



**Siambe v CFC Stanbic Bank & another (Civil Appeal 592 of 2019)
[2024] KEHC 13776 (KLR) (Civ) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13776 (KLR)

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

CIVIL

CIVIL APPEAL 592 OF 2019

CW MEOLI, J

NOVEMBER 7, 2024

BETWEEN

CHRISTOPHER AMISI SIAMBE APPLICANT

AND

CFC STANBIC BANK 1ST RESPONDENT

LEGACY AUCTIONEERS SERVICES 2ND RESPONDENT

RULING

1. The live prayers for consideration in the motion dated 12.06.2024 filed by Christopher Amisi Siambe (hereafter the Applicant) seek; -
 1. Spent
 2. That the honorable Court be pleased to enjoin Westminster Commercial Auctioneers as the 3rd Defendant.
 3. That the honorable Court be pleased to re-instate the Civil Appeal which was dismissed for want of prosecution on 23rd March 2023 and be heard and determined on merit.
 4. Spent
 5. That this honorable Court be and is hereby pleased to order stay of execution of the ruling delivered on Wednesday 12th February 2020 by Hon. P. Muholi in Civil Case No. 8637 of 2017 and all consequential orders made therein pending hearing and determination of the High Court appeal.
 6. That this honorable Court be pleased to issue a temporary injunction restraining Defendant, its agents, servants or assignees from interfering, advertising, disposing or offering for sale



that Plaintiff's/Applicant's Nairobi/Block/82/2452 pending hearing and determination of the High Court appeal.

7. That this honorable Court be pleased to issue an interim temporary injunction restraining Defendant, its agents, servants or assignees from interfering, advertising, disposing or offering for sale that Plaintiff's/Applicant's Nairobi/Block/82/2452 pending hearing and determination of the High Court appeal.
 8. That a declaration that any purported auction and sale of parcel of Nairobi/Block/82/2452 whereof by the Respondent to any third party is a nullity.
 9. That a declaration that the charge against Nairobi/Block/82/2452 in favour of the 1st Respondent is invalid.
 10. That the costs of the Application be provided for." (sic).
2. The motion is expressed to be brought pursuant Section 3 & 3A of the *Civil Procedure Act* (CPA), Order 22, Order 42 Rule 4 & 6 and Order 51 Rule 1 & 3 of the Civil Procedure Rules (CPR). It is premised on the grounds on its face and amplified in the supporting affidavit sworn by Applicant. The gist of his affidavit is that Nairobi/Block/82/2452 (hereafter the suit property) is a matrimonial property owned jointly with his spouse for over 20 years; that having secured a loan facility from CFC Stanbic Bank (hereafter the 1st Respondent) a charge was created over the suit property; and that he duly serviced the said facility. That he had in the course of time requested the 1st Respondent to restructure the loan facility and provide him with accounts for the period 2014 to 2019 but it had blatantly refused while failing to provide accounts.
 3. The Applicant further deposed that the 1st Respondent's action has hindered verification of the loan account statement in respect of the facility, even as it continued to levy excessive interest and penalties in contravention of the In Duplum Rule. That various auctioneers have in the past attempted to auction the property, and more recently, Westminster Auctioneers had served him with a notice of advertisement and auction. He views the said notice as irregular and pleads that it is in the interest of justice that the orders sought are granted.
 4. The 1st Respondent opposes the motion by way of a replying affidavit dated 18.07.2024, sworn by Wahura Mwangi, described as the legal advisor of the 1st Respondent, duly authorized, conversant with the issues and competent to swear the affidavit. He attacks the motion by stating that the Applicant's appeal was filed 4 years and 10 months ago and that at the time it was dismissed on 24.03.2023, the Applicant had yet to file a Record of Appeal (ROA) in the matter and or to take any steps in prosecution of the appeal. He contends the pendency of the appeal had been prejudicial to the 1st Respondent, whose right to a fair trial was adversely affected by the excessive delay in prosecution of the appeal. He contends that the delay in filing the instant motion is inordinate, unexplained and inexcusable. Therefore, reinstating the appeal in the face of apparent lethargy by the Applicant would run afoul of the overriding objective of this Court.
 5. He asserts that upon issuance of the orders on 24.03.2023 dismissing the appeal, the Court became functus officio. Thus, the ex-parte orders issued in respect of the motion are defective and not founded on an existing appeal. In summation he deposes that the present motion is without merit, is contemptuous, an abuse of the Court process as such it ought to be dismissed with costs.
 6. Legacy Auctioneers Services (hereafter the 2nd Respondent) did not participate in the instant proceedings. Nevertheless, directions were taken on the disposal of the Applicant's motion by way of written submissions. Only the Applicant complied.



