REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE (O.S) NO. 29 OF 2014

RAZAK MAQBOOL AHMED.....1ST APPLICANT

SABIA KOSAR.....2ND APPLICANT

VERSUS

SHAHEEN KOSSAR.....RESPONDENT

RULING

1. The Originating Motion herein was determined vide a ruling by **Sergon J** delivered on 3rd March 2016. Subsequently, the matter was listed on 14th June 2019 before **Kamau J** under notice to show cause why the suit should not be dismissed for want of prosecution. Only counsel for **Shaheen Kossar**, (the Respondent) attended and urged the Court to dismiss the suit. The Court dismissed the suit for want of prosecution**.** Through **Razak Maqbool Ahmed** (1st Applicant on behalf of his co- Applicant), hereafter the Applicants filed the motion dated 2nd October, 2019 seeking that the Court sets aside its orders of 14th June, 2019. The motion is inter alia expressed to be brought under section 3A of the Civil Procedure Act and is premised inter alia on grounds that the matter had been finalized and a decree issued on 3rd March 2016, and therefore it was incapable of further prosecution, the cause having been exhausted; and that the Applicants had already commenced the implementation of the decision of the court issued on 3rd March, 2016.

2. The motion is supported by an affidavit sworn by the Applicants' counsel **Shella Sheikh**, who deposes to have conduct of the matter on behalf of the Applicants. Counsel amplifies the grounds on the face of the motion, stating that pursuant to the determination, the Respondent had preferred an appeal to the Court of Appeal which was heard and determined in the Applicants' favour in March 2019 and that the notice to show cause was received by the said counsel's offices on 19th June, 2019, some three days after the date scheduled for the hearing of the notice to show cause. He complains that the Applicants were thus condemned unheard, and yet they had since the determination of the appeal already commenced the process of implementing the decision of 3rd March, 2016. He asserts that had the notice to show cause been served upon counsel prior to its hearing date, counsel would have appeared in court to explain why the matter should not have been dismissed as the substance of the matter had been exhausted and as such there was nothing remaining for prosecution at the time the court dismissed the matter for want of prosecution. Finally, it is deposed the Applicants having commenced implementation of the court's decision the matter ought to be reinstated to give effect to the orders earlier granted by this court.

3. The Respondent opposed the motion through a replying affidavit. The gist thereof is that this court having rendered its decision on 3rd March, 2016 became *functus officio* and was thus no longer seized of jurisdiction, and further that once appellate court rendered judgment and affirmed this court's decision this court could not exercise any jurisdiction over the matter. He asserted that the Applicants intention is to vary the decision of this court as affirmed by the appellate court. He pointed out that the Applicants' motion filed in 2017 had hitherto remained unprosecuted and hence the dismissal of the suit in 2019. He took the view that the Applicants are estopped from raising new issues for determination in their said motion seeking to enforce the decision of this court; that the reinstatement of the suit would be prejudicial to the Respondent in further legal costs. He viewed the motion as misleading, mischievous and one that ought to be dismissed with costs.

4. The motion was canvassed by way of written submissions. The Applicants submitted that the provisions of Order 17 Rule 1 to 3 of the Civil Procedure Rules (CPR) were inapplicable to the matter, and that the suit was erroneously dismissed as there was nothing outstanding for prosecution, the matter having bee earlier determined. He asserted that a successful litigant had up to 12 years to execute his judgment under the Limitation of Actions He reiterated that the notice to show cause was received after the date scheduled for hearing denying a chance to the Applicants to be heard. Citing decisions in **Election Petition No. 3, 4 and 5 Raila Odinga and Others v IEBC and others [2013] eKLR** and **Micheal Muoki Gature and 9 Others v Luka Kimeu Mutevu ELC No. 1159 of 2000** counsel argued that this court is not *functus officio* as its decision of 3rd March, 2016 is yet to be perfected.

