**Simba Coach Ltd & another v Owino (Civil Appeal 21 of 2021)**
**[2023] KEHC 20899 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20899 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL 21 OF 2021**

**HM NYAGA, J**

**JULY 24, 2023**

**BETWEEN**

**SIMBA COACH LTD ..... 1ST APPELLANT**

**JUMA MWANDURYA MBEGA ..... 2ND APPELLANT**

**AND**

**JULIUS OWINO ..... RESPONDENT**

**RULING**

1. Before Court is an application by way of Notice of Motion dated 20th March, 2023.

2. The application has been brought under Sections 1A,1B,3A and 95 of the *Civil Procedure Act* and Orders 45 Rule 1, 42 Rule 6,42 Rule 21,50 Rule 6 and 51 Rule 1 of the *Civil Procedure Rules*, 2010 wherein the Applicants seek for Orders: -

    a. Spent

    b. Spent

    c. Spent

    d. That this Appeal being Nakuru HCCA No.21 of 2021 be is hereby reinstated for hearing and determination in the normal way.

    e. That this Honourable Court do make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice.

    f. That the Costs of this Application be in the cause.

3. The application is based on the grounds set out therein and is supported by the affidavit sworn by Victor Ng'ang'a, advocate for the appellants/applicants.

4. In a nutshell, the application is premised on grounds that;

   a. The Appellants instituted this Appeal vide a Memorandum of Appeal dated 5th March,2021 against the Judgement of the lower court in Molo CMCC 373 of 2016 on 3rd September, 2019.

   b. Despite relentless efforts, the Appellants have not been able to obtain the relevant documents from the Lower Court to enable them file their Record of Appeal.

   c. As a result, the Appeal was dismissed on 24th January,2023 for want of prosecution and specifically for failure to file the Record of Appeal.

   d. Consequently, the Appellants are exposed to imminent execution, and thus apprehensive that the Respondent may at any time commence execution against them.

   e. The delay in filing the Record of Appeal was inadvertent and beyond the Appellants' control.

   f. The appellants have complied with stay conditions by depositing Ksh.387,764/- into Court.

5. The Appellants/applicants contend that the delay occasioned so far in prosecuting the appeal cannot be attributed to the Appellants, is not so unreasonable and/or inordinate as to prejudice the Respondent and such delay can always be compensated by an award of damages and/or costs.

6. It is the applicants' position that unless this application is certified urgent and heard immediately and the orders sought herein granted, they stand to suffer irreparable loss, prejudice and harm.

7. The applicants further state that under Article 48 of the *constitution* 2010, acess to justice for all is guaranteed and unlimited and that under Article 159 (2) (d) of the *Constitution of Kenya*, 2010, this Honourable Court is enjoined to administer justice without undue regard to procedural technicalities.

8. The appellants/applicants also state that they are keen on prosecuting the appeal and seek the indulgence of this Honourable Court not to be ousted from the seat of justice. They aver that they are desirous and fully committed to ensuring the just and timely disposal of the appeal herein and as such pray that the appeal herein be reinstated and set down for hearing in the normal manner. The appellants/applicants believe that they have an arguable appeal and should be given an opportunity in the interest of justice to have the same prosecuted and determined on its merits.

9. The application has been opposed by the Respondent who swore a Replying Affidavit on 3rd April,2023. He deposed that no steps have been taken by the Appellants to prosecute the Appeal since its institution, which is close to 4 years.

10. The Respondent averred that that the appeal herein was listed for notice to show cause as to why the same should not be dismissed for want of prosecution on 24th January,2023 and on that day both Counsel for the Respective parties appeared before Hon. Justice D.K. Magare. That the Appellants failed to give a good reason for delay in prosecuting their Appeal and for failure to file an Affidavit to show cause why the Appeal should not be dismissed.

11. The Respondent deponed that the Appellants misused the chance to defend themselves against the intended dismissal of the appeal herein and even now they have not advanced any good reason for failure to prosecute the Appeal.

12. The respondent further deposed that the allegation of failure by the Registrar to issue proceedings has not been proved by way of evidence.

