



South Sioux Farms Limited v Rasmi Commodities Limited (Civil Appeal E998 of 2022) [2024] KEHC 15201 (KLR) (Civ) (2 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15201 (KLR)

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

CIVIL

CIVIL APPEAL E998 OF 2022

CW MEOLI, J

DECEMBER 2, 2024

BETWEEN

SOUTH SIOUX FARMS LIMITED APPELLANT

AND

RASMI COMMODITIES LIMITED RESPONDENT

RULING

1. South Sioux Farms Limited (hereafter the Applicant) filed the Notice of Motion dated 24.06.2024 (the Motion) seeking to set aside the order made on 28.05.2024 dismissing the appeal for want of prosecution, and that upon the appeal being reinstated, unconditional leave be granted to the Applicant to file its record of appeal. The Motion which is expressed to be brought under Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* (CPA); Order 12, Rule 7; and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR); and Article 50(1) and 159(2)(d) of the *Constitution* is premised on the grounds on its face. As amplified in the supporting sworn by the Applicants' Managing Director, Gurbir Heer.
2. The deponent stated that previously, the Applicant complied with the conditions for stay of execution by depositing the security sum of Kshs. 500,000/- in court, on or about 13.12.2022. The deponent further stated that while the appeal was flagged under the Rapid Results Initiative (RRI) Exercise, the Applicant had all along taken active steps in prosecuting the appeal. That when the matter came up in court, the Applicant was directed to file its record of appeal by 28.05.2024, failing which the appeal would stand dismissed with costs. He asserted that the delay in complying with the above directions was occasioned by unsuccessful attempts on the part of the Applicant's advocates in obtaining the typed and certified proceedings from the lower court, which position was conveyed to the court on various occasions thereafter. That the Applicant's advocates eventually obtained the requisite proceedings on 20.06.2024 and have since prepared a draft record of appeal.



3. The deponent maintained that the Applicant remains willing and ready to prosecute the appeal, further maintaining that the delay in compliance was occasioned by the lower court registry and should therefore not be visited upon the Applicant. He therefore urged the court to exercise its discretion in the Applicant's favour, in the interest of justice.
4. Rasmi Commodities Limited (hereafter the Respondent) resisted the Motion by way of a replying affidavit sworn by its Director, Abdi Bare, on 17.07.2024. Therein, he deposed inter alia, that the Motion is purely intended to prevent the Respondent from enjoying the fruits of its judgment. The deponent further deposed that in any event, the appeal does not raise any arguable grounds. Because, the subject matter of the dispute, namely, certain container loads of sugar were no longer in the custody of the Applicant. He equally stated that the sum deposited in court as security falls way below the value of the loads of sugar purportedly sold by the Applicant, being the sum of Kshs. 11,000,000/-. According to the deponent, the Respondent is entitled to enjoy the fruits of its judgment and hence the instant Motion should be dismissed with costs.
5. Gurbir Heer swore a supplementary affidavit on 10.09.2024 in rejoinder, reiterating inter alia, that the stay order was granted on conditions which the Applicant had already complied with. That the stay order granted has similarly not been varied and/or set aside. Hence the Respondent is improperly calling upon the court to review and/or sit on appeal against its earlier order issuing stay of execution. The deponent accused the Respondent of attempting to pre-empt the appeal before it is heard. He therefore urged the court to allow the Motion, as prayed.
6. When the matter came up in court on 23.09.2024 it was agreed that the Motion be determined on the basis of the affidavit evidence on record. The court has therefore considered the rival affidavit material.
7. However, before delving into the merits of the Motion, the court observed that the Respondent, by way of the replying affidavit sworn by its Managing Director, sought to address both the stay order and the merits of the appeal. From a perusal of the record, it is apparent that at the onset, the Applicant filed an application dated 8.12.2022 seeking to stay execution of the lower court judgment, pending hearing and determination of the appeal. When the said application came up in court on 10.12.2022 this court allowed it on the condition that the Applicant deposits the sum of Kshs. 500,000/- in court by close of business on 6.01. 2023. The Applicant duly complied with the above condition. The issue has no bearing here. Neither do the matters relating to the containers of sugar which touch on the merits of the appeal. What is currently before the court is an application seeking reinstatement of the appeal.
8. Regarding the merits of the Motion, it is important to clarify at this point that the subject order was made by this court on 16.05.2024 effectively directing the Applicant to file its record of appeal by 28.05.2024 failing which the appeal would stand dismissed for want of prosecution. There was no compliance, and the default clause took effect, rendering the appeal dismissed.
9. 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-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. The Applicant invoked inter alia, Order 12, Rule 7 of the CPR, which provides for the setting aside of judgment or order resulting from non-attendance in a suit, thus:

