



Meiser Trading Company Limited v Mitsumo Computer Limited (Civil Appeal E406 of 2021) [2024] KEHC 15569 (KLR) (Civ) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15569 (KLR)

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

CIVIL

CIVIL APPEAL E406 OF 2021

CW MEOLI, J

DECEMBER 5, 2024

BETWEEN

MEISER TRADING COMPANY LIMITED APPELLANT

AND

MITSUMO COMPUTER LIMITED RESPONDENT

RULING

1. Meiser Trading Company Limited (hereafter the Applicant) filed the Notice of Motion dated 2.08.2024 (the Motion) seeking to set aside and/or discharge the order dismissing the appeal owing to the Applicant's failure to file a record of appeal within the time stipulated by the court and reinstatement of the appeal. The Motion which is expressed to be brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and 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 advocate, Kennedy Modi.
2. The advocate stated that the delay in complying with the directions given for filing the record of appeal was occasioned by futile attempts on the part of the Applicant's advocate at obtaining the typed and certified proceedings from the lower court. That the record of appeal has since been filed, together with written submissions in respect of the appeal. The advocate averred that the Applicant remains keen and willing to prosecute the appeal and thus urged the court to exercise its discretion in its favour, without placing undue regard to procedural technicalities.
3. Mitsumo Computer Limited (hereafter the Respondent) resisted the Motion through the replying affidavit sworn by its advocate, June Mumbi, on 4.11.2024. Therein, the advocate deposed inter alia, that it has been three (3) years since the appeal was filed; that no tangible material has been furnished to demonstrate any active steps on the part of the Applicant in applying for the proceedings in a bid to comply with the court's directions and; hence, the instant Motion is not only frivolous but is also



an abuse of the court process. The advocate further stated that following non-compliance on the part of the Applicant with the condition for a stay of execution set by Chitembwe, J. (as he then was) on 18.03.2022 requiring it to provide security for the sum of Kshs. 1,539,235/- by way of a bank guarantee within 45 days thereof, the Respondent proceeded to fully execute the decree and that the Applicant has since settled the decretal sum. That litigation must therefore come to an end.

4. When the parties' respective advocates attended the hearing of the Motion on 30.10.2024, they agreed to have the Motion determined on the basis of the affidavit material on record.
5. The court has therefore considered the rival affidavit material in respect of the Motion seeking the setting aside of the dismissal order and reinstatement of the appeal.
6. The grant or refusal 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 as conferred on the court was spelt out in the case of *Shah v Mbogo and another* [1967] E.A 116:

“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.”

7. Section 3A of the CPA, being the applicable provision here, 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.”

8. 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)

9. The events leading to the dismissal order are as follows. The Applicant filed the present appeal by way of the memorandum of appeal on 13.07.2021. Thereafter, the Applicant filed an application dated 18.08.2021 seeking to stay of execution of the decree issued by the lower court, pending hearing and



determination of the appeal. The application was heard before Chitembwe, J. (as he then was) who vide the ruling delivered on 15.03.2022, granted a stay of execution conditional upon the Applicant providing a bank guarantee for the decretal sum of Kshs. 1,539,235/- within 45 days thereof, failing which the stay order would lapse and the Respondent would be at liberty to execute the decree. The record shows that subsequently, the Applicant filed an application dated 16.06.2022 seeking review and/or varying of the ruling and enlargement of time to enable it comply with the conditions upon which a stay of execution was granted. Which application was eventually withdrawn on 23.05.2023, having been overtaken by events, namely the settlement of the decretal sum by the Applicant vide the two (2) cheques dated 15.06.2022 for the respective sums of Kshs. 739,235/- and Kshs. 800,000/-.

10. The record shows that when the matter came up in court on 18.07.2023 counsel for the Applicant indicated that he was yet to obtain the typed and certified lower court proceedings to enable him to prepare the record of appeal. The matter was therefore scheduled for mention on 2.11.2023 when counsel for the Applicant sought a further two (2) months to enable him comply with the requirement to file a record of appeal. The Deputy Registrar, Hon. Silvia Motari, granted this request and scheduled the matter for further directions on 25.06.2024.
11. It is apparent from the record that when the parties subsequently attended this court on 20.06.2024 it was noted that the Applicant was yet to comply with the above requirements. Consequently, the court directed inter alia, that the Applicant files its record of appeal within five (5) days thereof followed by the filing of its written submissions on the appeal, failing which the appeal would stand dismissed for want of prosecution, with costs to the Respondent. When the parties therefore attended this court on 18.07.2024 the appeal had been rendered dismissed for want of compliance with the orders of 20.06.2024. Thus precipitating the instant Motion.
12. As earlier mentioned, the explanation given by the Applicant for the non-compliance is that there was prolonged delay in obtaining the typed and certified proceedings from the lower court. The record herein contains correspondence dated 13.07.2021; 13.03.2023; and 3.11.2023 from the Deputy Registrar of this court to the Chief Magistrate's Court, Milimani Commercial Courts, requesting for the original lower court record. The record also contains email correspondences starting some two years since the filing the appeal, namely 23.02.2023 and 20.06.2024 addressed to the lower court proceedings section by the Applicant's advocate, similarly requesting for the typed proceedings. The Applicant eventually filed its record of appeal on 2.10.2024, some three years since filing the appeal, and outside the stipulated timelines.
13. Thus, the Applicant did not tender any credible evidence to demonstrate any diligent efforts on its part, in complying with the various court orders and directions requiring it to compile and file its record of appeal. Moreover, as regards the three (3)-year period since the year 2021 when the appeal was filed, and the filing of the instant Motion, the court was not furnished with any credible material to demonstrate any diligent attempts on the part of the Applicant at following up on the typed proceedings.
14. As earlier mentioned, the email correspondences availed by the Applicant indicate that the said proceedings were only sought on two (2) separate and random occasions between the years 2023 and 2024. In the court's view, this is not a reflection of any diligence or proactivity on the part of the Applicant, despite several opportunities extended to it, for the purpose of compliance. The Applicant was entitled to be heard on its appeal, but the right is not absolute or to be exercised with no regard for the overriding objective, and the equal rights of the party dragged to court to an expedited hearing of the appeal. At a time when courts are inundated with heavy caseloads, they cannot afford to allow parties to litigate at their leisure, in violation of the overriding objective in Section 1A and 1B of the CPA.



15. Thus, in *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 the Court of Appeal stated that:

“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.”

16. The court is therefore not satisfied here that the explanation given adequately accounts for the inordinate delay of over three (3) years on the part of the Applicant in applying for proceedings and progressing the appeal, and further does not effectively account for the Applicants’ failure to timeously comply with the various court orders and directions of the court. It appears likely that upon settling the decretal sums, the Applicant lost interest in the appeal. As the Respondent’s counsel has rightly stated, litigation must come to a timeous, cost-effective and just end, in accordance with the overriding objective in Section 1A and 1 B of the CPA.

17. In the result, the court find no merit in the Notice of Motion dated 2.08.2024 which is hereby dismissed, with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Ojuok h/b for Mr. Modi

For the Respondent: Ms. Gedion

C/A: Erick

