



REPUBLIC OF KENYA



**KENYA LAW**

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**Glory Driving School v Formax Insurance Brokers Limited (Civil Appeal  
52 of 2019) [2024] KEHC 14360 (KLR) (Civ) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14360 (KLR)

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

**CIVIL  
CIVIL APPEAL 52 OF 2019**

**CW MEOLI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**GLORY DRIVING SCHOOL ..... APPELLANT**

**AND**

**FORMAX INSURANCE BROKERS LIMITED ..... RESPONDENT**

**RULING**

1. Glory Driving School (hereafter the Applicant) brought the Notice of Motion dated 25.11.2022 (the Motion) seeking that the order made on 7.10.2022 dismissing the appeal be set aside and the appeal be reinstated and that the conditional order staying execution made on 20.02.2020 be reinstated pending hearing and determination of the appeal. The Motion which is expressed to be brought under Articles 50 and 159(2)(d) of *the Constitution*; Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 42, Rules 6 and 21; Order 51, Rule 1 of the Civil Procedure Rules (CPR) is premised on the grounds featured on its face and as amplified in the supporting affidavit sworn by the Applicant's administrator, Johnson Matara.
2. Therein, the deponent stated that being aggrieved by the judgment delivered by the trial court on 14.01.2019 in Milimani CMCC No. 5812 of 2011 (the suit), the Applicant instructed its advocate to lodge the present appeal vide the memorandum of appeal dated 6.02.2019. The deponent further stated that upon unsuccessfully seeking to stay execution before the trial court, the Applicant's advocate moved the High Court by a similar application; that the latter application was compromised by consent of the parties on 20.02.2020, to the effect that stay of execution was granted on the condition that the Applicant deposits half the decretal sum (Kshs. 290,968.90) within 14 days from being the date of adoption of the consent. That the Applicant complied with the said condition.
3. The deponent swore that the Applicant's advocate simultaneously applied for certified and typed copies of the judgment and proceedings in respect of the suit to facilitate the compilation of the record



of appeal, which request was not immediately acted upon by the lower court. Additionally, that the delay in filing the record of appeal was exacerbated by the onset of the Covid-19 pandemic which interrupted normal court operations as well as the discovery that the court file in respect of the suit could not be traced. Hence, it was not until the end of October 2022 that the requisite documents were ready, prompting the filing of the record of appeal on 22.11.2022 upon which the Applicant's advocate learned that the appeal had been dismissed for want of prosecution on 7.10.2022, in the absence of the parties herein.

4. The deponent stated that the Applicant's advocate never received prior notice of the notice to show cause why the appeal should not be dismissed (NTSC) adding that the dismissal done in the absence of the lower court file was premature in any event, as directions on the appeal had not been taken. The deponent in closing averred that the Applicant is keen on prosecuting the appeal and therefore urged the court to exercise its discretion in its favour.
5. Formax Insurance Brokers Limited (hereafter the Respondent) resisted the Motion by way of the replying affidavit sworn by Titus Nzuki Wambua, Technical Manager of the Respondent, on 19.07.2024. Therein, he deposed that the Applicant is guilty of laches and hence the dismissal was improper. He further stated that the Applicant has not offered any reasonable basis upon which the appeal can be reinstated, the Applicant having only made a follow-up on the typed proceedings on two (2) occasions and no further action in that regard, since January, 2022. He asserts that prior notice was given of the NTSC, contrary to the Applicant's averments, and in any case, the appeal is bereft of arguable grounds and chances of success are therefore slim.
6. The Motion was canvassed by way of brief written submissions. To support the Motion, counsel for the Applicant first restated the depositions in the supporting affidavit. And basing his submissions on the decision rendered in Joseph Kinyua v GO Ombachi [2019] KEHC 10508 (KLR), he asserted that dismissal of a matter is a draconian act. He further cited the decision in Kilonzo & another v Muthaka [2023] KEHC 19000 (KLR) where the court allowed the reinstatement of the appeal therein for want of evidence of service of a NTSC, and the fact that directions had yet to be given in respect of that appeal. Counsel further referred to the decision in Key Freight Kenya Limited v Mohammed Abdi [2022] KEHC 1161 (KLR) to support his argument that the Applicant is entitled to be heard on its appeal. The court was therefore urged to allow the Motion as prayed.
7. On the part of the Respondent, its counsel viewed the Motion as unmerited on the grounds that the Applicant violated the overriding objective under Sections 1A, 1B and 1C of the CPA and did not respond to the NTSC or attend court for hearing thereof. Counsel urged the court to consider the decision in Thuita Mwangi v Kenya Airways Ltd [2003] KECA 201 (KLR) which sets out the applicable principles in determining an application seeking to reinstate an appeal. Counsel equally relied upon the case of Bilha Ngonyo Isaac v Kembu Farm Ltd & Attorney General [2018] KEHC 4729 (KLR) to argue that the decision whether or not to reinstate a matter lies purely with the discretion of the court. On the basis of the averments set out in the replying affidavit, counsel prayed that the court exercises its discretion by dismissing the Motion in its entirety, with costs to the Respondent.
8. The court has considered the rival affidavit material, the submissions filed, and the authorities cited therein. The key prayers in the Motion seek the setting aside of the dismissal order made on 7.10.2022 and reinstatement of the appeal, and of the conditional order of 20.02.2020 staying execution.
9. The court's power to grant or refuse to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially



and justly. The rationale for the discretion to set aside 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.”

10. Here, the applicable provisions are Order 42, Rule 35 of the CPR as read together with Section 3A of the CPA, 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.” 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.”

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)

11. Order 42, Rule 35 (supra) on its part provides that:
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.
12. Rule 13(1) above was amended vide the Civil Procedure (Amendment) Rules, 2020 under Section 22, to read as follows:

Order 42 of the principal Rules is amended by —

...

