



**Karegwa v Chege t/a East Juja & another (Civil Case 287 of 2018)
[2024] KEHC 4640 (KLR) (Civ) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4640 (KLR)

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

CIVIL

CIVIL CASE 287 OF 2018

CW MEOLI, J

APRIL 11, 2024

BETWEEN

FRANCIS NGUGI KAREGWA PLAINTIFF

AND

BEN CHEGE T/A EAST JUJA 1ST DEFENDANT

WARREN ENTERPRISES LIMITED 2ND DEFENDANT

RULING

1. For determination is the Notice of Motion dated 7th December, 2022 (the Motion) filed by Francis Ngugi Karegwa (hereafter the Applicant) seeking the following orders:
 - i. Spent.
 - ii. That the firm of Ngugi Kamau Advocates be granted leave to come on record for the applicant herein.
 - iii. That this Honourable Court be pleased to issue leave for the Applicant to appeal out of time against the Judgment of Honourable Lady Justice C. Meoli in Civil Case No. 287 of 2018.
 - iv. That this Honourable Court be pleased to set aside order of this Honourable Court made on 29/3/2021 dismissing the suit for non-appearance of the Plaintiff's witnesses.
 - v. That this Honourable Court be pleased to reinstate main suit Civil Case No. 287 of 2018 filed herein on 2018-12-11.
 - vi. That this Honourable Court be pleased to order stay of execution of the dismissal order issued in Nairobi Civil Case No. 287 of 2018 pending the hearing and determination of this application.



- vii. That the dismissal order entered against the applicant/Plaintiff be and is hereby set aside and the main suit filed herein on 2018-12-11 is reinstated.
 - viii. That the costs of this application be provided for. sic
2. The Motion is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); and Order 12 Rules 6(1) & 7, and Order 51, Rules 1 and 3 of the *Civil Procedure Rules* (CPR).
 3. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by the Applicant, who averred that on 2nd September, 2022 he received communication from his former advocates, namely the firm of Nyokabi, Waiganjo, Omung'ala & Associates (the erstwhile advocates) informing him of the dismissal of the suit on 29th March, 2021, for non-attendance of witnesses.
 4. The Applicant averred that he was never served with the dismissal notice and further, that the erstwhile advocates did not previously inform him of the directions given by the court prior to the dismissal order; hence the inadvertence was on the part of counsel. He further stated that proper reasons have been demonstrated to warrant the grant of leave to appeal out of time against the resulting judgment, and for the setting aside of the dismissal order followed by reinstatement of the suit for hearing.
 5. Ben Chege T/A East Juja (hereafter the 1st Respondent) opposed the Motion by filing Grounds of Opposition dated 16th June, 2023 and swearing a replying affidavit of like date. His Grounds of Opposition state:
 1. The application before court is ambiguous and defective in that it seeks contradicting orders of leave to appeal out of time setting aside and stay at the same time.
 2. That the applicant is on a fishing expeditions.
 3. The applicant has failed to disclose material facts as to the reason for dismissal and the delay is inordinate.
 4. That the applicant has applied to amend the plaint after mediation and various disclosures and the application herein seeks to bring in his intended amendments.
 5. That the applicants seek to appeal on a non-existent judgement. sic
 6. By way of his replying affidavit, the 1st Respondent deposed that the suit which was originally filed in the year 2012, was referred to mediation but which failed. That when the parties subsequently attended court on 29th March, 2022 for hearing, the Applicant's counsel sought leave to amend his pleadings and was unwilling to proceed with the hearing in the absence of such leave, resulting in the dismissal order. The 1st Respondent further deposed that the reasons given for the delay in bringing the instant Motion are not sound, and that the delay is inordinate and the result of indolence on the part of the Applicant. Moreover, the 1st Respondent echoed his Grounds of Opposition that the Applicant cannot seek both a reinstatement of the suit and leave to appeal against the dismissal order. On those grounds, the 1st Respondent averred that the Motion ought to be dismissed with costs.
 7. Warren Enterprises Limited (hereafter the 2nd Respondent) similarly opposed the Motion, through the replying affidavit sworn by its advocate Anastacia Maina, on 27th October, 2023. Therein, counsel by and large echoed the sentiments by her counterpart, save to add that previous adjournments in the suit had been sought and granted at the behest of the Applicant and/or his advocate. The advocate therefore termed the delay in the matter as inordinate and inexcusable, further faulting the Applicant for failing to prosecute the Motion timeously, upon becoming aware of the dismissal of the suit.



