter the Deputy Registrar of this court vide a notice dated December 11, 2020 issued a notification to the Applicants to file their record of appeal within 21 days failing which the appeal would be place before a judge for dismissal. The Applicants did not comply hence the NTSC dated October 25, 2021 was issued pursuant to Order 42 Rule 35(2) of the *Civil Procedure Rules*.

18. On December 2, 2021 when the matter came up for the NTSC before this court, Mr Njuguna holding brief for Mr Ng'ang'a appeared for the Applicants while Mr Mwhuri appeared for the Respondents. The proceedings of the said date read as follows; -

“Mr Njuguna: Mr Ng'anga has not obtained lower court proceedings but he has not given me any copies of correspondence with the lower court.

Mr Mwhuri: No affidavit sworn to show cause. Appeal filed in 2016. We have written since then to prosecute the appeal without success. Let appeal be dismissed.

Court: Notice having been given to show cause why appeal should not be dismissed, and there being no satisfactory response, the appeal is hereby dismissed under Order 42 Rule



35 (2) of the *Civil Procedure Rules* with costs to the Respondent as no good cause has been shown.”

19. Pursuant to the NTSC, the Applicants were expected to place before the court detailed and cogent reasons explaining their delay and why the court should sustain 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.
20. 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 1st motion. The facts on record outlined earlier clearly dislodge these; as of December 7, 2020 the original record of the lower court proceedings was already in this court and due notification copied to the respective counsel for the parties. No reason other than lethargy on the part of the Applicants explains the inordinate delay herein. The court, having determined as much, is not persuaded to exercise its discretion in reinstating the appeal for hearing.
21. The Applicants cannot hide behind their counsel either. Ultimately, the appeal belongs to them and in this instance, they have not demonstrated their own efforts in progressing the appeal. Indeed, they did not swear an affidavit in support of their motion. The appeal had been pending for close to seven (7) years since filing until dismissal, and the single letter presented as proof of the Applicants’ alleged attempt to progress the appeal does not aid the Applicants cause.
22. The right of the Applicants to be heard on the merits of their appeal. Cannot be gainsaid. However, that right cannot be stretched to the detriment of the parties they dragged to court over ten years ago. Allowing the reinstatement of the appeal in the present circumstances would run afoul of the overriding objective in Section 1A and 1B of the *Civil Procedure Act*. At a time when courts are deluged with heavy caseloads, it is not enough for any party caught up with dismissal of their case to merely blame the court. 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*.
23. The Court of Appeal stated in *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl NAI 293/09 that:-

“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”.
24. Consequently, the court is of the considered opinion that the 1st motion is devoid of merit, and it is hereby dismissed with costs save for leave being granted to the firm of Kimondo Gachoka & Co Advocates to come on record for the Applicants in place of the firm of Kairu McCourt & Co Advocates. The court need not labor the merits of the 2nd motion which is allowed as prayed.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF JUNE 2023.

C.MEOLI

JUDGE



In the presence of:

For the Appellants: N/A

For the Respondent: Ms. Obwangi h/b for Mr. Mwihuri

C/A: Carol