13. It is the respondent's case that this Application is res judicata as the same was technically dealt with conclusively on the 24th January, 2023.

14. The respondent asserted that he will be grossly prejudiced if the Application is allowed as it is merely aimed at denying him the fruits of his Judgement, which he has awaited for close to 4 years.

15. It was his further deposition that the Appeal raises no triable issues and lacks chances of success. He thus prayed that the application be dismissed with costs.

16. The application was canvassed through written submissions.

**Appellant's/Applicants' Submissions**

17. The Appellants/applicants submitted that the hardship and prejudice likely to be occasioned to them is greater than the hardship to be occasioned to the Respondents since they will lose their opportunity to prosecute their appeal and have the same determined on merits. For this proposition, the Appellants relied on Article 159(2)(d) of the *Constitution* and the following authorities: -

    i. *Njai Stephen v Christine Khatiala Andika* [2019] eKLR- where the court held that every person is entitled as envisaged under Article 50 of the *Constitution of Kenya* to have a fair trial and that the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

    ii. *Allan Otieno Osula v Gurdev Engineering & Construction Ltd* [2015] eKLR- where the court declined to strike out the Appeal as prayed and employed the principle that the right of appeal is constitutional right and that in as much as there had been delay which had not been satisfactorily explained by the appellant, it had to weigh the cost and prejudice that was likely to be occasioned to the appellant as well as the respondent, if the appeal was struck out at that stage without according the appellant an opportunity to be heard on the merits of the appeal.

    iii. *Elem Investment Ltd v John Mokora Otwoma* [2015] eKLR- where the court adopted the principles enunciated in the above precedents.

18. The Appellants/applicants also argued that the Appeal was not ripe for dismissal since directions had not been taken. To buttress their submissions, the Appellants relied on the cases of *Jurgen Paul Flach v Jane Akoth Flach* [2014] eKLR where the court in declining to dismiss the Appeal for want of prosecution concurred with the holding of Mary Kasango J in *Kirinyaga General Machinery v Hezekiel Mureithi Ireri* HCC No.98 of 2008 who stated that;

> "It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained."

**Respondent's Submissions**

19. The respondent submitted that the principles that should guide the court when dealing with this application are as set in the case of *Ivita v Kyumba* [1984] KLR 441 and these are whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay.

20. The respondent argued that this application is an abuse of the court process since the Appellants seek to set aside the dismissal orders on the same grounds which were considered by the court before it dismissed the same and as such this Application is res Judicata as provided for under Section 7 of the *Civil Procedure Act*.

21. The Respondent further argued that since the Appellants were aggrieved by the said decision they ought to have appealed against it, but not to bring it back to the court that had already made its decision and is thus functus officio. To bolster this proposition reliance was placed on the case of *Henderson v Henderson* (1843) A11 ER 378 where the court stated that;

> " ... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

22. The respondent further submitted that the Appellants have failed to meet the requirements set under Order 42 and 45 of the *Civil Procedure Rules*, 2010.

23. The Respondent further submitted that the Applicants had a duty to expedite the prosecution of their appeal but they failed to do so and that from their conduct, justice will not be done due to the delay. He contended that Justice delayed is justice denied.

24. To buttress his submissions, the Respondent further relied on the case of *Ronald Mackenzie v Damaris Kiarie* [2021] eKLR where the court declined to reinstate a suit on grounds that court had heard the counsel for both parties on the notice to show cause and made a decision to dismiss the matter and as such the plaintiff ought to have filed an appeal against the said decision. The court also found that the plaintiff had not advanced good reasons to the court's satisfaction for setting aside the dismissal order in issue.

**Analysis & determination**

25. Having considered the application, the response thereto, submissions by the parties as well as the precedents and the provisions of the law relied on. The issues that crystalize for determination are: -

    a. Whether the matter is *res judicata* and whether the Court is functus officio;

    b. Depending on the answer to (a) above, whether the appeal should be reinstated as sought.