7. Counsel for the Applicant summarily condensed his submissions around four issues. At the onset, it was submitted that the motion is not an abuse of the judicial process as alleged by the 1st Respondent, as delay towards prosecution of the appeal was inadvertent. It was argued that upon filing of the memorandum of appeal, the Applicant was unable to file his ROA due to inability to obtain typed proceedings from the lower Court as the court file was said to be missing. Thus, by the date of the dismissal of the appeal, the Applicant was yet to obtain proceedings to facilitate prosecution of the appeal. While calling to aid the decision in *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR, counsel posited that it would be fair, prudent and in the interest of justice that the instant appeal is reinstated to be heard on merit. In conclusion, he submitted that the Applicant has an appeal with a high chance of success and on a balance of probabilities is entitled to the orders as sought in the motion.
8. The Court has considered the material canvassed in respect of the motion. Alongside the prayer for reinstatement of the instant appeal, the Applicant has equally sought, among others, an order to stay execution of the lower Court decision pending hearing and determination of the appeal. It is apt to observe at this point that a prayer seeking to stay execution and or injunction pending hearing and determination of an appeal, must be premised on an existing existence appeal. It is evident on a plain reading of Order 42 Rule 6(1) & (6) of the CPR, that an order to stay execution and or injunction pending hearing and determination of an appeal presupposes the existence of an appeal. An existing appeal being the condition precedent to the exercise of this Court’s appellate jurisdiction under Order 42 Rule 6 CPR and this applies both to prayers for stay orders or injunctions brought under that provision.
9. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR accepted the reasoning that a prayer for stay of execution pending appeal must be predicated on an existing appeal.
10. Earlier, the Court of Appeal in the case of *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga* [2012] eKLR). Here the appeal was dismissed for want of prosecution therefore ceased to exist and the court would be acting in vacuo by considering the prayer for stay in these circumstances.
11. Thus, the court must first address itself to the prayer for the reinstatement of the dismissed appeal, the outcome of which will have a bearing on the prayer for stay of execution and or injunction pending appeal. The Applicant’s prayer for reinstatement appears to be anchored on Section 3A of the CPA. The provision 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”.
12. Regarding the purport of 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 v 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 & 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.”

13. Upon a cursory review of the record it is apparent that the appeal was dismissed pursuant to a self-executing order issued by Visram. J on 20.01.2023 which the Court will address later in this ruling. That said, 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. Under Section 3A of the CPA, this Court would in an appropriate case be justified in invoking its inherent jurisdiction so that the ends of justice are met. Congruently, it is settled that the discretion of the Court to set aside a dismissal order is unfettered and 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.
14. 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.”
15. The principles enunciated in *Shah –vs- Mbogo* (supra) were amplified further by Platt JA in *Bouchar International (Services) Ltd vs. M’Mwereria* [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside ex parte judgments, the principles pronounced therein apply with equal measure in this matter, considering that the directions issued by Visram. J on 20.01.2023, had the effect of conclusively determining the appeal by way of the self-executing order.
16. A perusal of the brief record before the Court reveals the history of this appeal as follows. The appeal was filed on 16.10.2019. Since filing of the appeal, there was no further activity until issuance of a Notice to Show Cause (NTSC) dated 14.12.2022 pursuant to Order 42 Rule 35(2) of the CPR. The NTSC was listed before Visram. J on 20.01.2023. The Court upon hearing representation made by counsel for the Applicant made the following order:-

“I decline to dismiss the appeal based on the reasons for delay stated by counsel.



1. The Appellant is granted 45 days to file the record of appeal and prosecute the appeal failing which the appeal stands as dismissed.” (sic)
17. There was subsequently no activity by the Applicant and the self-executing orders took effect. The order of 20.01.2023 was unequivocal; the Applicant, in order to sustain the appeal, was required to file his ROA on or before the 06.03.2023, and prosecute his appeal failing which the appeal would stand dismissed. Astoundingly, the Applicant’s affidavit material in support of the motion makes no attempt to explain his non-compliance with the order of the Court. As a clear afterthought, the Applicant purported to canvass an explanation in his submissions. The matters raised being of a factual nature belong to an affidavit and have no place in submissions. By raising such matters via submissions, the Applicant effectively denied the Respondent the opportunity to reply via an affidavit in rebuttal.
18. The Court takes great exception to the manner in which the motion was drafted, and the issues canvassed therein. The Applicant through his affidavit appears to address peripheral issues that appear to be a preserve of the trial Court at best, while he fails to canvass the core issues that pertain to reinstatement of the appeal. Therefore, the affidavit in support does not address or aid the Applicant’s specific prayer for reinstatement. There is therefore no demonstration of the factual basis upon which the court should exercise its discretionary power of setting aside.
19. This appeal was filed almost five years ago, and the entire period of delay is relevant. From the record, it is apparent that having filed the appeal, the Applicant went into slumber and only reappeared at the first instance when he was presented with a NTSC; and again, more than a year later after the appeal already stood dismissed, to bring the present motion. The delay between dismissal and presentation of the instant motion is fifteen (15) months with no explanation being offered for the said delay. Given the inordinate delay herein, which has not been explained, the Applicant’s plea for a chance to be heard ring hollow; the Applicant squandered his opportunity to be heard through his own indolence, and even upon being given reprieve to prosecute the appeal, wasted the chance. He is the chief author of his karma and cannot be heard to attempt to deflect responsibility.
20. The overriding objective encapsulated in Section 1 A and 1 B of the CPA obligates parties and their advocates to progress their matters with expedition. The Courts are presently deluged with heavy caseloads, and can ill afford indulgence towards indolent parties, such as the Applicant, who take no responsibility for their cases and conduct therein. 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 equally deserve legal closure.
21. I think I have said enough to demonstrate that the prayer for reinstatement is without merit and must fail, and with it, the other prayers in the application dated 12.06.2024. The motion is hereby dismissed in its entirety, with costs to the 1st Respondent. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 7TH DAY OF NOVEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Onchanga for the Applicant:

N/A for the 1st Respondent:



C/A: Erick

