



**Tsimonjela v Infinity Autos Limited & another (Civil Appeal 729 of 2019)
[2024] KEHC 14825 (KLR) (Civ) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14825 (KLR)

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

**CIVIL
CIVIL APPEAL 729 OF 2019**

CW MEOLI, J

NOVEMBER 21, 2024

BETWEEN

CHARLES TSIMONJELA APPLICANT

AND

INFINITY AUTOS LIMITED 1ST RESPONDENT

DIPA DAXESHABHAI PATEL 2ND RESPONDENT

RULING

1. For determination is the motion dated 18.04.2024 by Charles Tsimonjela (hereinafter the Applicant) seeking inter alia that the Court be pleased to reinstate the appeal that was dismissed by this Court for want of prosecution on 07.10.2022. The motion is expressed to be brought pursuant to Section 1A, 1B, 3A & 63(e) of the Civil Procedure Act (CPA), among others, and based on the grounds on its, as amplified in the supporting affidavit sworn by Ratemo Amenia, counsel for the Applicant.
2. The gist of his affidavit is that the matter came up on 07.10.2022 for hearing Notice to Show Cause (NTSC) why the appeal should not be dismissed for want of prosecution. He goes on to depose that the matter was being handled by Mr. Ratemo Oira Advocate and that in the years 2020 & 2021 there was a scaling down of court activities due to the Covid-19 Pandemic. He states that the NTSC was sent through the registered postal address of the Applicant's counsel, Mr. Ratemo Oira who had personal conduct of the matter, and who had passed on the 24.03.2021. Hence there was no appearance for the Applicant when the appeal came up for NTSC on 07.10.2022, leading to its dismissal.
3. He goes on to depose that the Law Society of Kenya (LSK) appointed him to run and manage the firm of M/s Ratemo Oira & Co. Advocates, having been nominated by deceased counsel. That the custodian of the Post Office Box No. xxxx-00600, Nairobi cited in the NTSC, was Mr. Ratemo Oira (deceased) and it required certain processes to enable him access the said postal office box , which by



- the time the NTSC was sent , had not been completed ; that the Applicant has not abandoned the appeal and is interested in prosecuting it to conclusion ; that the motion has been brought in good faith ; and that it ought to be allowed as the Applicant was not accorded an opportunity to be heard on the NTSC. Finally, he deposes that the Applicant t will suffer irreparable loss if the motion is refused.
4. Infinity Autos Ltd and Dipa Daxeshabhai Patel (hereafter the 1st and 2nd Respondent/Respondents) oppose the motion by way of grounds of opposition dated 04.06.2024. They take issue with the application on grounds; - that the motion as filed is a non-starter in law and is a gross abuse of the hallowed Court process; that the reasons given for reinstatement of the appeal are unsatisfactory as the appeal was properly dismissed for want of prosecution after being in Court for four (4) years without being prosecuted, hence the Applicant is an indolent litigant ; that the application for reinstatement has been brought some two (2) years after the appeal was dismissed, which amounts to inordinate and unexplained delay that is prejudicial to the Respondents; that the Applicant has not shown cause why the appeal ought not to have been dismissed for want of prosecution on 07.10.2022; and that accordingly the motion is devoid of merit and an abuse of the Court process and ought to be dismissed with costs to the Respondents.
 5. The motion was disposed of by way of written submissions. On the part of the Applicant, counsel reiterated his affidavit evidence and collated his arguments in support thereof on a singular issue. Addressing the Court on the test that ought to be applied here, counsel relied on the provisions of Order 12 Rule 7 of the CPR, the decisions in *Ivita v Kyumbu* (1984) KLR 441 and *Shah v Mbogo & Another* (1967) EA 116 as cited in *Bilha Ngonyo Isaac v Keumbu Farm Ltd & Another* [2018] eKLR. Reiterating further that non-attendance in respect of the NTSC was not deliberate or intended to obstruct or delay justice. He urged the Court to find that the Applicant's material justifies the exercise of the court's discretionary power by allowing the motion.
 6. On behalf of the Respondents, counsel having set out the history of the matter stated that applying the mutatis mutandis the principles regarding dismissal of a suit for want of prosecution, it is evident that the Applicant failed to demonstrate sufficient cause for this Court to exercise its discretion by allowing reinstatement. While calling to aid the decision in *Peter Kipkurui Chemaiywo v Richard Chepsergon* [2021] KECA 979 (KLR) he argued that the Applicant has not offered sufficient explanation for delay since the demise of erstwhile counsel, and it has not been demonstrated when appointment of present counsel occurred. Moreover, the motion has been brought after inordinate delay; more than four (4) years since the demise of former counsel and two (2) years since dismissal of the appeal. That the delay is prejudicial to the Respondent(s).
 7. More so as the instant motion has been brought more than five (5) years since the appeal was filed and that no record of appeal had been filed. The decisions in *Bernard Muthee & Another v Anita Kamba Mwiti* [2021] eKLR and *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & Lucy Nduta Riungo* [2013] KEHC 1540 (KLR) were relied on in that regard. Counsel equally pointed out that the Applicant did not indicate when he learnt of the dismissal. Citing the decision in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2020] eKLR counsel asserted that the motion is devoid of any evidentiary material to invoke this Court's discretion in favour of the Applicant and that both counsel and the Applicant are guilty of indolence.
 8. In the alternative, counsel posited that the Applicant was served with the NTSC but failed to attend and show cause, leading to the dismissal of the appeal. Hence the Court is functus officio and bereft of jurisdiction to entertain the motion seeking to overturn the dismissal orders. That in these circumstances, such an order can only be overturned by way of appeal or review, which is not the case here. Counsel urged this Court not to depart from its decision in *Wafula & Another v Kamau (Civil*



