



Musamba (Suing as the Administrator and Personal Representative of the Estate of Dennis Simiyu Musamba) v Kenya Power & Lighting Company Limited (Miscellaneous Civil Appeal 155 of 2023) [2024] KEHC 13566 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPEAL 155 OF 2023
SC CHIRCHIR, J
OCTOBER 29, 2024**

BETWEEN

ALFRED MUSAMBA APPLICANT

**SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF
THE ESTATE OF DENNIS SIMIYU MUSAMBA**

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 26th July 2023 and amended on 15th February 2024 seeks for the following orders;
 - a. (spent)
 - b. That the Applicant be granted leave to file and serve the memorandum of appeal out of time against the judgment of Hon. S. Kipngeno in Butali SPMCC No. 10 of 2022 delivered on 23/5/23
 - c. The costs if this application be provided.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Alfred Musamba, the Applicant herein.

The Applicant's case

3. The Applicant's case is that he was not aware that Judgment had been delivered until a number of months later; that failure to get notification at the appropriate time was due to the loss of his phone .



He states that in the circumstances he could not reach his Advocate. For the same reason, the advocate could not reach him. However, he avers that his Advocate made unsuccessful attempts to reach him.

4. The Applicant states that it was “only recently” he managed to go to his advocate’s office and that is when he learnt about the Judgment; that due to the above stated circumstances he was unable to file the Appeal within the stipulated period.

The respondent’s case

5. It is the Respondent’s case that the applicant has not provided a reasonable justification for extension of time; that he has not provided reasonable grounds as to why he did not visit his Advocate’s office earlier than he did . The respondent terms the Applicant’s averments as evidence of his indolence which this court should not entertain.
6. The Respondent further states that it will be prejudiced since they will be denied their finality to the litigation.

Applicant’s submissions

7. The Applicant reiterated the averments in his supporting Affidavit and states that having lost his Advocate’s contacts he had no way of knowing the outcome of the judgment.
8. On the discretion of the court to allow the application, he has relied on Article 50 (1) of *the constitution* on a right to fair trial and section 79 G, of the *civil procedure Act* while submitting that the delay was not inordinate.
9. It is the Applicant’s final submission that he lost his son through the respondent’s negligence and it would be a great injustice if not granted a chance to appeal, and that the respondent won’t suffer any injustice in any event.

Respondent’s submissions

10. It is the respondent’s submission that the Applicant must discharge the burden of proof as set out on sections 107 (1), 109 and 112 of the *Evidence Act*. It is submitted that the alleged loss of the cell phone and hence delay in the Applicant’s visit to his Advocate’s offices, for instance was not supported by any evidence; It is further submitted that the applicant never indicated the exact date his phone got lost nor the exact time he was able to travel to his advocate’s office to be informed on the outcome of the judgment .
11. While relying on the case of Turea Limited T/A Dr. Mattress versus Mohammed (2022) the respondent points out the importance of justifying the delay , and states that the Applicant has failed in justifying the delay.
12. The respondent dismisses the Applicant’s submission that his advocate had tried to reach him without success, and argues that instead it was the Applicant’s Advocate who ought to have sworn an affidavit showing the efforts made in an attempt to reach the Applicant.

Determination

13. Section 79G of the *Civil Procedure Act* provides as follows: Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed



against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

14. The discretion to extend time, under the proviso to section 79G exercised within well-established principles which have been stated and restated in many past decision. In the case of Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR, the supreme court laid down the principles for enlargement of time to Appeal as follows:

- “1. extension of time is not a right of a 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 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 on a case- to- case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”

15. In the present case, judgment was delivered on 23rd May, 2023 , the Appeal window therefore closed on 23rd June 2023 . The present application was filed on 18th October 2023, approximately 2 months after the lapse of the 30 days appeal period. The delay in my view is not inordinate.
16. However, has the Applicant given a reason for the delay and has it been explained to the satisfaction of the court?
17. It is the Applicant’s case that he lost his phone, which contained his Advocate’s telephone contacts; that he is aware that his advocate had looked for him without success, and that it was only when he went to see his advocate “recently” that he learnt about the delivery of judgment.
18. I do not find the above explanation to be sufficient. Like the respondent I find his explanation selective and Evasive. When for instance did he go to see his advocate? The word “recently” is relative and cannot be used by this court to gauge whether or not there was indolence on the part of the Applicant. Further there is no evidence that his advocate had been looking for him. An Affidavit from his Advocate for example would have shed more light on why there was delay.
19. Further was he aware that the judgment was due on 23rd may 2023, and if he did , what effort did he make to reach the advocate , in the face of the lost phone? Finally, he met with his Advocate in July and presumably, gave her/ him instructions to appeal, but the present Application was filed about 3 months later? This Additional delay of 3 months has therefore not been explained.



20. It is also the responsibility of a party to follow up his case notwithstanding the appointment of an Advocate. It can not be that a litigant gives instructions to an advocate then goes into hibernation.
21. Am not satisfied that the reason for the delay has been sufficiently explained. If anything, what clearly emerges is a party is not ready to make a full disclosure on what caused the delay.
22. In short, the Applicant has failed the major test; - that of showing sufficient cause for the delay. The Application is unmerited. The same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF OCTOBER 2024.

S. CHIRCHIR

JUDGE.

In the presence of:

Godwin Luyundi- Court Assistant.

