REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 189 OF 2011

NANCY MUSILI..............................APPELLANT

-VERSUS-

JOYCE MBETE KATISI..............RESPONDENT

RULING

1. By a Notice of Motion dated 28th May, 2018, the Appellant herein seeks the following orders:

> **1. This application be certified urgent and be heard on priority and exparte in the first instance.**
>
> **2. Pending the hearing and determination of this application inter-partes there be ordered a stay of proceedings in respect of CMCC NO. 518 of 2007 at the Chief Magistrates Court.**
>
> **3. This Honorable Court be pleased to order and reinstate the appeal herein by setting aside or reviewing its orders of dismissal issued herein.**
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> **4. The costs hereof be in the case.**

2. The application was based on the following grounds:

> **1. The Appellant was never availed with typed proceedings by the lower court to enable the filing of the record of appeal on time.**
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> **2. The Appellant was never served with any Notice To Show Cause or an application on the intention to dismiss the Appeal.**
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> **3. The appeal raises very substantive issues on service and the basis of entry of an interlocutory judgment and issuance of a decree without formal proof on matters which are in the nature of damages and for which no documentary proof of the claim was availed to the court.**
>
> **4. The Appellant is an innocent victim of a court process she is not fully conversant with and upon which she relies heavily in her Advocates to manage the processes and advise her accordingly.**
>
> **5. Unless the Appeal is reinstated and heard on merit and the interlocutory judgment allowed to stand, the Appellant will be extremely prejudiced in being forced to pay a false claim to her financial ruin and to the unjust enrichment of the Respondent.**
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> **6. The Appellant is ready to abide any court's orders and/or conditions in granting the orders sought herein.**
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> **7. It is just and fair that all claims must be heard and proved before condemnation to avoid miscarriage of justice and hence the application herein.**

3. According to the Appellant, this appeal arose from a decision of the trial court declining to set aside the interlocutory judgement entered in the matter. Following the said decision, the appellant lodged this appeal. However despite follow up by her advocates to enable her prepare the record of appeal, the lower court file could not be traced. The appellant however received a Notice to Show Cause from the Court which she dispatched to her advocate and upon follow up they discovered that the file had been forwarded to the High Court by a letter dated 1st

February, 2018 and was later returned with an order dismissing the appeal for non-attendance. The appellant however contended that there was no notification to her advocates about the availability of the court file despite several letters inquiring about the same. It was further contended that there was no notification to the Appellant's current advocates about the intended dismissal of the matter.

4. The appellant therefore contended that both himself and her advocate were kept in the dark as regards the proceedings in the two files.

5. The Appellant accepted that she was willing to pay thrown away costs as a condition for reinstating the appeal.

6. It was submitted on behalf of the appellant that in dismissing the appeal without notice therefore she was condemned unheard. The appellant however submitted that the dismissal of her appeal without a hearing exposes her to great prejudice. The appeal did raise very substantive matters which required substantive justice. To the appellant, without service or on the basis of a disputed service interlocutory judgment was entered against herself for a sum of Kshs. 900, 000/= on account of alleged money lent by the respondent to the appellant.

7. The Appellant's position while challenging the interlocutory judgment and the decree which was drawn therefrom was that it was incumbent upon the court to demand for a financial proof from the respondent and to produce in evidence at least the document proving payment of the stated sum of money. In other words this was a case where formal proof was mandatory.

8. The Appellant lamented that the Respondent is now claiming Kshs 2,000,000.00 vide a Notice to show cause which in her view is a substantial sum of money a party can be condemned to pay without the claimant laying any proof before the court to justify the judgment. It was therefore averred that the appellant stands to suffer great prejudice if the appeal is not reinstated.

9. As regards the Respondent's response, it was contended that **t**he respondent completely failed to respond to the application and went on a tangent of previous matters before the lower court which actually do illustrate the appellant's efforts to get the dispute heard in substance. To the Appellant, the response and the submissions totally do not address the bone of contention which is that the appellant was not served and given an opportunity to be heard before her appeal was dismissed. According to the appellant, the issue in this case is not even about mistake of Counsel but failure of service upon either the appellant or her Counsel and it is not even in the purview of the respondent to fight the application since the notice was generated by the court.

10. It was therefore the Appellant's case that this is a fitting case for the court to exercise its discretion in favour of the appellant and reinstate her appeal on conditions the Court may find appropriate to impose.

