



REPUBLIC OF KENYA



**Smata General Supplies Limited v Claude & another (Civil Appeal  
261 of 2019) [2024] KEHC 12324 (KLR) (Civ) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12324 (KLR)

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

**CIVIL  
CIVIL APPEAL 261 OF 2019**

**CW MEOLI, J  
OCTOBER 9, 2024**

**BETWEEN**

**SMATA GENERAL SUPPLIES LIMITED ..... APPLICANT**

**AND**

**TENNYSON JONATHAN CLAUDE ..... 1<sup>ST</sup> RESPONDENT**

**LINUMAK INVESTMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. For determination is the motion dated 09.10.2023 by Smata General Supplies Limited (hereinafter the Applicant) seeking inter alia to set aside and or vary the Court's order of 05.10.2023 dismissing the appeal; that the appeal herein be reinstated for hearing on merit; and that time to prosecute the appeal be enlarged. The motion is expressed to be brought pursuant Section 1A, 1B & 3A of the [Civil Procedure Act](#) (CPA) and Order 12 Rule 7, Order 50 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules (CPR). And premised on the grounds amplified in the supporting affidavit sworn by Migui Mungai.
2. The gist of his affidavit is that the appeal was on 05.10.2023 dismissed for alleged lack of service of the record of appeal (ROA) upon counsel appearing for Linumak Investment Limited (hereinafter the 2<sup>nd</sup> Respondent). Pursuant to orders made on 20.06.2023 directing that the ROA be filed and served within twenty-one (21) days, and thereafter the appeal be prosecuted within four (4) months or stand dismissed for want of prosecution. The deponent asserts that the Applicant filed and served the ROA on 03.07.2023, which was fourteen (14) days after directions had been issued thereby within the timelines as ordered by the Court; that thereafter vide a letter dated 04.07.2023, counsel proceeded to request for a hearing date for the appeal but the registry could only issue a mention date for



21.09.2023; that when parties appeared before the Court for directions on 05.10.2023, counsel for the 2<sup>nd</sup> Respondent claimed that he had not been served with the ROA , leading to dismissal of the appeal.

3. That the 2<sup>nd</sup> Respondent’s counsel misrepresented the fact of service of service as he was duly served with the ROA vide his email address xxxx.com on 03.07.2023 at 12.55pm, which service was within the period ordered by the Court. Which email address was supplied to counsel vide the 2<sup>nd</sup> Respondent’s pleadings and had been used previously to effect Court notices; hence the dismissal of the appeal on grounds of lack of service was in error and the appeal ought to be reinstated ex-debito justitiae. That unless the orders sought in the motion are granted, the Applicant will be greatly prejudiced by being condemned unheard. In conclusion he asserts that the Applicant has an arguable appeal with a high chance of success, and it would be fair and in the interest of justice that the appeal is heard and determined on merit.
4. Tennyson Jonathan Claude (hereinafter the 1<sup>st</sup> Respondent) and the 2<sup>nd</sup> Respondent offered no responses to the Applicant’s motion. This notwithstanding, directions were taken on the disposal of the Applicant’s motion by way of written submissions. Only the Applicant complied. That said, a review of the said submissions indicates that they address the substantive appeal and not the motion that is presently before the Court for consideration and determination. To the foregoing end, the Court will however proceed to consider the merits of the Applicant’s motion on the basis of the affidavit material in support thereof and the record before the Court.
5. The Applicant invokes inter alia the provisions of Section 3A of the CPA as well as Order 12 Rule 7 of the CPR. The latter provision 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.” Plainly, Order 12 Rule 7 as cited has no application in this matter. As to the former provision, Section 3A of the CPA specifically 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”.
6. Regarding Section 3A, the Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR observed 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 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.” [Emphasis mine].

7. From the record, the appeal marked as dismissed when it came up for directions on 05.10.2023, pursuant earlier self-executing orders issued on 20.06.2023 which will be addressed latter in this ruling. It is trite that the right and opportunity to be heard is a fundamental principle of law and Courts are enjoined to do substantive justice. Accordingly, by dint of Section 3A of the CPA this Court would in an appropriate case be justified in invoking its inherent jurisdiction therein so that the ends of justice are met.

8. It is settled that the discretion of the Court to set aside a dismissal order is unfettered and that a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court’s discretion in their favor. The discretion must also be exercised judicially and justly. In the case of Shah –vs- Mbogo and Another [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

“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.”

9. The principles enunciated in Shah –vs- Mbogo (supra) were amplified further by Platt JA in Bouchard International (Services) Ltd vs. M’Mwereria [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal force in this matter, considering that the orders issued by this court on 05.10.2023 had the effect of conclusively determined the appeal by way of a dismissal order.

