**Njunia v City Council of Nairobi & 4 others (Civil Suit 903 of 2004) [2024] KEHC 8727 (KLR) (Civ) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8727 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL SUIT 903 OF 2004**

**CW MEOLI, J**

**JULY 8, 2024**

**BETWEEN**

**ROBERT MATHENGE NJUNIA ..... PLAINTIFF**

**AND**

**CITY COUNCIL OF NAIROBI ..... 1ST DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 2ND DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 3RD DEFENDANT**

**SPERANZA NYAGUTHII KARIUKI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NICHOLAS HIUHU MURITHI) ..... 4TH DEFENDANT**

**DOMINIC ICHUGU GACHANJA ..... 5TH DEFENDANT**

**RULING**

1. Before the Court for determination are two (2) motions. The first is dated 13.09.2023 and was filed by the estate of Nicholas Hiuhu Muriithi (deceased) through his legal representative Speranza Nyaguthii Kariuki, and Dominic Ichugu Gachanja (hereinafter the 4th & 5th Defendant). The second motion is dated 30.11.2023 and was brought by Robert Mathenge Njunia (hereinafter the Plaintiff). For purposes of this ruling, the Court will hereafter refer to them as first and second motions, respectively.

2. The first motion seeks review of the judgment delivered on 12.06.2023 by way of a determination on the issue of the cautions lodged by the Plaintiff in respect of land parcels known as Nairobi/Block 63/782 and Nairobi/Block 63/783 (hereafter the suit properties), and consequently issue an order directing the Chief Land Registrar (hereafter the 2nd Defendant) to forthwith remove and or cancel the caution lodged against the suit properties. The motion is expressed to be brought pursuant to Section

3A & 80 of the *Civil Procedure Act* (CPA), Order 45 Rule 1 & 2 of the *Civil Procedure Rules* (CPR). On grounds on the face of the motion, and as amplified in the supporting affidavit sworn by Speranza Nyaguthii, the legal representative of the estate of the 4th Defendant, and duly authorized to depose on behalf of the 5th Defendant.

3. To the effect that the Plaintiff filed the present suit claiming to be the proprietor of suit properties registered in the name of the 4th and 5th Defendants respectively and proceeded to lodge Cautions against the suit properties, which cautions remain in force to date. That the 4th and 5th Defendant filed their Amended Defence and Counterclaim dated 01.11.2005 seeking inter alia that the Plaintiff be compelled to withdraw the said cautions, a matter fully canvassed at the trial. That while the Court by its judgment delivered on 12.06.2023 found that the Plaintiff had failed to prove his claim, it did not pronounce itself on the matter of the cautions lodged in respect of the respective suit properties and or make an order directing removal of the same.

4. The deponent states that the cautions impinge upon the 4th and 5th Defendants' property rights and that despite being registered owners, they have been unable to develop the properties for over ten (10) years as a result incurring loss. She asserts that under Section 73(1) of the *Land Registration Act*, the Court has the power to order removal of the cautions exercising its residual jurisdiction. In conclusion, she deposes that the motion has be made expeditiously and it is in the interest of justice that the Court reviews its judgment by pronouncing itself on the issue.

5. The Plaintiff opposed the motion by way of a replying affidavit dated 06.11.2023. He confirms having lodged cautions on the respective suit properties to guard against any dispositions but that being aggrieved by the decision of this Court, he intends to prefer an appeal. He contends that the first motion does not disclose any error or grounds to justify the review sought. Asserting further that considering his intended appeal, the lifting of the caution would greatly prejudice him, and pointing out that the inordinate delay of three (3) months in filing the motion has not been adequately explained. In his view, the application lacks merit and ought to be dismissed with costs.

6. By the second motion, the Plaintiff sought enlargement of time to file the Notice of Appeal. The motion is expressed to be brought pursuant to Section 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* (CPA), Rule 1(3) & Rule 75 of the *Court of Appeal Rules*, Section 3A & 3B of the *Appellate Jurisdiction Act* and Order 51 Rule 1 & 2 of the *Civil Procedure Rules (*CPR). It is premised on the grounds on the face of the motion and the supporting affidavit sworn by Plaintiff.

7. To the effect that when judgment was delivered on 12.06.2023 his counsel on record failed to attend Court and only learnt of the delivery of the judgment upon being served with a hearing notice in respect of the first motion. He states being aggrieved with the judgment he has instructed counsel to prefer an appeal, however the time prescribed for filing the Notice of Appeal has lapsed. He concludes by deposing that he has an arguable appeal with a very high chance of success and that the Defendants would not suffer any prejudice if the motion is allowed.