**Is the application res judicata?**

26. Section 7 of the *Civil Procedure Act* provides as follows:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

27. This doctrine was expounded by the Court of Appeal in *IEBC v. Maina Kiai & 5 others* [2017] eKLR where it was held that: -

> " Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:
>
> i. The suit or issue was directly and substantially in issue in the former suit.
>
> ii. That former suit was between the same parties or parties under whom they or any of them claim.
>
> iii. Those parties were litigating under the same title.
>
> iv. The issue was heard and finally determined in the former suit.
>
> v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

28. On 24th January 2023, the parties appeared before my brother Justice D.K. Magare on a notice to show cause as to why the appeal should not be dismissed. This is as provided for under Order 42 Rule 35 of the *Civil Procedure Rules* which state as follows;

> " 35. Dismissal for want of prosecution [Order 42, rule 35.]
>
> (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."

29. From the court record, both parties appeared the learned Judge and after hearing them, he found that there were no sufficient reasons to explain the delay in prosecuting the appeal. He then dismissed the appeal with costs assessed at Kshs. 30,000/-.

30. I have looked at the application. It is basically providing reasons that the applicants ought to have presented at the time the matter was fixed for the notice to show cause.

31. I am in agreement with the respondent that the reasons being given now are what should have been given on 24th January 2023. Having been given an opportunity to explain the delay in prosecuting the appeal, the applicants failed to do so, and the appeal was dismissed. In bringing this application, the applicants are asking me to litigate over an issue already dealt with by the court, albeit differently constituted. I find that the issues raised are res judicata.

32. In addition, the applicants are challenging the abovementioned decision. For instance, in praying for the reinstatement of the appeal they are now going ahead to aver that the decision of the learned Judge was erroneous because the appeal had not been admitted. I am of the view that this is a matter to be handled by a court handling an appeal over a decision of this court.

**Is the court functus officio?**

33. The doctrine of *functus officio* was stated by the Court of Appeal in the case of *Telcom Kenya Ltd v John Ochanda (Suing on his own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR as follows:-

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler v Alberta Association of Architects* [1989] 2 SCR 848, Sopinka J traced the origins of the doctrines as follows (at p 860):
>
> > " The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In *re St Nazaire Co,* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: Where there had been a slip in drawing it up, and, where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v J.O. Rose Engineering Corp.,* [1934] S.C.R. 186"

34. It is thus clear that as a general rule, once a court has made a final determination on a matter, it becomes *functus officio*.

That general rule is only subject to the slip rule and application for review. The slip rule is provided for under sections 99 of the *Civil Procedure Act* which states as follows;

> " 99. Amendment of judgments, decrees or orders.
>
> > Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

35. Evidently, the application is not founded on this principle. Indeed, there is no clerical or arithmetic error to move the court under this section.

36. The appellants have brought their application under the provisions of order 45 rule 1, order 42 rule 6, order 42 rule 21, order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules*. Order 45 Rule 1 provides for the review of a decree as follows: -

> " (1) Any person considering himself aggrieved: -
>
> > a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred or
> >
> > b) By a decree or order from which no appeal is hereby allowed, and from whom the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some

> mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay."

37. From part (b) above it is discernible that review can be allowed where there is discovery of new and important matter or evidence; mistake or error apparent on the face of the record; and Any other sufficient reason.

38. It is uncontroverted that the Appeal herein was listed for Notice to show cause why the same should not be dismissed on 24th January,2023. The Counsel for the respective parties were present before court and the Appellants counsel only told the court that they had complied with order of stay without explaining the reasons for delay. The Respondents Counsel asked the court to dismiss the Appeal and the court agreed with him and proceeded to dismiss the same for want of prosecution for reasons that there were no sufficient grounds advanced for failure to prosecute the Appeal by the Appellants.

39. The Appellants without supportive evidence now claim that the reasons for the failure to prosecute their appeal within reasonable time was beyond their control as their relentless efforts to obtain requisite documents from the lower court to enable them file their record of Appeal bore no fruits.

