

**IN THE COURT OF
APPEAL AT
MOMBASA**

(CORAM: MUSINGA (P), MURGOR & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. E122 OF 2023

BETWEEN

EDMUND JILANI SADI.....APPELLANT

AND

KENYA PORTS AUTHORITY.....RESPONDENT

*(Being an appeal from the Ruling of the High Court at
Mombasa (Kizito Magare, J.) delivered on 22nd June
2023*

in

H.C.C.C. No. 5 of 2004)

JUDGMENT OF THE

COURT

1. In the ruling giving rise to this appeal, the High Court at Mombasa dismissed the appellant's application seeking orders of reinstatement of his suit that had been dismissed for want of prosecution.
2. The dispute traces back to an employment relationship between the parties which ended on 19th September 2003, prompting the appellant to file **Mombasa HCC No. 5 of 2004** seeking terminal dues and damages for alleged wrongful dismissal. The suit was defended and after pleadings closed, the matter proceeded for hearing and was partly heard between 2006 and 2008, but no

further steps were taken after 9th April 2008 when it was last in court.

3. Following that prolonged inactivity, the respondent moved the court vide an application dated 17th July 2014 and brought under Order 17 rules 2 and 3 of the Civil Procedure Rules seeking dismissal of the appellant's suit for want of prosecution. Vide a ruling delivered on 9th April 2014, the High Court (**Kasango, J.**) dismissed the suit for want of prosecution.
4. Approximately eight (8) years from the date of the dismissal, the appellant, vide an application dated 8th June 2022, sought orders for the setting aside of the dismissal and for the reinstatement of the suit. He attributed the earlier inaction to the negligence and failure of his former advocates to inform him of hearing dates and the dismissal proceedings. He urged the court to reinstate the matter in the interests of justice.
5. The respondent opposed the application contending, *inter alia*, that the appellant had been indolent for years, had failed to demonstrate any diligent follow-up of his case, and that reinstatement would occasion serious prejudice given the lapse of time and the likely unavailability of witnesses.
6. The trial court vide a ruling delivered on 22nd June 2023 held, *inter alia*, that the application for reinstatement was, in substance, an improper attempt to reopen or appeal against a discretionary decision rendered nearly a decade earlier, noting that the 2014 dismissal had been made *inter partes* in accordance with settled

principles on dismissal for want of prosecution and ought to have been challenged by way of appeal. The court found the delay inordinate and unexplained, observing that the suit had remained pending for about ten years before dismissal, and a further nine years had elapsed before the reinstatement application was filed and therefore concluded that the appellant had been indolent. It further held that reinstatement would prejudice the respondent due to the passage of time and likely unavailability of witnesses, and rejected the claim that the appellant had been denied a hearing. The court emphasized that litigation must come to an end, and accordingly dismissed the application with costs of Kshs 30,000/= and ordered the file closed.

7. Being aggrieved and dissatisfied with the decision of the trial court, the appellant lodged this appeal, contending that the learned judge erred both in law and in fact by, *inter alia*, dismissing the appellant's application without properly considering the circumstances surrounding the delay and the earlier dismissal of the suit; by failing to appreciate that the dismissal was allegedly contributed to by the conduct and alleged collusion between the appellant's former advocate and counsel for the respondent, including an asserted arrangement tied to the employment of the appellant's wife by the respondent; by failing to find that the appellant's former

advocate deliberately declined to prosecute the reinstatement application and

subsequently walked out of court thereby compromising the appellant's right to a fair hearing; by holding that the delay was inordinate without adequately evaluating the explanation tendered and the role of counsel in occasioning the delay; by accepting the respondent's assertions regarding prejudice and the traceability or availability of witnesses without sufficient proof; and by failing to consider specific provisions of the Constitution, including Article 159 which requires substantive justice to parties without undue technicalities.

8. At the hearing of this appeal, learned counsel **Mr. Mang'aro** appeared for the appellant, while the respondent was represented by learned counsel **Mr. Wafula**. Both counsel briefly highlighted their respective client's written submissions.
9. Highlighting the applicant's submissions dated 26th July 2024, Mr. Mang'aro first contended that the trial court lacked jurisdiction to entertain the application giving rise to the impugned ruling, asserting that the dispute arose from an employment relationship and therefore fell within the exclusive jurisdiction of the Employment and Labour Relations Court pursuant to Article 162(2)(a) of the Constitution as read together with section 12(1) (a) of the Employment and Labour Relations Court Act. Although counsel acceded to having filed the application seeking reinstatement before the High Court, he nonetheless contended

that that court ought to

have declined jurisdiction and referred the matter, even *suo moto*, to the Employment and Labour Relations Court.

