



**Talib & another v Abdalla & another (Civil Appeal 240 of 2018)
[2024] KEHC 11704 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 240 OF 2018
JK NG'ARNG'AR, J
OCTOBER 3, 2024**

BETWEEN

ABUBAKAR AHMED TALIB 1ST APPLICANT

MOHAMED AHMED TALIB 2ND APPLICANT

AND

ABDALA MOHAMED ABDALLA 1ST RESPONDENT

MOMBASA LINERS LIMITED 2ND RESPONDENT

RULING

1. The Appellants/Applicants filed a Notice of Motion application dated 24th June 2024 under Certificate of Urgency pursuant to Article 50 and 159 (2)(d) of the *Constitution*, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 12 Rule 7 of the *Civil Procedure Rules, 2010*. The Applicants seek for an order of stay of execution of the judgment in Mombasa Chief Magistrate's Court Civil Suit No. 1845 of 2004, *Abdala Mohamed Abdala v Mombasa Liners Limited* pending the hearing and determination of the appeal. That this court be pleased to set aside the order issued on 13th July 2023 dismissing the appeal hereof and reinstate the same for hearing, and that the court may make any other order it deems fit.
2. This application was premised on grounds on its face and the Supporting Affidavit of Abubakar Ahmed Talib sworn on 24th June 2024 that vide a letter dated 14th February 2021 to the Deputy Registrar, the Appellants applied for a date for directions on the appeal. That no date was issued or communicated and that instead the Appellants have learnt that on 6th June 2023, the matter was listed before the judge for Notice to Show Cause and when it came up on 13th July 2023, it was dismissed for want of prosecution. That the urgency of this matter is that warrants of arrest have been issued against the Appellants and the arrest is imminent hence the need to stay execution in the lower court. That the Applicant is willing to comply with any conditions that the court may grant for stay and/



- or readmission of the appeal, that the appeal is arguable and has extremely high chances of success, that it is in the interest of justice that the application be allowed, and that the Respondent shall not be prejudiced if this application is allowed.
3. The 1st Respondent in opposing the application filed a Replying Affidavit sworn on 24th June 2024 that judgment was not delivered by the lower court on 31st January 2022 as alleged by the Applicant but on 4th July 2004 and the ruling the Applicants are appealing was delivered on 28th February 2018. That it is not true that the applicant drew a letter dated 14th February 2021 and presented the same on 20th August 2021 to the Deputy Registrar for directions. That indeed a Memorandum of Appeal was filed in 2018 which was close to 6 years but the matter was not listed for directions. That the court issued a Notice of Show Cause for 6th June 2023 which was duly served on the parties but the Applicant failed to appear, the same was listed again on 13th July 2023 for Notice to show Cause and the Applicants failed to appear and the court dismissed the appeal for want of prosecution.
 4. The 1st Respondent further deponed that the appeal has no typed and certified copies of the ruling and proceedings, that the Applicants failed and/or neglected to file a record of appeal 7 years down the line, that the appeal has no record of appeal and that the appeal was dead even before it was struck out. The 1st Respondent stated that justice delayed is justice denied and that 20 years down the line he has never enjoyed the fruits of judgment. He therefore prayed that the application be dismissed with costs.
 5. The Appellants/Applicants filed another Notice of Motion application dated 25th June 2024 under Certificate of Urgency pursuant to Article 50 and 159 (2)(d) of the *Constitution*, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 12 Rule 7 of the *Civil Procedure Rules, 2010*. The Applicants seek that the court do suspend in the interim the warrants of arrest dated 15th May 2024 in Mombasa Chief Magistrate's Court Civil Suit No. 1845 of 2004, *Abdala Mohamed Abdala v Mombasa Liners Limited* pending directions on 11th July 2024, that the application be considered together with the application dated 24th June 2024 and that the court makes any other orders it deems just.
 6. The said application is based on grounds on its face and the Supporting Affidavit of Abubakar Ahmed Talib sworn on 25th June 2024 that a warrant of arrest has been issued against them and that their freedom is at stake, that the Applicants are strangers to the motor vehicle in question and that is why the Respondents have not attempted to attach the motor vehicle that allegedly caused the accident, and that the insurance cannot settle the decree in the trial court because the Applicants are not the insured and are simply strangers. That the mistake and/or perceived mistakes of counsel in prosecuting the appeal should not be visited upon the client.
 7. The 1st Respondent in the Replying Affidavit sworn on 3rd July 2024 in response to the application stated that the issues raised herein are baseless as the trial court dealt with the issues at the hearing which judgment was never appealed against. That the mistakes by counsel of the Applicants in failing to prosecute the appeal is so grave that this court cannot cure. That the Memorandum of Appeal was filed in 2018 and the Applicant's advocate never bothered to apply for typed certified copies of proceedings and ruling. That the Applicants have not filed the Record of Appeal which is the foundation of appeal almost 6 years after filing the Memorandum of Appeal and that without the Record of Appeal the Applicants cannot prosecute the appeal. The Respondent prayed that the application be struck out with costs for lack of merit.
 8. On 17th July 2024, the court gave directions that the applications be canvassed by way of written submissions. As at the time of writing this ruling, only the 1st Respondent had filed their submissions dated 12th July 2024. The 1st Respondent argued that the notion by the Applicants that the mistake by their advocate for failing to prosecute the appeal and that it should not be visited on them is irrelevant



as they have failed to explain why it took them 7 years to realise that the appeal was not prosecuted. The 1st Respondent relied on authorities in *Gerald Mwithia v Meru College of Technology & Another* [2018] eKLR, *Josephat Nderitu Kariuki v Pine Breeze Hospital Ltd* [2006] eKLR and *Water Partners International v Benjamin Koyoo t/a Group of Women in Agriculture Kochieng (Kwako) Ministries* [2014] eKLR. The 1st Respondent submitted that in the above cases, the court held that litigants must bear the brunt mistake made by their advocates. That the clients are at liberty to pursue their advocate for such mistakes as was held in the case of *Omwoyo v Afrikan Highlands & Produce Co. Ltd* [2002] 1 KLR.