8. The 4th and 5th Defendants on their part opposed the motion by way of a replying affidavit dated 15.03.2024 deposed by Speranza Nyaguthii, who asserts that she is conversant with the facts relevant to the suit and duly authorized depose on behalf of the 5th Defendant. She attacks the second motion on grounds that it is fatally defective for being premised on the Court of Appeal Rules, devoid of merit, frivolous, an abuse of the Court process, an afterthought aimed at protracting the litigation. Further asserting that the Plaintiff is guilty of indolence and is therefore undeserving of the Court's exercise of discretion and in that regard relying on her affidavit dated 28.07.2022 in response to the Plaintiff's application dated 18.07.2022. As demonstrated by the fact that at the delivery of the judgment the

City Council of Nairobi (now County Government of Nairobi) (hereinafter 1st Defendant) and her counsel were present.

9. She further asserts that the Plaintiff has not shown any reasonable or sufficient cause to merit the orders sought, while equally failing to evince that the intended appeal is arguable through a draft Notice of Appeal or Memorandum of Appeal to demonstrate. She concludes by that the motion ought to be dismissed with costs.

10. Both motions were canvassed by way of written submissions. On the part of the Plaintiff, in addressing the first motion, counsel argued that the applicants are guilty of inordinate delay of three (3) months since judgment for which no explanation has been offered. That the Plaintiff will further be prejudiced by the motion because the subject matter of the suit may be dissipated thereby rendering the intended appeal nugatory. In his view, the first motion ought to be disallowed.

11. Concerning, the second motion, counsel cited section 7 of the *Appellate Jurisdiction Act* and the decision in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR to contend that this Court has the power to extend time for filing a Notice of Appeal. Reiterating his explanations in the supporting affidavit, the Plaintiff asserts that these are satisfactory. Moreover, contending that the 4th and 5th Defendant will not be prejudiced by dismissal of the firs motion and granting of the second motion.

12. Counsel for the 4th and 5th Defendants opened his submissions by addressing the first motion. While placing reliance on Section 45 Rule 1 of the CPR, the decision in *National Bank of Kenya v Ndungu Njau* [1997] eKLR, *John Waweru & 12 Others v Theta Tea Factory Co. Ltd & Another* [2019] eKLR and *Shanzu Investments Ltd v The Commissioner of Lands* [1993] eKLR, counsel contended that this Court's failure to pronounce itself on the cautions question despite the as pleaded in the 4th and 5th Defendant's Amended Statement of defence & Counterclaim amounts to an error apparent on the face of the record, and is amenable to review as sought.

13. Addressing the second motion, counsel relied on the decision in *Leo Sila Mutiso v Rose Hellen Wangari* Civil Application No. Nai. 255 of 1997 as cited in *Thuita Mwangi* (*supra*) and *Nicholas Kiptoo Arap Korir Salat v IEBC* [2014] eKLR to submit that the Plaintiff has erroneously invoked the Court of Appeal Rules while not meeting the pertinent considerations, namely, explanation of delay, arguability of the appeal and prejudice. It was further contended that the Plaintiff's conduct throughout the proceedings demonstrates wanton indolence which this Court ought not countenance by allowing his motion. Counsel went on to contend that Plaintiff's application is likely to prejudice the 4th and 5th Defendant through the continued denial of their property rights as the successful litigants. The decision in *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR was cited in the latter regard. The Court was thus urged to allow the first motion while dismissing the second motion.

14. The 1st Defendant, 2nd Defendant and The Attorney General (hereafter the 3rd Defendant) did not participate in the two applications.