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

11. The above provision is inapplicable in the present circumstances, relating to the dismissal of an appeal for want of prosecution.
12. More relevant here is Section 3A of the CPA, also cited in the Motion, and which 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.” The Court of Appeal in Rose Njoki King’au & Another v Shaba Trustees Limited & Another [2018] eKLR stated concerning the section 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 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.”

13. 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)

14. The events leading to the order made on 16.05.2024 are summed up as follows. The Applicant filed its memorandum of appeal on 9.12.2022 accompanied by the earlier mentioned application filed on like date, seeking an order to stay execution pending the appeal, which was granted on the condition. Thereafter, the matter came up severally in court when on each occasion the Applicant sought and was granted extension time to enable it file its record of appeal. For want of compliance by the Applicant on multiple occasions, the court on 8.05.2024 directed that a notice to show cause (NTSC) be issued for 16.05.2024.
15. The record shows that when the parties attended the court on the 16.05.2024 the Applicant through its advocate yet again claimed to have been unable to file the record of appeal due to the challenges faced in obtaining the typed and certified proceedings from the lower court. The advocate’s assertions were opposed by counsel for the Respondent, who pointed out, and rightly so, that the matter had come up in court severally before, and that each time, there was non-compliance on the part of the Applicant. Upon considering the counsels’ respective positions, the court directed that the record of



appeal be filed by 28.05.2024, failing which the appeal would stand dismissed for want of prosecution with effect from 28.05.2024. There being no compliance, the appeal stood dismissed as of 29.05.2024.

16. Concerning the explanation by the Applicant that the delay was primarily occasioned by inability to obtain the typed and certified lower court proceedings, the record shows that the Applicant's advocate wrote to the Executive Officer-Chief Magistrate's Court at Milimani Commercial Courts, vide the letters dated 7.11.2022 and 14.05.2024 requesting for the typed proceedings. The Applicant did not tender any credible evidence or correspondence for that matter, to demonstrate any diligent steps taken in that regard during the intervening period of almost two years.
17. The court is not satisfied that the explanation given adequately accounts for the Applicant's inordinate delay of two (2) years in seeking the lower court proceedings since the time of institution of the appeal in the year 2022, and further does not effectively account for the Applicant's failure to timeously comply upon being granted multiple extensions of time by the court, to file its record of appeal.
18. While the Applicant is entitled to be heard on its appeal, the right is not absolute and cannot be stretched to accommodate the Applicant indefinitely. To the detriment of the Respondent which was dragged to court and has a judgment in its favour. The Applicant is the author of its own misfortune, having squandered various opportunities to progress the appeal. Litigation must come to a just and cost-effective end. That is the thrust of the overriding objective in Section 1A and 1B of the CPA.
19. Regarding the above provisions, the Court of Appeal stated the following in Karuturi Networks Ltd & Anor v 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.”
20. In the result, the court is convinced that the justice of the matter lies in rejecting the Notice of Motion dated 24.06.2024 for want of merit. The Motion is hereby dismissed, with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Wesonga for the Applicant:

Mr. Irungu for the Respondent:

C/A: Erick