9. I have considered the Notice of Motion applications dated 24th June 2024 and 25th June 2024, the 1st Respondent's Replying Affidavits sworn on 24th June 2024 and 3rd July 2024, and the 1st Respondent's submissions dated 12th July 2024. The issues for determination are: -

- i. Whether the Applicants have met the threshold for setting aside the dismissal order of 13th July 2023 and reinstatement of the appeal.
- ii. Whether there can be stay of execution of the judgment in Mombasa Chief Magistrates Court Civil Suit No. 1845 of 2004, *Abdala Mohamed Abdala v Mombasa Liners Limited*, pending the hearing and determination of the appeal.

10. The principles governing reinstatement of suits were set out in *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR that: -

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the *Constitution*. Article 50 coupled with article 159 of the *Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

11. The accident leading to filing of the suit in the trial court occurred on 21st April 2000. Judgment was then delivered on 4th June 2006 in favour of the 1st Respondent as against the Appellants/Applicants. On 11th December 2007, the court allowed the 1st Respondent to proceed with execution against the Appellants/Applicants. By then, the Appellants/Applicants had not filed an appeal against judgment of the trial court. The trial court record shows that the Appellant/Applicants were served with the Notice to Show Cause why execution should not issue dated 9th November 2016. The Appellants/Applicants then filed an application dated 15th August 2018 seeking for lifting of warrants of arrest that were issued in execution of the decree. After dismissal of the application in a ruling delivered on 1st November 2018, the Appellant/Applicants filed an appeal against it through a Memorandum of appeal as well as a Notice of Motion application both dated 23rd November 2018. The application was seeking for stay of execution of the orders of 1st November 2018 and the court in its ruling of 28th November 2019 ordered the Appellants/Applicants to deposit in court the decretal sum of Kshs.



- 1,669,410/- within 30 days from the date of the ruling failing to which the 1st Respondent was at liberty to execute.
12. There is no evidence on record that the Appellants/Applicants wrote to the Deputy Registrar vide a letter dated 14th February 2021 requesting for a date for directions on the appeal. However, the Appellants/Applicants have annexed to their application a copy of the said letter as well as an email print-out as proof that indeed they wrote to the Deputy Registrar requesting for a date for directions.
 13. This court also notes that proceedings of 1st March 2023 indicate that the matter was listed for dismissal on 23rd March 2023. On 6th June 2023 when the matter came up, this court issued directions for parties to appear on 13th July 2023 to show cause why the case should not be dismissed for want of prosecution. Perusal of the court records show two notices where parties were required to appear on 6th June 2023 and 13th July 2023. The notices also show the names of the advocates for the parties being GS Law LLP Advocates for the Applicants & Swaleh & Company Advocates for the Respondents. There are email printouts attached to the notices as an indication that indeed the notices were sent out to the advocates. However, the email printout shows that the notices were sent to advocates for the Respondents only. This must have been an oversight on the part of this court and a valid reason for the absence of advocates for the Appellants/Applicants on the two occasions.
 14. The court has wide and unfettered discretionary powers in setting aside or varying an order. However, the discretion must be exercised judicially and justly. Section 3A of the *Civil Procedure Act* provides for inherent powers of the court for the ends of justice and to prevent abuse of the court process.
 15. The Appellants/Applicants in their application dated 25th June 2024 also pleaded that failure to prosecute the appeal are mistakes of their counsel and the same should not be visited upon them. In *Joseph Wekesa Tulula v Hilda Wanjiru Tulula*, Kitale ELC Case No. 52 of 2013 the court held: -

“Mistakes of counsel are common and in certain deserving cases this court is inclined to overlook those mistakes if only to do substantive justice to an applicant. In the case of *Shiekh T/A Hasa Hauliers v Highway Carriers Ltd* [1988] eKLR the Court of Appeal (Gachuhi, JA) observed as follows: -

“... it must be clear that the court is to administer justice that the suit in court is between two litigants and the counsel is merely putting the case for his client forward. The litigant, may not be aware of the failure of his advocates in complying with rules. He is at the mercy of his advocates. It is the law of agency that the principal is bound by the acts of his agent. Yet in administering justice, why should the litigant suffer due to the mistakes and errors of his advocate.

If the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant’s rights. Mr. Maosa relied on *Pitbon Waweru Maina v Thuki Mugiria* (ibid) as an authority that a litigant should not be punished through the mistake of his counsel. This is what was referred to by Harris J in *Sha v Mbogo*, (ibid) so as to avoid miscarriage of justice. The judge misdirected himself in importing matters which cause miscarriage of justice.”
 16. In conclusion, I am satisfied that there is a basis for setting aside the dismissal order of 13th July 2023 and reinstatement of the appeal. On the issue of stay of execution, the orders of court issued on 14th November 2019 by Hon Lady Justice D.O. Chepkwony stay in force.
 17. The court therefore makes the following orders: -



- i. The applications dated 24th June 2024 and 25th June 2024 are merited and hereby allowed.
- ii. The warrants of arrest dated 15th May 2024 in Mombasa Chief Magistrates Court Civil Suit No. 1845 of 2004, *Abdala Mohamed Abdala v Mombasa Liners Limited* shall be suspended in the interim pending the hearing and determination of the appeal.
- iii. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3RD DAY OF OCTOBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

No appearance Advocate for the Applicants

Arande Advocate for the 1st Respondent

Court Assistant – Mr. Samuel Shitemi