10. On the merits of the appeal, counsel contended that the appellant's dismissal from employment was unlawful. He submitted that the appellant had initially been charged with a criminal offence but was later acquitted after which he was reinstated by the respondent before being dismissed again in alleged public interest. According to counsel, such dismissal entitled the appellant to all employment benefits. Counsel further submitted that the appeal was arguable, and that the central issue was whether the delay leading to the dismissal of the suit was attributable to the appellant. He contended that the delay was occasioned by the negligence of the appellant's former advocates who failed to communicate hearing dates to the appellant despite his efforts to follow up the case. Counsel maintained that the appellant had attended court on several occasions and had relied on assurances from his former advocates that the matter would be fixed for hearing. He therefore urged that the mistake of counsel should not be visited upon the appellant and that the suit ought to have been reinstated.
- 11.** In support of the contention that the trial court improperly exercised its discretion in declining to reinstate the suit and in urging this Court to interfere with that exercise of discretion,

counsel relied on **Tana and Athi Rivers Development Authority v Jeremiah**

Kimigho Mwakio & 3 others [2015] KECA 674 (KLR), where this Court held that an appellate court may interfere with a discretionary decision where the trial judge misdirected himself in law, misapprehended the facts, considered irrelevant matters, failed to consider relevant factors, or reached a plainly wrong decision. Counsel also cited **Mbogo & Another v Shah** [1968] EA 93 for the principle that judicial discretion should be exercised to avoid injustice arising from accident, inadvertence, or excusable mistake or error. In this regard therefore, counsel asserted that the trial court failed to take into account the appellant's demonstrated efforts to follow up the case as well as the failure of his former advocates to notify him of the hearing dates and the dismissal proceedings and consequently misdirected itself in the exercise of its discretion by declining to grant the application for reinstatement.

12. As regards prejudice, counsel submitted that reinstatement of the suit would not occasion prejudice to the respondent, whereas refusal to reinstate the suit would deny the appellant an opportunity to be heard on the merits of his claim for wrongful dismissal and loss of employment benefits. In support of that proposition, reliance was placed on **Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others** [2018] KEHC 1240 (KLR), where the court held that reinstatement may be granted where no prejudice would be suffered by the defendant that

cannot be compensated by costs, and

that the greater injustice would be to drive a litigant away from the seat of justice without a hearing.

13. Finally, on the issue of leave, counsel maintained that the appeal lay as of right and that it was therefore unnecessary to seek leave prior to lodging the appeal. However, when responding to a question posed to him by the Court, counsel candidly conceded that no leave had been sought or obtained. He nevertheless asserted that the dismissal of the suit for want of prosecution amounted to a judgment from which an appeal could properly lie as of right. When further pressed on the legal consequence of instituting an appeal where leave was required but had not been obtained, counsel indicated that he would be willing to withdraw the appeal and seek leave afresh but ultimately left the matter to the Court's determination.
14. On his part, Mr. Wafula for the respondent contended that the appeal was incompetent for want of leave. He submitted that the appellant's suit had been dismissed in 2014 under Order 17 of the Civil Procedure Rules for want of prosecution and that orders arising under Order 17 are not among those listed under section 75(1) of the Civil Procedure Act and Order 43 of the Civil Procedure Rules as appealable as of right. Consequently, the appellant was required to obtain leave before lodging the notice of appeal. Counsel pointed out that no such leave had been sought or obtained and therefore there

was no valid notice of appeal capable of invoking the jurisdiction of this Court.

15. Counsel further submitted that even if this Court were to find the appeal was properly before it, the appeal has no merit. He emphasized that the ruling dismissing the suit for want of prosecution had been delivered *inter partes* on 9th April 2014 after the appellant's advocate left the matter to the court to determine. In those circumstances, the dismissal was made on merit and could only be challenged through an appeal or review. Counsel argued that the subsequent application filed on 8th June 2022 seeking to set aside that dismissal was improperly before the High Court because granting it would have effectively required the court to sit on appeal over its own earlier decision.
16. On the merits, counsel contended that the record clearly demonstrated prolonged and inexcusable delay on the part of the appellant. He noted that no action had been taken in the suit between 2008 and its dismissal in 2014, and that a further eight years elapsed before the appellant filed the application for reinstatement in 2022. Counsel rejected the appellant's attempt to shift blame to his former advocates, contending that a suit belongs to the litigant and that the appellant had a duty to diligently follow up his case.