- (c) deleting sub-rule 13 (1) and substituting therefor the following new sub rule —



13(1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.

13. Therefore, the duty of causing an appeal to be listed for directions rests in the first instance with the Deputy Registrar. However, nothing bars the diligent appellant from prodding the Deputy Registrar to act. Nor does the court accept the narrow argument by the Applicant that the respondent or the court cannot move to dismiss a dormant appeal merely because directions have not issued. More so, where, as in this case, an appellant has neglected to file the record of appeal. Such an argument appears to fly in the face of the overriding objective as encapsulated in sections 1A and 1B of the CPA. As the Court of Appeal stated in *Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09:

“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.”

14. The Applicant filed the present appeal on 6.02.2019. Going by the record, the Applicant subsequently filed an application dated 6.01.2020 seeking to stay execution, which application was compromised by way of a consent recorded between the parties and adopted as an order of the court on 20.02.2020. The key terms thereof being that the Applicant was granted stay of execution on condition that it would pay half the decretal amount (being Kshs. 290,968.90) to the Respondent within 14 days. The record reveals that thereafter, no progressive steps were taken in the appeal, leading to the issuance of the NTSC and eventual dismissal on 7.10.2022 pursuant to Order 42, Rule 35(2) of the CPR, as the Applicant was absent, and no cause was shown to the court why the appeal should not be dismissed. The said dismissal order prompted the instant Motion.

15. The Applicant’s proffered explanation for the non-attendance for the hearing of the NTSC is that the NTSC was not served upon its advocate. The court upon perusing the record noted that contrary to the above assertion, the NTSC issued on 16.08.2022, for 7.10.2022 and evidence of service filed via the affidavit of service sworn by the Court Bailiff, Rosemary Wanjiru, on 19.09.2022. Therein the process server deposed that the NTSC was dispatched by registered mail to the parties’ respective advocates.

16. Contrary to the averments made by the Applicant that the appeal was dismissed in the absence of the parties, it is clear from the court proceedings of 7.10.2022 that Ms. Naima holding brief for Ali, counsel for the Respondent, was present during hearing of the NTSC, while the Applicant and/or its advocate, were absent. The court having satisfied itself regarding service of the NTSC, and there being no cause shown, proceeded to dismiss the appeal for want of prosecution.

17. While the Applicant seems to dispute service on behalf of its advocate, the Applicant’s counsel himself did not deem it necessary to swear an affidavit, either to dispute the postal address to which the NTSC was addressed, or to support the essentially hearsay claims of the Applicant’s deponent to the supporting affidavit concerning non-service. Allegations of non-service from a ‘stranger’ in the form of an officer of the Applicant are therefore without foundation and on their own and do not constitute direct evidence on a matter that was core to the application. A party seeking the exercise of the court’s discretion in his favour must not be seen to presume on the court by appearing flippant.



18. Concerning the Applicant's explanation on the delay in prosecuting the appeal, essentially, the alleged difficulties and delays encountered in obtaining the certified copies of the typed proceedings and lower court judgment, the court has noted copies of the letters dated 20.01.2020 and 25.01.2022 annexed to the affidavit supporting the Motion (marked as annexures "JM-3" and "JM-5"). The said letters were addressed to the Executive Officer-Milimani Commercial Courts, requesting for the lower court proceedings and judgment to enable the compilation of the record of appeal.
19. It is apparent from the exhibited material that the first letter elicited a response (annexure marked "JM-4") through the Judiciary e-filing portal requesting the Applicant's advocate to make the necessary payments. It is not clear whether payments were made or what next happened as by the second letter coming two years later, (annexure marked "JM-5") the Applicant's advocate stated that the lower court file could not be traced and sought the assistance of the Executive Officer in that regard. There is no telling when exactly, the Applicant's advocate did finally receive the requisite record of the lower court, but the record shows that the record of appeal was filed on 22.11.2022 by which time the appeal had already been dismissed.
20. Evidently, there was a long period of unexplained delay in prosecuting the appeal, and it did not help that the Applicant's advocate failed to attend the hearing of the NTSC, to explain the delay. Instead, the Applicant has now opted to unfairly transfer blame to this court for non-service of the NTSC and the lower court for not furnishing proceedings on time, and yet from the Applicant's exhibited material, the proceedings had not been pursued by their advocate with any particular vigour. Save for the two (2) letters exhibited here, the court did not come across any serious demonstrate of diligent and persistent efforts on the part of the Applicants at following up on the requisite records.
21. The court is therefore not satisfied with the Applicant's explanation given for the inordinate delay of over three (3) years since filing appeal in 2019, in following up and obtaining the requisite proceedings since the institution of the appeal in the year 2019. Nor is there a reasonable explanation offered to account for the Applicant's overall delay, not to mention that there was a delay of two (2) years since dismissal of the appeal to the filing of the present application for reinstatement. The latter, if nothing else, puts to doubt, indeed displaces, the Applicant's avowed interest and keen pursuit of the appeal.
22. Litigation must surely come to an end. It is to no avail for a party who has shown lethargy in prosecuting his matter, when eventually faced with his karma, to fail to admit responsibility for his own default while deflecting blame onto third parties, and in the same breath emphasizing that he has a right to be heard. He does, but that right is neither absolute nor to be exercised at his leisure, and to the adverse party's detriment. The Applicant herein clearly squandered his right to be heard on his appeal.
23. I think I have said enough to demonstrate that the Notice of Motion dated 25.11.2022 cannot be justified in the circumstances of this case. Consequently, the Motion is hereby dismissed, with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**C. MEOLI**

**JUDGE**

In the presence of

Mr. Atera for the Applicant:

N/A for the Respondent:



C/A: Erick