5. The Respondent, relied on the Court of Appeal decision in Dickson **Muricho Muriuki v Timothy Kagondu Muruiki & 6 Others [2013]**

eKLR counsel to assert that upon pronouncing itself on 3rd March, 2016, this court became *functus officio* and cannot do more in this matter. Secondly, that upon determination of the appeal in the Court of Appeal, this court had no jurisdiction to re-engage with the suit. Citing the case of Charo **Shuhuli Randu v Karisa Nzai & Another [2018] eKLR** counsel pointed out that the Applicants waited 3 months since the date they claim to have received the notice to show cause, to file the instant motion and are therefore guilty of laches.

6. The court has considered the material canvassed in respect of the motion. There is no dispute that the suit herein was determined vide the ruling in favour of the Applicants delivered by **Sergon** J on 3rd March, 2016. Subsequently, the Respondent filed an appeal to the Court of Appeal, being **Nairobi Civil Appeal No. 169 of 2016 Shaheen Kossar V. Razak Moqbool Ahmed and Another**. It is not clear from the record whether a ruling scheduled for 22/07/2017 in respect of the Respondent's motion dated 15/07/2016 to stay execution pending appeal was delivered, but an order was made subsequent to the reservation of the ruling date, in the presence of the parties on 7/12/2016 by **Mbogholi J.** (as he was then) as follows:

> **"Following the filing of the further affidavit the court order of 3/03/2016** (by Sergon J) **is now stayed. Mn (mention) before Sergon J. for direction on 8/02/2017.**

7. When the parties appeared before Sergon J, they were directed to determine the way forward and to report to the court on 27/04/2016. The matter lay dormant for a while, but it seems that the appeal in the Court of Appeal was prosecuted, and a judgment delivered on 8/03/2019, affirming the High Court decision. On 14/06/2019 the matter was listed for notice to show cause under Order 17 Rule 2of the Civil Procedure Rules. Only counsel for the Respondent attended. Counsel, in addressing the court made no reference to the determination by Sergon J. or the appeal thereon. Asserting that the Applicants were not *"keen to have the dispute determined"*, Counsel urged the court to dismiss the Originating Summons with costs. The court **(Kamau J**) proceeded to dismiss the suit for want of prosecution, noting that the Applicants' advocate though served was absent and appeared to have lost interest in the matter.

8. The instant motion is expressed to be brought under Section 3A of the Civil Procedure Act. Order 17 of the Civil Procedure Rules which provides for dismissal of suits for want of prosecution states in Rule 2 (6) that:

> **"A party may apply to court after dismissal of a suit under this order".**

In addition to asserting that he was not served with the notice to show cause until 19th June, 2019, the Applicants' advocate has raised legal objections regarding the propriety of the order of dismissal in light of the fact that the suit had indeed been heard and determined by Sergon J. Setting out from the same premise, the Respondent questions whether there was in existence a suit capable of reinstatement and asserts that this court is *functus officio.*

9. The court takes the following view of these matters. The questions whether there existed suit capable of dismissal as of 14/06/2019, and now capable of reinstatement and whether the court is *functus officio* are related. The Respondent's argument is that the court is presently *functus officio* as the suit had already been determined. By parity of reasoning, this suggests that as of 14/06/2019 when the suit was dismissed, the court was *functus officio* the suit having been earlier determined. This court declines the invitation to deal with the legal objections raised on both sides as doing so could well be tantamount to this court sitting on appeal on the decision of Kamau J. made on 14/06/2019. These issues were not canvassed by the Respondent's advocate who was present on that date. Had the Applicants attended the hearing, they too would have had opportunity to raise the objection they now raise before me, to the effect that, the suit was not capable of dismissal having been earlier determined.

10. An application made under Order 17 Rule 2(6) is not an appeal wherein the legal merits of a dismissal order such as raised herein can be canvassed before a judge of concurrent jurisdiction with the Judge who made the subject order. For these reasons, this court declines to deal with the said legal objections, save to make the observation that Order 17 Rule 2(6) of the CPR grants the Court jurisdiction to entertain an application brought by a party whose suit has been dismissed for want of prosecution.