Appeal 393 of 2017) [2023] KEHC (KLR)(Civ). In conclusion, counsel urged the Court to dismiss the motion with costs to the Respondent(s).

9. This Court has considered the material canvassed in respect of the motion. The Applicant's motion invokes inter alia the provisions of Section 3A of the CPA. Section 3A of the CPA which 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". The said provision was discussed by the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR.
10. However, before addressing the substance of the motion the Court will address the Respondent's preliminary question relating to jurisdiction. The Respondent contends that the Court is functus officio having dealt with the NTSC, as was held in *Wafula & Another v Kamau (Civil Appeal 393 of 2017)* [2023] KEHC (KLR)(Civ)
11. In *Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others* [2013] eKLR the Supreme Court while considering the functus officio doctrine cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832 wherein it was stated that: -

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.
12. The same Court equally relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that;

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors, nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."
13. In *Wafula & Another v Kamau* (supra) this Court addressed itself to the preliminary question raised by counsel concerning a NTSC that was anchored on Order 42 Rule 35 as read together with Order 43 Rule 1(1)(w) of the CPR. The former provision which 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."
14. Whereas the latter states that: -



(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—

.....

(v)

(w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);

(x)

15. The facts in *Wafula & Another v Kamau* (supra), are distinguishable from the present case. In that case, the NTSC was heard inter partes. The Court, upon hearing the oral representations of the respective parties, by its short ruling observed that no good cause had been shown and proceeded to dismiss the appeal. The appellant therein subsequently filed an application seeking reinstatement of the appeal, which was met with a plea of *functus officio* from the respondent therein. In its ruling, Court stated inter alia that: -

“Pursuant to the NTSC, the Applicants were required on 17.03.2022 to place before the court detailed and cogent reasons why the court ought not to dismiss the appeal. A good practice that has developed over time is that appellants served with a NTSC usually file an affidavit in that regard. The Applicants herein opted to orally address the court in deflecting the NTSC rather than file such affidavit. The Applicants were therefore given the opportunity to be heard in their bid to salvage the appeal, and the Respondent was also heard. In its brief ruling, the court found the reasons advanced by the Applicants to be unsatisfactory. The same reasons are again being canvassed in the present motion. The court having made a finding thereon cannot revisit its own decision save by way of review.

There is no jurisdiction under Order 42 Rule 35(2) CPR or under section 3A of the CPA for the court to purport to set aside its own orders of dismissal in the present situation. The absence of an express provision regarding an important matter such as the reinstatement of an appeal dismissed under Order 42 Rule 35(2) of the CPR cannot be assumed to be accidental and the court’s inherent jurisdiction cannot be invoked to cloth the court with jurisdiction, as argued by the Applicants. In my view, this is not the kind of situation for which the inherent jurisdiction of the court, properly understood, can be invoked; this court is *functus officio*. This is a matter of jurisdiction and not technicality, as the Applicants appear to suggest.”