15. The Court has considered the pleadings, and material canvassed in respect of the two motions. The first motion essentially seeks the review of the judgment of this Court delivered on 12.06.2023, apparently on grounds of error or mistake apparent on the face of the record, evident in the Court's asserted failure to pronounce itself on the question of the cautions against the suit properties allegedly raised in the 4th

and 5th Defendant's Amended Statement of defence & Counterclaim. The motion is premised on the provisions of Order 45 (1) of the CPR which provides that: -

> "(1) Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

16. There is a long line of authorities on the principles applicable to a review application brought under Order 45 (1) of the *CPR*. In the judgment of Okwengu JA in *Associated Insurance Brokers v Kenindia Assurance Co. Ltd* [2018] eKLR the Court of Appeal in discussing these principles, and specifically the ground of mistake or error apparent on the face of the record stated:

> "It is clear that Order 45 rule 1(1) of the *Civil Procedure Rules p*rovides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:-
>
> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." (Emphasis added)

In *Nyamogo and Nyamogo Advocates v. Kogo* [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:

"An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

17. Further, in M*ultichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR the Court of Appeal held that:

> " It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:
>
> "The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in Mulla, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions [*State of Gujarat v. Consumer Education & Research Centre* (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [*Chhajju Ram v. Neki* (1922) 3 Lah. 127]..."

18. With the forestated dicta in reserve, has such an error been demonstrated here? In its judgment, the Court addressed itself to the respective parties' pleadings at paragraphs 1, 2, 3, 4, 5, 6 and 7. Specifically, at Para. 6 judgment of the court captured the 4th and 5th Defendant's pleadings as hereunder;-

> " 5 .....
>
> 6. The 4th and 5th Defendant equally filed a joint statement of defence dated 12.10.2004 denying the key averments in the plaint and averred that they were duly registered as the exclusive lessees of the suit premises by the 2nd Defendant upon due compliance with the lawful allotment procedures of the 1st Defendant, and thus hold a valid and good title to the suit properties. It was further averred that if the Plaintiff ever obtained any letters of allotment in respect of the suit properties, then the same were issued illegally and irregularly, prior letters of allotment having already been issued to the 4th and 5th Defendants and that the subsequent letters issued to the Plaintiff were null and void and their effect and purpose subsequently extinguished by the issuance of titles to the 4th and 5th Defendant.
>
> 7....." (sic)

19. The first motion is predicated on the Amended Defence and Counterclaim dated 01.11.2005 allegedly filed in the suit by the applicants. Indeed the assertion that such pleading had been filed is contained in the applicants' submissions before judgment. However, upon a thorough scrutiny of the record, no such pleading can be traced. Additionally, the proceedings of 31.10.2005 before Kubo, J ( as he then was) reveal that Miss Wambua held brief for J.M. Njenga for the 4th and 5th Defendants while C.N

Njenga appeared for the 1st Defendant, and Mr. Eredi for the 2nd and 3rd Defendants. Also present was Mr. Kibanga for the Plaintiff. The record of the proceedings on the said date reads as follows; -

> " Kibanga
>
> We have a consent to record. Re: the N/M dated 26/09/05 and CS dated 27/10/05, we agreed that both applications be allowed, and costs be in the cause.
>
> Also that the defs. be a liberty to file and serve amended defence within 14 days.
>
> Also that the hearing of the 23rd & 24th Nov. 2005 of the hearing suit be confirmed. That is all.
>
> Mr. Eredi
>
> I confirm the above.
>
> Mr. Njenga
>
> I confirm the above.
>
> Mr. Wambua
>
> I confirm the above.
>
> Court
>
> Orders as per consent by the parties as recorded above."

20. A second order allowing the filing of an amended defence by the 4th and 5th Defendants, appears to have been made on 20.04.2015 when parties appeared before Onyancha, J. However, as earlier noted, a review of the respective parties' pleadings does not disclose the Amended Defence and Counterclaim allegedly dated 01.11.2005 as having been filed pursuant to the Court's orders. It is trite that the issues for determination before a Court are premised on pleadings before it. There is no dearth of authorities in this regard. The Court of Appeal in *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others* [2014] eKLR addressing itself to the question observed that; -

> " The complaint running through the submissions by the learned counsel for the appellant in this appeal was that the learned judge wrote and delivered a judgement on issues that were not pleaded in the plaint and which were therefore not be before the learned judge for determination.
>
> .....One of the issues for determination on appeal in the case of Abdul Shakoor Sheikh v Abdul Najeid Sheikh Civil Appeal No. 161 of 1991 (ur) was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors Bullen and Leake (12th edition) page 3 under the rubric Nature of Pleadings:-
>
> "The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the

> opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

21. The Court proceeded to state that:-

> It was held in the case of *Galaxy Paints Co. Limited v Falcon Guards Limited* [2000] 2EA 385 that the issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for determination. It was further held that unless pleadings were amended parties were confined to their pleadings. This position had been taken in the earlier case of *Gandy v Caspair* [1956] EACA 139 where it was held that unless pleadings were amended parties must be confined to those pleadings. It was further held that to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.
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> In a judgement delivered recently by this Court on 14th February, 2014 in *Romanus Joseph Ongombe & others v Cardinal Raphael Ochieng Otieno & others* (Kisumu) Civil Appeal No. 20 of 2011 (ur) it was held that a judgement whose basis was on issues not founded on the pleadings was a nullity. This Court proceeded in that case to remit the matter to the High Court for retrial.

