Lumfa Self-Help Group v Mwangi (Civil Appeal 221 of 2019)
[2023] KEHC 23198 (KLR) (Civ) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23198 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 221 OF 2019

CW MEOLI, J

OCTOBER 5, 2023

BETWEEN

LUMFA SELF-HELP GROUP ..... APPELLANT

AND

PETER GICHUKI MWANGI ..... RESPONDENT

RULING

1. For determination is the Notice of Motion (the Motion) dated October 7, 2022 brought by Lumfa Self-Help Group (hereafter the Applicant) seeking *inter alia* that the order made on October 7, 2022 dismissing the appeal be set aside and that the appeal be reinstated.

2. The Motion is expressed to be brought under Article 159 of *the Constitution*, Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 51, Rule 1 of the *Civil Procedure Rules*. It is premised on the grounds on the face of the Motion as amplified in the supporting affidavit sworn by the Applicant's advocate, Nancy Waruguru Mwangi to the following effect.

3. That upon filing the memorandum of appeal on April 17, 2019 the Applicant's advocate followed up on the typed proceedings in the lower court suit and only managed to obtain the said proceedings sometime the year 2022; that the appeal was subsequently listed for dismissal on October 7, 2022; and that while attempting to log in for the hearing of the notice to show cause on the material date, the Applicant's advocate experienced technical challenges which hindered her participation, resulting in the dismissal of the appeal for want of prosecution.

4. The advocate averred that the Applicant is still keen on prosecuting the appeal, and that it would be in the interest of justice for the dismissal order to be set aside and for the appeal to be reinstated for hearing. Finally, counsel asserted that no prejudice will be visited upon Peter Gichuki Mwangi (hereafter the Respondent) upon grant of the orders sought.

5. The Respondent resisted the Motion by filing Grounds of Opposition dated November 10, 2022 portraying the following grounds:

    1. "That the Application is a non-starter, incurably defective, vexatious, unmerited having been brought under the wrong provisions of the law and unsustainable only meant to abuse court process.

    2. That the Application is made very late in the day noting that the Appellant filed its memorandum of appeal way back on April 17, 2019 and they have taken no step to have either the Appeal be heard and as such the applicant has been indolent and thus equity cannot tilt in its favour.

    3. That the Applicant's misapprehension of material facts and lack of candor is clearly manifest in the Application and its pleadings which renders it undeserving of this Honourable Court's discretion.

    4. That this Honourable Court's discretion is not designed to assist a person who has deliberately sought orders through misleading, non-disclosure, concealment of material facts and arm twisting whether by evasion or otherwise to obstruct or delay the course of justice such as the Applicant is trying in the present Application.

    5. That as it is, the Applicant has not demonstrated sufficient cause or at all to warrant a grant of the orders sought and as such we pray that the Application be dismissed with costs." sic

6. Advocate Nancy Waruguru Mwangi swore a supplementary affidavit (erroneously titled a replying affidavit) sworn on 17th January, 2023 essentially reiterating the averments made in her supporting affidavit.

7. The Motion was canvassed by way of written submissions. In support of the Motion, counsel for the Applicant anchored her submissions on the decisions rendered in *Daniel Kamau Kagai v Andrew Githae Kamau* [2021] eKLR and *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR on the principles for consideration in the dismissal of appeals. Counsel submitted that the delay in prosecuting the appeal was not intentional but was primarily occasioned by the time taken in obtaining the typed proceedings from the lower court coupled with the effects of the global Covid-19 pandemic which paralyzed court operations and the country.

8. Counsel further submitted that the filing of the record of appeal preceded issuance of the notice to show cause which resulted in the dismissal order, and that the Applicant is interested in prosecuting the appeal to its conclusion. The court was therefore urged to allow the Motion as prayed.

9. On the part of the Respondent, his counsel relied on the decisions in *Charles Alexander Kiai v Frasiah Wangui Gicheru & 4 others* [2015] eKLR and *Salim Said & 2 others v Jedidah Wangui Gachie & another (legal administrator of the Estate of the Late Stephen Wangui Gachie)* [2021] eKLR to argue that the provisions of Article 159 of *the Constitution* do not serve as a shield for parties who have either been indolent in prosecuting their matters, or in procedural default. Counsel contended that there has been an inordinate delay and indolence on the part of the Applicant in prosecuting its appeal, thereby hindering the Respondent from enjoying the fruits of his judgment.