16. Here, the appeal was dismissed pursuant to the NTSC on 7.10.2022 without the Applicant being heard. There would have been merit to the Respondent’s objection if the facts were similar to those in *Wafula & Another v Kamau* (supra). Therefore, the Respondents contestation is not well taken and the court will proceed to consider the motion on the merits.

17. The court notes that the Respondent opted to file grounds of opposition thereto. The Court of Appeal in *Blue Thaitian SRL (Owners of the Motor Yacht ‘Sea Jaguar’) v Alpha Logistics Services (EPZ) Limited* (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) rightly observed that a party opting to respond to motion by way of grounds of opposition by virtue of Order 51 Rule 14 of the CPR confines themselves to issues of law and legal arguments only.

18. The motion correctly invokes the court’s discretion under section 3A of the CPA. The discretion is unfettered but 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 v Mbogo & 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.”

19. The principles enunciated in *Shah v 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 07.10.2022 had the effect of conclusively determining the appeal by way of a dismissal order.
20. The record shows that the appeal was filed in 2019. The record of appeal was not filed and the appeal remained dormant for three years until it was dismissed by Seron. J on 07.10.2022. Thereafter, there was no action until 19.04.2024 when the Applicant moved the court seeking to reinstate it. The Applicant's explanation through counsel on delay in prosecuting the appeal and seeking reinstatement revolves around the demise of the Applicant's erstwhile counsel on 24.03.2021, his own delayed appointment and lack of access to the postal box of the deceased counsel, namely Post Office Box No. xxxx-00600, Nairobi where the NTSC was sent.
21. This does not in any way explain the failure prior to dismissal to prosecute the appeal, and in that regard, it is strange that the Applicant himself did not consider it necessary to swear an affidavit, opting instead to stay in the shadows of his counsel. The Applicant was the appropriate person to speak to the pertinent question of delay and his own steps in progressing the appeal. It was not helpful for the Applicant's counsel to rivet his depositions around the fact of the death of erstwhile counsel in 2021, while offering vague statements on his own takeover of the deceased counsel's law firm and subsequent steps. Counsel's affidavit in support of the motion does not even indicate the date when the LSK appointed the counsel to take over the management of the firm of M/s Ratemo Oira & Co. Advocates, hence explain the delay of two years in bringing this motion filed on 19.04.2024. Or the steps subsequently taken to access of the deceased's Post Office Box No. xxx-00600, Nairobi and when exactly the access was obtained. Besides, counsel does not indicate whether he took stock of the matters he inherited with a view to verifying their status without delay. Vague and unsupported depositions such as brought here cannot offer succor to an application of this nature.
22. The period of delay in prosecuting the appeal prior to dismissal and subsequent filing of the motion appears inordinate, and no satisfactory explanation has been given. It is trite that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the Court's discretion. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR held that “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”.
23. Additionally, court actions ultimately belong to the litigants and not the advocates. Thus, it is the litigant's duty to pursue or otherwise take active steps to ensure the timely prosecution of his or



her claim. This position was fortified by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR when it held that:

“.....Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

24. As correctly observed in *Shah –vs- Mbogo* (supra), this Court’s discretion “.....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.” At a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute their cases at leisure. It is now almost five (5) years since the appeal was filed and more the twelve (12) years since the cause of action arose in respect of the lower court suit. As observed, the Applicant eschewed to swear any affidavit in support of the motion for reinstatement.
25. Parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the CPA. While the constitutional right of the Applicant to be heard on the merits of his appeal is undisputable, it is not absolute and must be balanced against the Respondents’ equal right to have the appeal to which they have been dragged determined expeditiously. The Respondents’ apprehension of further prejudice if the motion were to be granted does not seem idle, in the circumstances of this case. Considering all the foregoing, the Court is of the firm view that the justice of the matter lies in dismissing the Applicant’s motion dated 18.04.2024 with no orders as to costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2024.

C. MEOLI

JUDGE

In the presence of

N/A for the Applicant:

Mr. Wanjohi for the Respondents:

C/A: Erick