11. In support of her case the appellant relied on **Nyeri HCCC No. 101 of 2011 - Wachira Karan vs. Bildad Wachira [2016] eKLR, Mombasa Civil Appeal No. 6 of 2015 - James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR** and **Mombasa Civil Appeal No. 15 of 2015 - JMK vs. MWM & MFS [2016] eKLR.**

12. In response it was averred by the Respondent that this application is an afterthought, fatally defective, a gross abuse of the court process and ought to be dismissed with costs. According to the Respondent, the appellant has been taking both the court and himself round in endless litigation over same issues and the applicant vowed to her that she will never honour the court judgment come what may and she will use all means to frustrate her including up to the Supreme Court.

13. Setting out the history of the matter, the Respondent averred that she filed a suit in the lower court on 14/6/2007 and it was registered as Machakos CMCC 518 of 2007 and that the appellant who was the defendant in the lower court was served with summons to enter appearance together with the plaint but she failed to enter appearance or file defence within the recommended period and the Respondent requested for interlocutory judgment which was accordingly entered.

14. Through her advocates on record the Respondent served notice of entry of judgment upon the applicant but she ignored the same. Consequently, the Respondent extracted decree and took out warrants of attachment through Kande Auctioneers and proceeded to execute. Subsequently a person by the name **Edward Kibe Kimana** who is a friend to the applicant filed objection proceedings vide the application dated 28/8/2007 but was later dismissed with costs. Further, the applicant made an application for stay of execution in the lower court dated 7/9/2008 and after long litigation process it was dismissed with costs on 1/12/2009. Undeterred, the applicant filed a similar application for stay of execution on 27/10/2010 which was dismissed with costs for abuse of court process. She then moved to the High Court vide an application dated 19/12/2011 seeking stay of execution and again it was dismissed with costs though the ruling dated 5/10/2015 delivered four years later. It was averred that when the date for ruling of the applicants' application dated 19/12/2011 was taken, the applicant was represented, the date was fixed by consent and thus it is wrong to state that she was not aware when the ruling was delivered. Following the delivery thereof, the Respondent served draft decree on the applicants advocates on 24/5/2017 and which they acknowledged receipt by stamping on the face of it.

15. To the Respondent, because the applicant thrives in delays and controversies, she did not act as usual and kept quiet until the Respondent took out execution. However, the notice to show cause came up in the lower court severally on 25/5/2018, 5/6/2018 and on 20/6/2018 but all these occasions she was represented and directed by the court to appear in person but she defied those directions of the court and never attended court. Instead of doing so, the applicant filed an application dated an even date again seeking stay of execution and proceedings.

16. It is the Respondent's case that the applicant is just taking the court in circles because the lower court heard two similar applications for stay and both were dismissed with costs and this confirms that the applicant is merely buying time to frustrate any process of execution and ensure the Respondent never enjoys the fruits of the judgment.

17. According to the Respondent, whereas, the Appellant has moved this Court vide application dated 28/5/2018 seeking stay of proceeding in the lower court matter, the application in the lower court is also seeking stay of proceedings.

18. The Respondent averred that the applicant keeps changing advocates every now and then to continue buying time and now the current

firm of advocates on record. In her view, the applicant is guilty of duplicity, she is doing guess work to see which application will succeed and she is engaging the court in wastage of valuable judicial time. To her, the applicant is literally engaging in legal wrestling with anyone including the courts which are not parties to the suit, she blames everybody except herself and her advocate and she even wrote a letter to the Chief justice dated 31/5/2018 attacking the court process and raising allegations which have no basis at all. While aware of the court ruling dated 5/10/2015 the appellant did not take any action only to run to court again after execution and in an attempt to cover her indolence and ignorance of the court process, the appellant has now attached a letter dated 30/5/2018 claiming she had been looking for the court file for one week without success yet she has been aware of the court ruling dated 5/10/2015 but never took any steps to fix the appeal for hearing.

19. The Respondent averred that since 2015, the applicant has never taken any steps to prosecute the appeal, no letter has ever been done requesting for proceedings and no attempt has ever been made to fix the appeal for hearing. The application is thus an afterthought, brought in bad faith and should be dismissed.

20.l The Respondent was further of the view that since the applicant has not attached the order dismissing the appeal, the application is thus fatally defective. To her, the proceedings in the lower court suit were ready on 3/5/2013 and the appeal was subsequently admitted on 4/7/2013. She therefore asserted that the misfortunes of the applicant are as a result of her indolence, deliberate ignorance of court process and she does not deserve sympathy at all. The Respondent therefore prayed that the application be dismissed with costs.