22. The Court concluded by stating that:

> The position flowing from all the previous judgements we have considered herein is that a judgement must be based on issues arising from the pleadings and the trial judge is not at liberty, as the trial judge in the case leading to this appeal did, to depart from the pleadings or the case before the court to write and deliver a judgement on issues that are not before the court. The difference would of course be where the parties introduce an unpleaded issue in the course of the trial and leave that issue for the court to decide. The court would in that event be entitled to make a necessary finding - See *Odd Jobs Mubia* [1970]EA 476 where it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision.
>
> > The appellant's complaint in this appeal is basically that the learned judge delivered a judgement on issues that were not pleaded and which were not before the court. We agree. The learned judge adopted a path of doing what she perceived to be "justice" to the parties but in the event she erred by departing from the general rule that issues for determination in a suit generally flowed from the pleadings and the learned judge could only pronounce judgment on the issues arising from the pleadings." (Emphasis added).

23. The contention by 4th and 5th Defendants that the Court failed to consider their Amended Defence and Counterclaim dated 01.11.2005 therefore cannot lie in the absence of the said Amended Defence and Counterclaim dated 01.11.2005. Interestingly, the 4th and 5th Defendants did not tender a copy of the said pleading, while the Plaintiff was reticent on the matter. The court could not pronounce by its judgment itself on the questions related to the cautions against the suit property in the circumstances. The asserted error apparent on the face of the record has not been demonstrated. Therefore, the Court cannot invoke the review jurisdiction in these circumstances and declines the 4th and 5th Defendants' invitation to revisit an issue that was never pleaded. In the result the first motion dated 13.09.2023 must fail with and is dismissed. The court hastens to add, for the avoidance of doubt, that this determination does not bar the 4th and 5th Defendants from availing themselves of any lawful procedure available for the perfection of the judgment issued in their favour.

24. Moving on to the second motion, it invokes Section 3A & 3B of the *Appellate Jurisdiction Act* and Rule 75 of the *Court of Appeal Rules* among others. The procedure by which a decision of the High

Court may be challenged in the Court of Appeal is prescribed in the *Court of Appeal Rules*. Specifically, Section 77(1) & (2) of the Court of Appeal Rules provides that-

(1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

(2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.

(3) ....."

25. Rule 2 of the *Court of Appeal Rule*s, defines "Court" as the Court of Appeal and includes a division thereof and a single judge exercising any power vested in the judge when sitting alone. Concerning extension of time within which to lodge a notice of appeal Rule 4 of the Rules states that;-

> " The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended".

26. The above provisions must be read alongside Section 7 of the *Appellate Jurisdiction Act* which provides that;-

> " The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:
>
> ....."

27. Hence the 4th and 5th Defendants' technical objection to the second motion is not well taken. The High Court is empowered by section 7 of the *Appellate Jurisdiction Act* to entertain the second motion despite the Plaintiff's failure to cite the appropriate provisions. That said, the principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *CPA*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:-

> " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

28. While the discretion of the Court is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his favor. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap*

*Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stating inter alia that:

> "(T)he underlying principles a court should consider in exercise of such discretion include;
>
> 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
> 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
> 6. Whether the application has been brought without undue delay.
> 7. ....."
>
> See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

29. There is no dispute that the judgment of this Court was delivered on 12.06.2023. The Plaintiff's explanation for delay in filing the Notice of Appeal is premised on the sole fact that his counsel on record was not aware of the delivery of the judgment and thus failed to attend Court and the fact of the delivery came to his attention on 09.10.2023 through a notification from his counterpart. See annexure marked "RMN1". The 3rd and 4th Defendants have challenged this position by arguing that delay is inordinate, and that the Plaintiff is guilty of indolence and hence undeserving of this Court's exercise of discretion.