40. In *Bernard Muthee & another v Anita Kamba Mwiti* [2021] eKLR, the Court observed thus:

> " Concerning the reasons advanced of difficulties in obtaining the record of typed proceedings form the court registry, this Court recognizes that there is an avenue to file an initial record of appeal and thereafter file a supplementary record once the proceedings are obtained. This would have been the best course to take and would be more convincing bearing in mind that it was over a period of 8 months between the date when the appellants were ordered to file their record of appeal on December 5, 2019and when the order confirming the dismissal was made on July 27, 2020. The appellants have also failed to annex evidence in form of correspondence or otherwise to confirm what efforts, if any, they made to secure the said typed proceedings. It is not enough to make mere averments devoid of supporting evidence."

41. It is not clear why the aforesaid ground was not earlier raised when the matter was heard on 24th January,2023. I believe this was an issue which was within the knowledge of the Appellants then and if it was backed by concrete evidence the court would have considered it. Therefore, there is no discovery of any new matter that would warrant a review of the orders of the court issued on 24th January, 2023.

42. It was submitted that directions had not been issued as envisaged under Order 42 Rule 35(1), and (2) and as such the court fell into error when it dismissed the same. The court had powers under sub-rule (2) to dismiss the appeal even if directions had not been given. If the court erred in so finding, then this is an issue for appeal, not a review.

43. The application is also brought under Order 42 rule 2. The rule provides for re-admission of appeal dismissed for default as follows:

> " Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

44. It is clear that the said rule refers to an appeal dismissed for non-attendance, under sub rule 20, which provides as follows;

> " 20. Dismissal of appeal for appellant's default [Order 42, rule 20.]
>
> 1. Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed."

45. Clearly, the said rule does not come to the applicant's aid.

46. It is thus my finding that this court is *functus officio* and even if I was to hold otherwise, the issues are *res judicata*.

47. Assuming I am wrong on the above, I would still, on merits, not be inclined to grant the orders sought. I will give my reasons.

48. Re-instatement of an appeal/suit is a matter of discretion, which must be exercised judiciously and If this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify the exercise of that discretion. Clearly the Applicants have not placed any concrete material before this court for it to exercise its discretion in their favour.

49. A perusal of the materials on record shows that the Lower Court Judgement was delivered on 3rd April, 2019 and the Appellants were granted 30 days stay of execution. That stay lapsed and vide an application dated 7th October, 2019, the Appellants sought for a further stay of execution by 21 days. The Application was allowed and the Appellants complied with the conditions set therein by depositing Ksh. 387,764/= into Court's account on 19th November,2019. From there the Appellants have never taken any steps to set down their appeal for hearing.

50. I am alive to Article 159 of the *Constitution* and the overriding objective which decries undue regard to technicalities. However, it is equally an important principle of the Constitution that justice must be dispensed without undue delay. As the Supreme Court emphasised in *Raila Odinga and 5 Others v IEBC & 3 Others* [2013] eKLR and in *Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others* [2014] eKLR, Article 159 is not a panacea in each and every instance of breach of procedure. It avails only in deserving cases.

51. The Appellants filed their Appeal on 5th March,2021 and without any sufficient cause failed to follow up on the same for close to two years before it was dismissed on 24th Januray,2023. This was plain indolence and dilatoriness, which is not excusable.

52. The considerations to be made in determining whether or not to dismiss matters for want of prosecution and whether to order reinstatement were considered in the case of *Ivita v Kyumbu*, Civil Suit No. 340 of 1971 (1975) EA 441, 449, *Ivita v Kyumbu* [1975] eKLR where Chesoni J. (as he then was) held as follows:

> " So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered... "

53. The fact that the applicants had already complied with orders of stay of execution that were issued by the trial court did not give them a right to sit idle and not prosecute the appeal. The Record of Appeal

filed on 8th March 2023 was an exercise in futility as there was no appeal in existence at the time, having dismissed way back on 24th January 2023.

54. From the foregoing, it is my opinion that the application is also wanting in merits.

55. In conclusion, I proceed to dismiss the application with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JULY, 2023.**

**HESTON M. NYAGA**

**JUDGE**

**In the presence of;**

C/A Jeniffer

Miss Oganga for Respondent

N/A for Applicant