



**Wangari v APA Insurance (Civil Appeal E743 of 2022)
[2025] KEHC 110 (KLR) (Civ) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 110 (KLR)

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

**CIVIL
CIVIL APPEAL E743 OF 2022**

**CW MEOLI, J
JANUARY 16, 2025**

BETWEEN

JOHN MAINA WANGARI APPELLANT

AND

APA INSURANCE RESPONDENT

RULING

1. The Notice of Motion dated October 14, 2024 (the Motion) was brought by John Maina Wangari (hereafter the Applicant). The proper and live prayers in the motion are nos. 1, 4, 5, and 7 (the rest of the prayers being essentially grounds) seeking that:-
 1. That the court order herein issued on July 9, 2024 be vacated or varied.
 2.
 3.
 4. That the Honourable Court be pleased to issue alternative orders in the circumstances to actuate the hearing of this appeal.
 5. That the court be pleased to direct that this appeal be heard based on the memorandum of appeal, the pleadings Minus the impugned judgment appealed from.
 6.
 7. That the Respondents do bear costs of this Application”. (sic)
2. The Motion which invokes Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* (CPA); Order 45, Rule 1; Order 42, Rule 13(4)(ii) of the Civil Procedure Rules (CPR); and Article 159(2)(b) and (d) of



the Constitution is premised on the grounds featured on its face and amplified in the supporting sworn by the Applicant's advocate, Joseph Musomba.

3. The advocate stated that the appeal lies against a ruling delivered by Small Claims Court, Nairobi on 16.09.2022 in SCCC No. E1924 of 2022 (the suit). Which ruling allowed the preliminary objection raised by APA Insurance (hereafter the Respondent) thus striking out the Respondent from the suit proceedings. The advocate stated that upon the Applicant's institution of the appeal, the court severally directed that the record of appeal be filed within certain stipulated timelines, and that Applicant's unintentional delay in complying was occasioned by the fact that the impugned ruling could not be traced in the lower court file, despite numerous correspondences and visits by the Applicant's advocates, in that regard. That to date, the impugned ruling cannot be traced and hence it would only be fair for the appeal to be reinstated and to proceed in the absence of the said ruling.
4. The Respondent resisted the Motion by way of a replying affidavit sworn by his advocate, CS. Kennedy Ochieng, on 2.11.2024. Terming the Motion an afterthought tainted with falsehoods, he asserted that upon the Applicant filing the appeal of appeal on or about 19.09.2022 the matter came up in court on various dates, namely 28.03.2023; 06.2023; and 16.11.2023 for purposes of confirming whether the record of appeal had been filed. That all the while, the Applicant had not complied, prompting the court to issue an order and related notice dated 6.12.2023 upon the Applicant, requiring him to file the record of appeal within 21 days thereof, failing which the appeal would be listed before a judge for dismissal.
5. That when the matter subsequently came up in court on 5.03.2024, no record of appeal had been filed by the Applicant and his counsel was notably absent from court, resulting in issuance of a notice to show cause as to why the appeal should not be dismissed (NTSC). That no cause was shown by the Applicant when the matter came up on 15.05.2024, but that notwithstanding, the court gave directions for the Applicant to file a record of appeal within 7 days thereof and scheduled the matter for mention on 9.07.2024, when once more, the Applicant's counsel was absent from court and not having complied with directions for the filing of the record of appeal. That eventually, the court by an order made on 11.09.2024 rendered the appeal dismissed for non-compliance with the orders previously made on 9.07.2024.
6. The advocate deposed that the foregoing events are a clear indicator of indolence on the part of the Applicant and that such indolence ought not to be aided. That despite the court having accommodated him in the past, the Applicant has shown no interest in complying with previous court directions. That the appeal was therefore properly dismissed for want of compliance and prosecution. That in the premises, the Applicant is not entitled to a grant of the orders being sought.
7. At the hearing of the Motion the parties' respective counsel agreed to have the Motion determined on the basis of the affidavit evidence tendered.
8. The court has thus considered the rival affidavit material on record. As earlier stated, the proper and substantive prayers in the Motion are 1), 4) and 5). The main prayers sought are two-fold in nature; the foremost seeking to vary or set aside the order dated 9.07.2024, and thereby reinstating the appeal.
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-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.”

10. The Applicant herein approached the court inter alia, via Order 42, Rule 13(4)(ii) (on the court’s discretion to dispense with the production of any document or part of a document which is not relevant to an appeal); Order 45, Rule 1 of the CPR (on review). The Applicant further cited Sections 1A, 1B of the CPA (on the overriding objective of the Act) Section 3 (on the special jurisdiction and powers of the court) and 3A of the CPA (on the inherent powers of the court) of the CPA; and Article 159(2) (b) and (d) (on the constitutional principles that justice shall not be delayed and that justice shall be administered without undue regard to procedural technicalities) of *the Constitution*.
11. From a reading of the provisions cited hereinabove and a consideration of the orders sought in the Motion, the court is of the view that the more applicable provisions here would be Section 3A (supra); and Order 51, Rule 1 (supra).
12. Section 3A of the CPA as earlier referenced, 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 regarding 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 in *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, added that:

“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 recorded events leading to the Motion are as follows. The Applicant filed his memorandum of appeal sometime on or about 16.09.2022. When the matter subsequently came up in court on 29.11.2022 before the Deputy Registrar, counsel for the Applicant sought time to enable him to file a record of appeal. The same was granted and the matter was scheduled for mention on 28.03.2023. On the latter date, the Applicant’s counsel was yet to comply, and the parties were given a subsequent mention date for 29.06.2023, with a further order being made for the lower court file to be availed. When the matter came up on the scheduled latter date, only the advocate for the Respondent was in attendance, and he informed the court that he had not been served with a record of appeal. The matter



- was therefore rescheduled to 16.11.2023 during which mention none of the parties were present. Nonetheless, the Deputy Registrar directed that the record of appeal be filed within 30 days therefrom
15. The record shows that thereafter, the matter came up before the Deputy Registrar on several subsequent occasions, all the while there being no compliance by the Applicant in filing his record of appeal. Eventually, when the matter came up before this court on 15.05.2024 directions were given for the Applicant to comply, else the matter would be listed for notice to show cause why the appeal should not be dismissed for want of prosecution (NTSC) on 19.06.2024. On that date, the Applicant's advocate was absent from court, despite being served with the requisite notice by counsel for the Respondent. That notwithstanding, the court upon noting that the typed proceedings were ready and that the lower court file had been availed, directed that the record of appeal be filed within 10 days thereof, and rescheduled the matter for directions on 9.07.2024.
 16. On the said date, the Applicant's counsel was yet again absent from court despite being served with the requisite notice. Once more, and despite the Applicant's non-compliance with earlier orders, the court granted a further opportunity to the Applicant to file the record of appeal within 14 days thereof, failing which the appeal would stand automatically dismissed for want of prosecution. It is not in dispute that the Applicant failed to comply with the above directions and hence the appeal was rendered dismissed pursuant to the order made on 9.07.2024. The Applicants brought the instant Motion about four (4) months later.
 17. The explanation given on behalf of the Applicant is that the delay in complying with the directions requiring him to file a record of appeal was occasioned by the fact that the trial court ruling delivered on 16.09.2022 and against which the appeal lies, could not be traced in the lower court file and was equally never availed to the Applicant and/or his advocate. From a perusal of the record, it is apparent that the Applicant's advocate wrote to the Executive Officer-Small Claims Court vide letters dated 11.08.2023; 16.05.2024; and 14.06.2024, requesting for a certified copy of the impugned ruling.
 18. Be that as it may, upon perusal of the record, it is clear that first and foremost, the lower court file was forwarded to and received by the High Court, Civil Appeals Division, sometime on or about 7.11.2023, which position was conveyed when the matter came up in court the court on 19.06.2024. Secondly, from the record, Applicant through his advocates was served for dates when the matter was scheduled in court as disclosed by the various affidavits proving service of the requisite notices upon the Applicant's advocate. The Applicant's advocate did not refute service thereof.
 19. Thirdly and more significantly, upon its perusal of the lower court file, the court noted the copy of the impugned ruling therein, which displaces the allegation and or excuse brought forth on behalf of the Applicant that the impugned ruling could not be traced and was therefore unavailable to enable him to file the record of appeal. Fourthly, it is clear from the record that the Applicant had been granted every reasonable opportunity to comply with the requirement for filing his record of appeal and thus prosecute his appeal, which he squandered. Thus, his explanations for non-compliance are untenable and he cannot hope to have the Respondent pay for his perennial indolence.
 20. Besides, there had been a prolonged delay of over two (2) years in the matter, between the date of institution of the appeal and the date of issuance of the order resulting in dismissal thereof; and a further delay of about three (3) months between the date of dismissal of the appeal and the filing of the instant Motion. Not to mention the multiple mentions and court indulgences to repeated non-compliance by the Applicant with directions in the appeal, all in furtherance of the interest of justice. Evidently, the Applicant did not take any of these with seriousness and finally trifled with the court by asserting a patent untruth in the supporting affidavit to the effect that the impugned ruling of the lower court had been unavailable, hence his non-compliance. The delay herein has not been



reasonably explained and is indicative of indolence on the part of the Applicant and/or his advocate and indifference to the fact that the subject suit in the lower court was claim under the *Small Claims Court Act*, in respect of which expeditious disposal is envisaged.

21. Notably, the Applicant did not even deem it important to swear his own supporting affidavit to the Motion, opting instead to stay in the shadows of his advocate. Cases ultimately belong to the parties who, are duty bound to ensure speedy prosecution in accordance with the overriding objective in section 1A and 1B of the CPA. While the Applicant was entitled to be heard on his appeal, the right is not absolute and it cannot be stretched in a manner that not only indefinitely delays the conclusion of the dispute, but also exposes the Respondent who was dragged to court to prejudice involving, but not limited to increased legal costs. As stated in *Shah vs Mbogo* (supra) the discretion which the Applicant desires to be exercised in his favour “is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
22. In view of all the foregoing, the court is of the firm view that the Applicant is not deserving of the exercise of discretion in his favour and that the justice of the matter lies in dismissing his Motion. The Notice of Motion dated October 14, 2024 is therefore without merit and must fail in its entirety. It is hereby dismissed costs to the Respondent. The costs of the already dismissed appeal are also awarded to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF JANUARY 2025.

C. MEOLI

JUDGE

In the presence of

For the Applicant:

For the Respondent:

C/A: Erick