17. Finally, and relying on the principle in **Mbogo & Another v Shah** (supra), counsel submitted that there was no basis upon which this Court could interfere with the trial court's exercise of discretion as the appellant had not demonstrated any misdirection in law or fact. He therefore urged this Court to find the appeal incompetent for want of leave or, alternatively, to dismiss it for lack of merit.
18. We have considered the grounds of appeal and the written submissions filed as well as the authorities cited. The instant appeal is against exercise of discretion on the part of the trial judge who declined to reinstate the appellant's suit that had been dismissed for want of prosecution. An appellate court will not interfere with the exercise of discretion by a lower court unless the exercise of that discretion was erroneous in law. This is well captured in **Mbogo & Another v Shah** (supra), where it was held that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
19. The issue that we must address in this appeal is whether the trial judge exercised his discretion properly in declining to reinstate

the appellant's suit. However, and before we advert to the substantive

merits of this appeal, it is imperative that we first address the issue whether the appellant was required to obtain leave of the trial court before filing this appeal. In our view, this issue goes to the jurisdiction of this Court to hear and determine this appeal without which we cannot take any single further step.

20. The parties have taken diametrically opposed positions on the issue.

The respondent contends that the appeal is incompetent for want of leave as the impugned ruling arose from proceedings under Order 17 rule 2 of the Civil Procedure Rules relating to reinstatement of a suit dismissed for want of prosecution. According to the respondent, Order 17 rule 2 is not among the orders listed under section 75(1) of the Civil Procedure Act or Order 43 of the Civil Procedure Rules as appealable as of right. The respondent therefore contends that the appellant was required to seek and obtain leave, either from the High Court or from this Court before lodging the notice of appeal. As no such leave was sought or obtained, the respondent posits that there is no proper or valid notice of appeal capable of invoking the jurisdiction of this Court.

21. On his part, the appellant maintains that an appeal lies as of right and that leave was unnecessary. However, and as noted hereinabove, at the hearing of this appeal counsel for the appellant conceded that no leave had been obtained. When this

Court pressed counsel on the legal consequence of instituting an appeal without

leave where leave was required, counsel indicated willingness to withdraw the appeal in order to seek leave afresh but ultimately left the matter to the Court.

22. The record leaves no room for doubt as to the nature of the proceedings giving rise to the impugned ruling. The initial application that culminated in the dismissal of the suit was brought under Order 17 rules 2 and 3 and on 9th April 2014. The suit was dismissed inter partes for want of prosecution. Subsequently, by a Notice of Motion dated 8th June 2022, the appellant moved the High Court seeking to set aside the dismissal and reinstate the suit for hearing. It is that motion which was dismissed by the ruling dated 22nd June 2023, now the subject of this appeal. Plainly, therefore, the impugned ruling arose from an application anchored under Order 17 rule 2 of the Civil Procedure Rules, a provision that confers discretion upon the court, where sufficient cause is shown, to make such orders as may be necessary to secure the expeditious hearing of a suit. The orders contemplated therein, in our view, include and are not limited to orders for the reinstatement of a suit dismissed for want of prosecution.
23. The right of appeal in such circumstances is governed by section 75(1) of the Civil Procedure Act which stipulates that appeals lie as of right only from the orders expressly enumerated therein and those listed under Order 43 rule 1 of the Civil Procedure

Rules. Order 17

does not appear among the orders specified in Order 43 Rule 1. This Court addressed that precise issue in **Sanpac Limited v Stanbic Bank Limited** [2023] KECA 960 (KLR) in the following terms:

“Section 75(1) read together with Order 43 Rule 1 provides for the orders and rules from which a right of appeal lies as of right. Order 17 is not included under the orders and rules listed in Order 43 Rule 1. This means that any decision arising from Order 17 is only appealable with leave of court. The appellant has not demonstrated to the Court that it obtained any leave to appeal the order of 13th July 2018. In fact, there is an implied admission that leave was not obtained as the appellant urges the Court that it has a fundamental right for its appeal to be heard, and that fundamental right should not be defeated by failure to obtain leave.”

24. In **Sanpac Limited v Stanbic Bank Limited** (supra), this Court considered and examined its earlier jurisprudence on the effect of failure to obtain leave where leave is a statutory prerequisite to an appeal. In doing so, it revisited the principles articulated in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others** [2013] eKLR, where this Court held that the right of appeal is a jurisdictional issue that cannot be cured by invocation of Article 159(2)(d) of the Constitution. The Court also reaffirmed its holding in **Peter Nyaga Muvake v Joseph Mutunga** [2015] eKLR, emphasizing that where leave is required, failure to obtain it renders the notice of appeal incompetent *ab initio* and deprives this Court of jurisdiction.

25. In the present matter, it is common ground that no leave was sought or obtained either at the time of delivery of the impugned ruling or

thereafter. That omission was candidly conceded by counsel for the appellant. In the circumstances, the inescapable conclusion is that this Court’s jurisdiction has not been properly invoked. It is trite law that jurisdiction is everything and without it, a court must down its tools, which we hereby do. Consequently, this appeal is incompetent for want of jurisdiction and is accordingly struck out with costs to the respondent.

Dated and delivered at Mombasa on this 25th day of March 2026.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....
REPUBLIC OF KENYA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.