8. The Motion was canvassed by way of written submissions. The Applicant's counsel anchored his submissions on the decision in *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR and Order 12, Rule 7 of the CPR, regarding the discretionary power of the courts in setting aside ex parte orders. Counsel reiterating the averments earlier made in the affidavit in support of the Motion, that sufficient reasons have been presented to warrant the order for setting aside and reinstatement of the suit. Counsel stating further that the Applicant has always been diligent and interested in prosecuting his case, and that had he been notified of the hearing date by the erstwhile advocates, he would have availed himself accordingly. He therefore urged the court to exercise its discretion in favour of the client, in that respect.
9. Concerning the prayer for leave to lodge appeal out of time, it was counsel's contention that sufficient reasons had been presented to warrant the grant of the said prayer, whilst citing the decision in *Wachira Karani v Bildad Wachira* [2016] eKLR as to what constitutes sufficient reason. And the decision rendered in *Njue Ngai v Ephantus Njiru Ngai & another* [2016] eKLR to the effect that the dismissal of a plaintiff's suit for non-attendance in effect gives rise to a judgment. For those reasons, the court was urged to allow the Motion as prayed.
10. For the 1st Respondent, his counsel by way of his brief submissions, reiterated the averments made in his replying affidavit and Grounds of Opposition. Contending that the Applicant cannot simultaneously seek an order for setting aside of the dismissal order and leave to appeal against the same dismissal order. That moreover, the Applicant has not demonstrated by way of evidence that the erstwhile advocates were to blame for the dismissal of the suit. Consequently, counsel urged the court to dismiss the Motion with costs.
11. Counsel for the 2nd Respondent submitted that the prayer for setting aside and leave to appeal out of time cannot be sought in the same application. Counsel went on to argue that the court acted correctly by dismissing the suit as it did, further arguing that the reasons given by the Applicant do not warrant the exercise of the court's discretion in the Applicant's favour. Referring here to the decision in *Ronald Mackenzie v Damaris Kiarie* [2021] eKLR, concerning inordinate delay. In addition, citing the decision in *Edney Adaka Ismail v Equity Bank Limited* (*supra*) regarding the discretionary power of the court and the expectation that a party ought to exercise diligence in pursuing his or her case. On those grounds, counsel urged the court to dismiss the Motion, with costs.
12. The Court has considered the rival affidavit material, the Grounds of Opposition, and the rival submissions on the Motion. From the record, it is apparent that prayer (ii) of the Motion has since been overtaken by events, while prayer (vi) is spent.
13. Regarding the remaining prayers in the Motion, it is apparent that the Applicant is primarily and contemporaneously seeking the setting aside of the dismissal order made by this court on 29th March, 2021 and leave to appeal out of time against the said dismissal order. It is contradictory for a party to seek by the same motion, to challenge an order on appeal whilst at the same time seeking to have it set aside.
14. Despite the grounds raised by the Respondents' responses to the motion in that regard, counsel for the Applicant proceeded in his submissions to press the two contradictory prayers by his submissions. Thus, it seemed that the combination of the said prayers in the Motion was intentional, and not through inadvertence or error. It appears that the Applicant wants to have his cake and eat it. The court concurs with the sentiments raised by the respective Respondents, that the prayers set out in the Motion cannot be considered contemporaneously. The prayers are incapable of being considered or granted as presented.



15. The Motion is defective, and the court will not delve into its merits.

Consequently, the Notice of Motion dated 7th December 2022 is hereby struck out, with costs to the 1st and 2nd Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Kimathi

For the Respondent: Mr. Gikunda

C/A: Erick