11. The objection by the Respondent to the effect that this court can have no further merit engagement with this suit after the decision of the Court of Appeal in the case is accurate. However, nobody can seriously dispute the fact that ordinarily, once the Court of Appeal has affirmed the decision of the High Court, the successful party proceeds to execute his decree in the usual manner before the High Court. Correctly understood, execution of a judgment affirmed on appeal would not amount to reopening issues determined on appeal.

12. The Respondent's submissions in this regard appear to erroneously suppose that the reinstatement of the suit herein will lead to a fresh re-agitation of the case, or at best, that any further processes herein would amount to violation of the *functus officio* principle. As stated in **Dickson Muricho's** case, there is a judgment of the Court which has been affirmed on appeal and no determined issues could be reopened before this Court. The Respondent ought not to anticipate the Applicants' next steps at this stage, but such steps as are available to them are already circumscribed by the law and the Respondent will be at liberty to object as he deems necessary once the step or step (s) are taken.

13. The foregoing is sufficient to deal with the legal objections of the parties. However, looking at the factual premises upon which the application is made, it does appear that the Applicants may not have had adequate notice of the notice to show cause (NTSC). The affidavit of **Martha Wangare** dated 6/06/2019 concerning service of the notice on the Applicants' advocates indicates that the notice was dispatched by expedited mail service (EMS) on 6th June 2019 to the Applicants' advocate. Discounting the date of dispatch and scheduled date of the NTSC, there were only 7 clear days in between. The Applicants' advocates' assertion that that the notice was received after the fact, on 19/06/2019 has not been controverted even though no explanation is given by him for the failure to move the court earlier than October 2019 with the instant application. Nevertheless, it is undisputed that the appeal in the Court of Appeal had only been determined 3 months prior to the NTSC. Hence the hiatus between 2017 and March, 2019 could well be attributed to the parties' engagement in the appeal.

14. The court has wide discretion in setting aside an exparte judgment or order. In the case of **Shah –Vs- Mbogo and Another [1967] E.A 116** the Court of Appeal set out the purpose of the discretion:

> **"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."**

15. The Court of Appeal recently stated in **Richard Ncharpi Leiyagu –Vs- IEBC & 2 Others Civil Appeal No. 18 OF 2013 [2013] eKLR** that:

> **"We agree with the noble principles which go further to establish that the Courts' discretion to set aside ex-parte Judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."**

16. The Applicants herein have a decision in their favour which has been affirmed by the Court of Appeal. It appears doubtful that there was timely service of the NTSC upon them. Had they been served in good time, time they would most likely have attended court and raised the poignant legal points that they have canvassed before me. In upholding the right to be heard, the Court of Appeal stated in **Leiyagu's** case that:

> **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

17. There is no evidence that the Applicants have obstructed or sought to delay the course of justice despite the 3month delay in bringing this motion. The Respondent will not be unduly prejudiced and can be compensated by an award of costs. On the other hand, the Applicants would be subjected to hardship if they were unable to give effect to their hard-won judgment should their application be denied. In such eventuality their judgment will be no more than a pyrrhic victory and, in the circumstances of the case, a travesty of justice.

18. In my considered view, this is a proper case for the court to intervene in the interest of justice. I think I have said enough to demonstrate that the justice of the matter lies in allowing the application dated 2nd October 2019 by reinstating the Applicants' suit to the same status as was subsisting as of 14/06/2019.The costs of the application are awarded to the Respondent in any event. This court further directs that the Applicants expedite the prosecution of their motion dated 28/03/2017 by taking an early hearing date before SERGON J, in light of the orders sought therein.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 7TH DAY OF OCTOBER 2021

C.MEOLI

JUDGE

In the presence of:

For the Applicants: N/A

For the Respondent: Ms Tanui h/b for Mr Amir

C/A: Carol