30. In support of the explanation for the delay the Plaintiff exhibited an email enclosing the first motion dated 13.09.2023 (annexure marked RMN1). However, the record reveals that judgment earlier scheduled earlier for 6.12.2023 in the presence of the Plaintiff's advocate, was subsequently adjourned to 8.6.2023 and delivered in the presence of all parties except the Plaintiff's advocate. Neither the Plaintiff nor his advocate has cared to explain why unlike other parties, they failed to attend the judgment and also failed to follow up on the matter for almost six months thereafter until woken up by the service of the first motion via the email of 24th November 2023, prompting the second motion was drawn. This conduct must be considered in the context of the general delay in prosecution of the case.

31. Indeed, the complaints by the 4th and 5th Defendants in that regard are not without merit as the record appears to justify these assertions. This suit was filed in 2004 and was pending for almost twenty years at conclusion last year. It was the duty of the Plaintiff to progress and prosecute it in reasonable time. More so as the scales were tilted in his favour having lodged cautions prohibiting the 4th and 5th Defendants from any dealings in respect of the properties in dispute. Whatever explanation there might be, the delay of twenty years in a case of this nature is inordinate and offends the overriding objective. The record shows that the suit was earlier partly heard and subsequently proceeded for defence hearing before this Court on 30.11.2021, in the absence of the Plaintiff and or his counsel, despite notice of the hearing date being served upon them. Upon the close of the hearing, the suit was mentioned on

15.03.2022 and 02.06.2022 to confirm filing of submissions. On both occasions, neither the Plaintiff nor his counsel was present in Court.

32. Thereafter, the Plaintiff filed the motion dated 18.07.2022 seeking to set aside the exparte proceedings of 30.11.2021. The latter motion was in the presence of counsel for the Plaintiff re-scheduled for hearing on 25.10.2022. However, when the motion eventually came up for hearing on the said date, neither the Plaintiff nor his counsel were present in Court, leading to dismissal of the motion. This foregoing conduct demonstrates wanton lethargy on the part of the Plaintiff.

33. In a motion of this nature, the period of delay as well as explanation thereof are key considerations. A party seeking extension of time must not be seen to presume on the Court's discretion. Here the explanation given the delay of almost six months since judgment is not only inordinate, given the age of the case and antecedents earlier highlighted, but also not satisfactorily explained. The Plaintiff's counsel did not even deem it necessary to swear an affidavit explaining his non-attendance on the material dates and or delay. Coming at a time when the courts are under a constitutional injunction not to allow delay in the dispensation of justice, and under a duty under Section 1A and B of the *Civil Procedure Act* to ensure the just, expeditious, proportionate and affordable resolution of disputes, the casual conduct of the Plaintiff as disclosed herein is unacceptable.

34. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR observed that;-

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable....."

35. While the Plaintiff was at pains to plead his own likely prejudice, he is the author of his debacle. Having sued the Defendants herein some twenty years ago regarding his asserted claims to the suit properties, the Plaintiff dragged his feet in prosecuting the case and skipped key dates in his matter, including the delivery of the judgment, and thereafter showing scant interest in the outcome. Through his own tardiness, the Plaintiff has squandered his opportunity to be heard on appeal. It would be a travesty of justice to make the Defendants pay for this indolence, and their assertion that delay impinges on their property rights is not idle in the circumstances. There is nothing to show that, beyond protracting the litigation, the Plaintiff upon being granted leave to file his appeal will be transformed and show any more diligence or alacrity in the matter. Which portends further prejudice to the Defendants who have held title to the properties in dispute all along but cannot enjoy any meaningful rights or benefit in that regard because of existing cautions lodged by the Plaintiff.

36. Concerning the merits of the intended appeal, based on the language employed in Mutiso (supra), the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. All that is required is for the applicant to demonstrate an arguable appeal, not necessarily one that will succeed so long as it raises a bona fide issue for determination by the Court. See *Vishva Stone Suppliers Company Limited v RSR Stone* (2006) Limited (2020) eKLR. Once more, the Applicant did not deem it necessary to demonstrate by way of a draft memorandum of appeal, or by his affidavit that his intended appeal is arguable; it was not enough to merely state that he was aggrieved with the judgment of the court.

37. In the circumstances of this case, the court is not persuaded to exercise its discretion in favour of the Plaintiff and the second motion must equally fail. In the result, both the first and second motion are dismissed but the parties will bear their own costs in respect of the said motions.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8TH DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Plaintiff: Mr. Mahugu h/b for Mr. Kibera

For the 4th and 5th Defendants: Mr. Orenge h/b for Mr. Nganga

C/A: Erick