10. Counsel further asserted that no reasonable explanation has been provided or sufficient evidence tendered to support the averments made in the Motion, to warrant the exercise of the court's discretion in favour of the Applicant. Whilst relying on the case of *Leah Alasa Omollo v Lydia Nkatha Mbaya & Purity Kananu (Suing on behalf of the estate of Richard Mwachari Mwakulomba* [2021] eKLR

counsel for the Respondent argued that where it is evident that an appellant has not demonstrated any reasonable steps taken in prosecuting his or her appeal, a dismissal order is warranted. Consequently, counsel urged the court to dismiss the Motion with costs, and to uphold the dismissal order.

11. The court has considered the rival affidavit material, the Grounds of Opposition and the rival submissions in respect of the Motion. The key prayers in the instant Motion seek the setting aside of the dismissal order made on October 7, 2022 and for the reinstatement of the appeal. However, before addressing the merits thereof, the court notes that the Respondent challenged the competency of the Motion on the premise that it was brought under the wrong provisions of law.

12. As earlier mentioned, the Motion was brought under Article 159 of *the Constitution*, Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 51, Rule 1 of the Civil Procedure Rules. While Sections 1A, 1B and 3A provide for the overriding objectives of the Act, Order 51, Rule 1 merely provides for the filing of applications in situations where no specific procedure is specifically provided for. Article 159 of *the Constitution* on its part makes provision inter alia for the administration of substantive justice.

13. There is no express provision relating to the reinstatement of appeals. Suffice it to say that the provisions of Article 159 (2) (d) of *the Constitution* express that justice shall be administered without undue regard to technicalities. Based on this constitutional provision, the failure by a party to cite the relevant or correct legal provisions would not necessarily render an application fatally defective. In the court's mind, such a lapse is cured by Article 159(2) (d) (supra). On that basis, the court will now consider the merits of the Motion.

14. The appropriate provisions in relation to the setting aside of a dismissal order and the reinstatement of an appeal are Order 42, Rule 35 of the *Civil Procedure Rules* as read together with Section 3A of the *Civil Procedure Act*, the latter of 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."

15. The Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

> " 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."

16. The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another v Malcolm 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." (sic)

17. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, 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 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 events leading to the dismissal order issued of October 7, 2022 are as follows. The Applicant filed the present appeal on April 17, 2019. However, it is apparent from the record that no further progressive action took place in the appeal, thereby resulting in issuance of the notice to show cause (NTSC) on August 17, 2022 requiring the parties to attend court on October 7, 2022 to show cause why the appeal ought not to be dismissed for want of prosecution. When the matter came up for hearing on the said date, none of the parties were in attendance, leading to the dismissal of the appeal. The said dismissal order prompted the instant motion.

19. The explanation by the Applicant's counsel to the effect that on the material date, she had unsuccessfully attempted to log into the virtual platform due to technical challenges is not demonstrated through credible proof, nor did the counsel attempt to log onto the platform afterwards to register her presence before the court rose. The record does not show such effort.

20. There has been a prolonged delay in the prosecution of the appeal since its filing, even though the Applicant has exhibited material to support the averments concerning attempts made at obtaining the typed proceedings and requisite documents to enable the filing of the record of appeal, and which record of appeal has since been filed. In addition, the record contains evidence of similar follow-ups by the High Court to the lower court, which facts would seem to support the averments made by the Applicant. However, the Court takes a dim view of the fact that the Appellant has remained in the shadows, leaving counsel to make averments on its behalf. Cases belong to litigants and not their counsel and in a case where there has been delay or default the litigant himself ought to demonstrate his own efforts in ensuring the progress of his case.

21. Be that as it may, the right to a hearing is a constitutionally underpinned and will not be whimsically taken away. 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.... crystalized .... in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. 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…"

22. Consequently, and whilst acknowledging the prolonged delay in the appeal, the court is persuaded to exercise its discretion in favour of the Applicant in this instance. Therefore, in allowing the Notice of Motion dated October 7, 2022 the court makes an order that the dismissal order made on October 7, 2022 be and is hereby set aside and the appeal is reinstated, on condition that the Applicant prosecutes the appeal within 90 (ninety) days of today's date, failing which the appeal will stand automatically dismissed for want of prosecution, with costs to the Respondent. The costs of the Motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Njoroge

For the Respondent: Ms. Lucheveleli h/b for Mr. Mwangi

C/A: Carol