



REPUBLIC OF KENYA



KENYA LAW
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Nibble Century Holdings Ltd v Kenya Power & Lighting Co Ltd (Civil Miscellaneous E241 of 2024) [2024] KEHC 16518 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 16518 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL MISCELLANEOUS E241 OF 2024
MS SHARIFF, J
OCTOBER 31, 2024

BETWEEN

NIBBLE CENTURY HOLDINGS LTD PLAINTIFF

AND

KENYA POWER & LIGHTING CO LTD DEFENDANT

RULING

1. Vide a notice of motion dated 10.6.24 the as filed by Kenya Power & Lighting Company Limited as Defendant/Applicant v Nibble Century Holdings Limited as Plaintiff/Respondent, Mess Kenya Power & Lighting Company Limited has moved this court under the provisions of Order 42 Rule 6, Order 51 Rule 1 of the [Civil Procedure \(Revised\) Rules 2010](#), Sections 3A and 63 (e) of the [Civil Procedure Act](#) and Article 159 of the [Constitution](#) of Kenya 2010, craving the following orders:-
 1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to grant leave and extend time to the Applicant to file its appeal out of time in respect of the ruling delivered by Hon. Douglas Ogoti on 9/5/2024 in Kisumu CMCC No 322 of 2017 Nibble Century Holdings Ltd v Kenya Power & Lighting Company Ltd.
 4. That consequential to prayer 2 and 3 above, this Honourable Court be pleased to make an order for stay of proceedings in Kisumu CMCC No 322 of 2017 Nibble Century Holdings Ltd v Kenya Power & Lighting Company Ltd pending the hearing and subsequent determination of the Applicant's appeal in the Court of Appeal.
 5. That the costs of this application be in the cause.



2. This application is supported by the affidavit of Lucy Nekesa Cheloti advocate sworn on 13.6.2024, whose general line of averment is that the impugned ruling was delivered on 9th May, 2024 by which time the limitation period for seeking leave to appeal had lapsed. Further that a similar application for leave was disallowed by the trial court and that the Applicant has an arguable appeal as per the annexed draft memorandum of appeal. The Applicant maintains that the case before the trial court proceeded ex parte due to want of service of a hearing notice upon the Applicant.
3. This application is resisted by the Respondent by way of a replying affidavit sworn by Zachary Mboya Ooro on 26th June 2024. It is deposed on behalf of the Respondent that this court has no jurisdiction to grant leave as it is only the trial court that grant leave and this court can only exercise an appellate jurisdiction if leave is declined by the trial court.
4. The Respondent further states that whereas the Applicant had properly filed the application for enlargement of time before the trial court through a notice of motion dated 23.5.2024, it later withdrew it vide a notice of withdrawal dated 21.6.2024 yet the application had been slated for hearing on 26.6.2024. That the said application before the trial court was ably resisted by the Respondent who filed grounds of opposition dated 28.5.2024.
5. Mr. Zachary Mboya Ooro deposes that the Applicant had filed two similar applications; one before the trial court and the current one with a view of broadening its chances of success.
6. The Respondent accuses the Applicant of deceit and material misrepresentation that the trial court had declined its application for leave yet it had withdrawn its on application before it was heard and determined. The Respondent maintains that no ruling has been exhibited to demonstrate the denial of leave to appeal by the trial court.
7. It is also deposed that no reasons have been adduced to explain the failure by the Applicant to seek leave to appeal during delivery of the ruling and to appeal within the limitation period.

Analysis and determination

8. That application was canvassed by way of written submissions. Both parties complied and their respective submissions have been duly considered. The issues that emerge for consideration are as follows :-
 - a. Does this court have jurisdiction to entertain the application herein?
 - b. Whether the Applicant ought to be granted leave to lodge an appeal out of time.
 - c. If the answer to (a) above is in the affirmative, whether the proceedings in the trial court ought to be stayed pending the hearing and determination of the intended appeal.