Determination

21. I have considered the application herein, the affidavits in support thereof and the submissions filed.

22. As regards the prayer for stay, it is not in doubt that there is pending before the court below a prayer that pending the determination of the instant application there be a stay of proceedings. Whereas that is not exactly the prayer sought herein, there is no reason why that prayer could not have been made in the instant application. In **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**, the Court of Appeal held that:

> **"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -**
>
> > **i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
> >
> > **ii Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
> >
> > **iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.**
> >
> > **iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.**

23. In **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009, Kimaru, J** stated with respect to the court's power to prevent abuse of its process as follows:

> **"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".**

24. The Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others** (supra) opined that:

> **"In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 All E.R 486* at page 488 where *Lord Roskil* states:**

> **'It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.'**

Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

25. I therefore agree with the Respondent that the said prayer amounts to playing lottery with judicial process and is an abuse of the process of the court. The same therefore fails.

26. As regards the prayer seeking reinstatement of the appeal, the Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** held that there is inherent power to restore a case for hearing after it has been dismissed.

27. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

28. However, the Respondent contended that the appellant has been taking both the court and himself round in endless litigation over same issues. Whereas if the conduct of a party in re-litigating issues already determined amounts to abuse of the court process, the court would not entertain such matters, the mere fact that a party makes applications which he is by law entitled to make, however numerous, ought not to be taken against him, As was held by **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243**:

> **"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."**

29. It was however appreciated by the Court of Appeal in **J M Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeal No. 156 of 1997** that:

> "The appellant is a familiar figure in the Law Courts. He does not hesitate to institute litigation on any aspect of perceived breach of his rights. Whereas litigants are perfectly free to bring any number of suits they may so desire, they must understand that in doing so, they are bound to stick to the rules governing the conduct of litigation in courts…The application before the Superior Court, as well as this appeal, are nothing but subtle attempts by the appellant to re-open the matter of the sale of the suit property. The suit was heard and determined by the Superior Court and an appeal against its judgement was heard and determined. The Court of Appeal cannot sit on appeal on its judgement for there is no power for a Court to sit on appeal against itself in the same proceedings. The Court of Appeal, when it delivers its judgement, that judgement is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject to the limited application of the slip rule…The appellant, no doubt, lost a substantial property. The loss arose out of operation of the contract of mortgage freely executed by him and the respondent bank. The court should not be seen to lack sympathy for him. But, no consequence that flows out of the enforcement of law can be said to cause injustice. Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation… The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts. This appeal is indeed vexatious and amounts to an abuse of the process of the court and it is dismissed with costs."

30. In **James Mwashori Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeal No.147 of 1986**, the same Court dealing with the same litigant held that:

> **"The learned Judge conscious of the appellant's handicap went into great trouble not only to understand his case but virtually prompted him to state his real grievance so he can understand and pronounce on it. In the process the learned Judge threw procedural rules to the winds and himself attempted to draft issues for him. All these came to nought as the appellant denied him his co-operation. It seems to the court ironical that this self-same appellant whom the Judge bent over backwards to assist should charge him with judicial or any sort of impropriety. The charge is found baseless and the court does not scruple in dismissing it….The plain truth is that the appellant who has been unable to pay his just debt has used the machinery of the court to postpone, what to him, must be the day of reckoning. That day has now come and the court has the duty to tell him so in plain terms."**

31. Therefore if this Court were to find as the Respondent contends that the Appellant is engaging in legal wrestling with everyone including the courts, the Court would not hesitate in bringing to an end such conduct.

32. In this case, the Appellant's case is that her appeal was dismissed without her being afforded an opportunity of being heard. The general position was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...

33. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... *A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at* ...*Denial of the right to be heard renders any decision made null and void ab initio*.” [Emphasis mine].

34. This was a restatement of Lord Wright’s decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

35. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

36. However, in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held that:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

37. In this case, I have perused the Court file and I have not been able to find any notice to the Appellant or her Counsel intimating that the matter would be dismissed. In the premises whereas I agree that the Appellant has been indolent in setting down the appeal for hearing, that did not relieve the Court from the obligation to notify the Appelant of its intention to terminate the appellate proceedings.

38. In the premises, I find merit in the application, set aside the order dismissing the appeal and reinstate the same to hearing on condition that the Appellant pays to the Respondent a sum of Kshs 20,000.00 being thrown away costs and prepares the record of appeal within 21 days from this date and in default the appeal shall stand dismissed with costs.

39. It is so ordered.

Read, signed and delivered in open Court at Machakos this 3rd day of December, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muumbi for the Respondent

N/A for the Applicant

CA Geoffrey