10. A perusal of the brief record before the Court reveals the history of this appeal as follows. The appeal was filed on 14.05.2019. The record reveals that since filing, there was no further activity in the appeal until issuance of Notice To Show Cause (NTSC) in 2022 pursuant to Order 42 Rule 35(2) of the CPR. Leading to the dismissal order by Chepkwony. J on 06.10.2022. Seven months later, the Applicant moved the Court vide the motion dated 04.04.2023 seeking to set aside the order issued on 06.10.2022, dismissing the appeal for want of prosecution. When the said motion came up before me for hearing on 20.06.2023, the same was compromised by consent in the following terms: -

“By consent the motion dated 4/4/2023 is allowed subject to the Applicant: -

- a) Filing/serving the ROA in 21 days;
- b) Prosecuting the appeal fully within 4 (four) months of today’s date; and
- c) In default of any of the above conditions, the motion dated 4/4/2023 will stand dismissed and dismissal order of 6.10.22 revived with costs to the Resp (Respondent).”

11. On 05.10.2023, the appeal came up for directions before the Deputy Registrar (DR). Upon hearing representations by counsel appearing in the matter, the DR expressed herself as follows: -

“The directions/order by the judge on 20/06/2023 were very clear that in default of any of the orders given on that date, the notice of motion dated 4/4/2022 will stand dismissed and the dismissal order of 6/10/2022 revived with costs to the Respondent. No evidence of service of ROA within 21 days has been proved and thus the Appellant is in default. The default



clause has thus come alive. This appeal stands dismissed in accordance with the terms of the default clause issued on 20/06/2023.” (sic)

12. The above prompted the instant motion under consideration. While the motion was pending, the appeal was listed before the DR again on 6.05.2024, and the DR, evidently in error directed that the matter be placed before me in chambers for admission. The court noting the anomaly declined to admit the matter, noting that the appeal stood dismissed.
13. It is evident from the record that the orders of this Court on 20.06.2023 were unambiguous, a fact acknowledged by the Deputy Registrar when she pronounced herself on 05.10.2023. Equally, the orders were self-executing, and all the DR did by her directions was affirm that due to default in service of the ROA, the appeal stood dismissed, a second time. The DR did not issue the dismissal order as purported in the present motion.
14. The Applicant through the deponent of the affidavit in support of the motion, contends that the ROA was filed and duly served upon the 2<sup>nd</sup> Respondent’s counsel on 03.07.2023 vide the email address xxxx.com (annexure marked MM2), which was within the fourteen (14) day window as directed by the Court whereas despite requesting for a hearing date for the appeal, the Court registry could only issue a mention date for 21.09.2023 (annexure marked MM1). The deponent therefore contends that the 2<sup>nd</sup> Respondent’s counsel’s representation on 05.10.2023, that he had not been served with ROA was inaccurate. Hence, the Deputy Registrar’s order dismissing the appeal for lack of non-service of the ROA, ought to be set aside ex-debito justitiae.
12. First, as earlier indicated the appeal was not dismissed by the DR; the DR merely formalized an event that had already occurred as a consequence of default by the Appellant in complying with the orders of this court of 20.06.2023 in full. Second, the Applicant fails to mention that both parties present before the DR on 5.10.2024 addressed the court on the contested issue of service, the Appellant’s counsel, Ms. Wangui eventually conceding that there was no affidavit of service filed as proof of service of the ROA on the Respondent; a fact highlighted in the DR in her subsequent order.
12. Service of the ROA having been contested, the onus was on the Appellant to prove it by the conventional manner through an affidavit of service. No proof was tendered. The DR correctly found that there was no proof of service and no such proof has been proffered even in the present motion. Where is the misrepresentation now alleged by the Applicant? The terms of the consent order recorded on 20.06.2023 were explicit regarding the conditions attaching to the compromise of the reinstatement motion dated 04.04.2023. Inter alia, the ROA had to be filed and served on or before the 11.07.2023.
12. This appeal was filed almost five years ago, and the entire period of delay is relevant. It seems that, having filed the appeal, the Appellant went into slumber and only reappeared with the first application for reinstatement seven months after the initial dismissal of the appeal. When the reinstatement motion was granted, the Appellant was still unprepared to move with alacrity to file the ROA, taking almost the entire period allowed, and failing to comply fully with the terms of the consent order. Given the inordinate delay herein, which I daresay has not been satisfactorily explained, the lament by the Appellant that it will be condemned unheard if the motion is disallowed sounds hollow: the Applicant squandered its opportunity to be heard by its own indolence, and even when given a new chance to prosecute the appeal, floundered again.
12. The overriding objective obligates parties and their advocates to progress their matters with expedition. The courts, currently deluged with heavy caseloads can ill afford indulgence towards indolent parties, such as the Applicant, who take no responsibility for their cases and deflect blame onto others when such cases suffer dismissal. It is certainly not the object of the discretion for setting aside to aid dilatory



parties, as clearly stated in Shah –vs- Mbogo and Another [1967] E.A 116. Justice cuts both ways and litigation must come to an end; the Respondents who were dragged to court deserve closure.

12. I think I have said enough to demonstrate that the application dated 9.10.2023 is without merit and must be dismissed. It is so ordered. As the Respondents did not file any response in respect of the motion, there will be no order as to the costs of the motion. However, the costs of the dismissed appeal are awarded to the Respondents.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF OCTOBER 2024.**

**C. MEOLI**

**JUDGE**

In the presence of:

For the Appellant/Applicant: Mrs. Macharia

For the Respondents: N/A

C/A: Erick