Jurisdictional question

9. This court is clothed with the jurisdiction to enlarge time under the provisions of Section 95 of the *Civil Procedure Act* CAP 21 Laws of Kenya and Order 50 rule 6 of the *Civil Procedure Rules*. Section 95 provides thus:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.



10. On the other hand Order 50 Rule 6 states as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for is not made until after the expiry of the time appointed or allowed.”

11. The Court of Appeal set out the factors to be considered in an application for enlargement of time in the case of *Mwangi v Kenya Airways Ltd* (2002) KLR Justice Prof. Joel Ngugi cited the said case with the approval in the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* (2018) eKLR, these are the following:-

- a. Period of delay
- b. The reason for the delay
- c. The chances of success of the appeal
- d. The degree of prejudice which could be suffered by the respondent if the extension is granted.
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

12. The Respondent has stated categorically in its replying affidavit that this court lacks jurisdiction to entertain this application and that it is the trial court that has the requisite jurisdiction. The case of *Owners of Motor Vessel Lillian S. v Caltex Oil Kenya Ltd & another* (1982) KLR has been cited in this regard, where the Court of appeal rendered itself that where the court has no jurisdiction it must down its tools.

13. As already stated hereinabove this court can enlarge time pursuant to the provisions of section 95 of the *Civil Procedure Act* and order 50 Rule 6 of the *Civil Procedure Rules*. Whereas the applicant has deposed that its application made for enlargement of time before the lower court was declined, no ruling evidencing such decline has been annexed. In any event orders made under Order 50 Rule 6 of the *Civil Procedure Rules* are per Order 43 of the same Rules appealable as of right. This material omission to annex the said ruling must attract an adverse inference on the part of the Applicant.

14. I do note that the said omission has duly been explained by the Respondent; that the Applicant withdrew a similar application dated 23.5.2024 on 26.6.2024 vide a notice of withdrawal of even date. That at the time of the said withdrawal the applicant had already filed the application herein and therefore it was prosecuting two similar applications simultaneously before two courts. The applicant deliberately failed to disclose this fact to this court but instead, opted to peddle material and deliberate falsehoods; that the trial court had declined to grant it leave to appeal. If that was the case, then the applicant ought to have approached this court in its appellate and not its original jurisdiction, but as already observed the order that the applicant intends to appeal against is appealable as of right per the provisions of Order 43(1) of the *Civil Procedure Rules*. It is evident that there is no ruling made on the applicant's application for enlargement of time before the trial court given the withdrawal of the same before it was heard and determined. The applicant's conduct epitomizes blatant abuse of court process, yet it is seeking equity from this court. The applicant's hands are tainted; it has contravened the maxims of equity that provides that he who seeks equity must do equity and must approach the court with clean hands.



15. Premised upon the analysis hereinabove made I do agree with the respondent that the applicant is yet to exhaust the available remedy in the subordinate court which is the first forum.
16. The doctrine of exhaustion was expounded in the case of the *Speaker of the National Assembly v James Njenga Karume* (1992) where the Court of Appeal rendered itself on the issue as follows:

“In our view there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.”
17. In this instance the applicant had it’s day in the trial court but it chose to squander it and is now before this court in an act that bespeaks of forum shopping. This court will not condone such blatant abuse of it’s processes. In light of this finding the other issues fall by the way.
18. The application herein as intituled is defective as there is no plaint filed herein and any reference to a plaintiff or a defendant in this application is a misnomer.
19. In conclusion I do find that the applicant did not exhaust the remedies available to it wherefore I hereby disallow the application herein with costs to the respondent assessed at Kshs 20,000 to be paid within 30 days from the date hereof. In the event of default by the applicant in payment of the costs the respondent shall be at liberty to execute.

This file is marked as closed.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 31ST DAY OF OCTOBER 2024.

MWANAISHA S SHARIFF

JUDGE

