



REPUBLIC OF KENYA



KENYA LAW
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Kenya Power & Lighting Company Ltd v Mutunga (Environment and Land Appeal E030 of 2022) [2023] KEELC 19074 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19074 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E030 OF 2022**

**A NYUKURI, J
JULY 24, 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD APPELLANT

AND

DANCAN M. MUTUNGA RESPONDENT

(An Appeal from the Ruling and Order of the Chief's Magistrate Court of Kenya at Machakos before the Honourable Principal Magistrate Anne Nyoike dated and delivered on 28th July 2022 in Chief Magistrate's ELC Case No. E374 of 2021)

JUDGMENT

Introduction

1. This is an appeal against the ruling of Honourable Anne Nyoike, Principal Magistrate, delivered on 28th July 2022 in Machakos PMCC ELC NO. E374 OF 2021. In the ruling, the learned trial magistrate dismissed the Notice of Motion dated 31st March 2022 filed by the Appellant. That motion had sought stay of proceedings and enlargement of time to appeal against the court's ruling delivered on 10th March 2022, dismissing the Appellant's preliminary objection on the jurisdiction of the court.

Background

2. By a plaint dated 10th July 2021, the Plaintiff (the Respondent herein), filed suit against the Appellant alleging that he was the legal owner of land parcel Machakos/kiandani/5712 (suit property) having acquired the same by purchase and that in 2013, the Defendant's workers trespassed on the suit property and unlawfully placed overhead electric wire lines therein without the Plaintiff's consent and prevented the Plaintiff from further developing his property, at a time when the Plaintiff was already constructing thereon and having already done first floor. The Plaintiff stated that despite demanding that the defendant stops the trespass, the defendant refused to comply.



3. The Plaintiff sought for a declaration that the defendant was a trespasser on the suit property and had caused permanent and irreparable damage thereon; and an order for compensatory damages.
4. On 16th August 2022, the Defendant filed defence denying the Plaintiff's claim and averred that the installation of electric lines over the suit property was done pursuant to a grant of an easement by virtue of Section 28 of the [Land Registration Act](#) No. 3 of 2012. It also stated that it was the Plaintiff who had trespassed on the defendant's lawful wayleaves corridor. According to the Defendant, the Plaintiff was guilty of offences under sections 169 (1) (a) of the [Energy Act](#), 2019. It stated that the suit was res judicata and that the Plaintiff lacked locus standi to make the claim as he was not the registered proprietor of the suit property. It gave Notice of a preliminary objection on ground that it had been wrongly sued and that the suit is incompetent, and that the suit was time barred by section 4 (2) of the [Limitation of Actions Act](#) and the [Public Authorities Limitation Act](#). It also stated that this court had no jurisdiction as the suit ought to be heard by the Energy & Petroleum Tribunal or the Energy and Petroleum Regulatory Authority in accordance to the [Energy Act](#) and the Energy Complaints and Disputes Resolutions Regulations, 2012. It further stated that the suit is a preserve of the small claims court. It stated that the Plaintiff had not exhausted the statutory laid down procedures for addressing such dispute.
5. On 16th August 2021, the Defendant filed a preliminary objection dated 12th August 2021 contending that the trial court had no jurisdiction to hear and determine the suit as the suit offends sections 3(1), 10, 11 (e), (f), (i), (k), & (L), 23, 24, 36,40,42 and 224 (2) (e) of the [Energy Act](#) together with Regulations 2, 4,7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations 2012 as read together with Article 159 (2) (c) and 169 (1) (d) and (2) of [the Constitution](#) of Kenya 2010 and sections 9 (2) and (3) of the Fair Administration Act, 2015.
6. Upon hearing the above preliminary objection, the trial court dismissed the same.
7. Dissatisfied with the ruling, counsel for the Defendant vide application dated 31st March 2022 sought the leave of court and enlargement of time to appeal against the ruling on the preliminary objection. Vide a ruling dated 28th July 2022, the trial court dismissed the application dated 31st March 2022 on grounds that the Defendant had not demonstrated an arguable case against the ruling on the preliminary objection and that it was fair that the suit is heard to conclusion and where any party is not satisfied, that is when they can pursue an appeal. It is that ruling that provoked the instant appeal.
8. Vide a Memorandum of Appeal dated 11th August 2022, the Appellant sought to set aside the Ruling delivered on 28th July 2022 on the following grounds;
 - a. That the learned Principal Magistrate erred in law and in fact in failing to grant an order enlarging time to appeal against the Ruling and Order dated 10th March 2022.
 - b. That the learned Principal Magistrate erred in law and in fact by arguing that the Appellants did not have an arguable case meriting an Appeal at the interlocutory stage against the Ruling dated 10th March 2022, which ruling dismissed the Defendant's preliminary Objection on jurisdiction.
 - c. That the learned Principal Magistrate erred in law and in fact in failing to apply the guiding principles and conditions enunciated by law and superior courts on enlarging time to appeal when it declined to grant the Appellant leave to lodge an Appeal out of time against the Ruling dated 10th March 2022.



- d. That the learned Principal Magistrate erred in law and in fact failing to consider the Appellant's Affidavit in evidence, submissions and authorities as rendered by the Appellant/Applicant, thereby arriving at an erroneous decision.
 - e. That the learned Principal Magistrate erred in law and in fact in dismissing the Application by the Appellant dated 31st March 2022.
9. Subsequently, the Appellant sought the following orders;
- a. This appeal be allowed with costs.
 - b. The ruling and order of the Honourable Magistrate delivered on 28th July 2022 in Machakos Magistrate Court ELC E 374 of 2021 be set aside and the same be substituted by the decision of this Honourable court.
 - c. Such other reliefs as may appear to this Honourable court to be just.
10. The appeal was disposed by way of written submissions. On record are the Appellant's submissions dated 18th January 2023 and the Respondent's submissions dated 27th January 2023.

Submissions by the Appellants

11. Counsel for the Appellant set out two issues for determination by the court as follows;
- a. Whether leave can be granted to appeal out of time.
 - b. Whether an order of stay of proceedings can be granted in MACHAKOS ELC E374 of 2021.
12. On whether leave ought to be granted to appeal out of time, Counsel relied on Section 75 of the *Civil Procedure Act* and Order 43 Rule (1) of the Civil Procedure Rules which sets out orders and rules of which appeals would lie as of right. According to the Appellant, the Ruling delivered on 10th March 2022 was not appealable as a matter of right. They acknowledged that they inadvertently failed to seek for leave to appeal against the Ruling and promptly made an application under certificate of urgency seeking enlargement of time which was subsequently dismissed.
13. Counsel further submitted that Section 79 G of the *Civil Procedure Act* empowers a court to apply its discretion to admit an appeal out of time, and that Section 95 of the Act similarly allows the court to enlarge time required for any act prescribed in the Act. They stated the principles to be considered for enlargement of time as set out in the case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal No.255 of 1997* and the case of *First American Bank of Kenya Ltd vs Gulab P.Shah & Others HCC 2255/2000 [2002] IEA 65* include;
- a. The length of delay.
 - b. The reason/ explanation for the delay.
 - c. The chances of appeal succeeding if the Application is granted; merits of contemplate action, if appeal is arguable.
 - d. The Degree of prejudice the Respondent is likely to suffer and whether it can be compensated by damages.
14. On the limb of the length of delay, Counsel submitted that a plausible explanation for the delay is the key that unlocks the court's favourable discretion, as was held in the case of *Vishva Stone Suppliers Company Limited v Stone Limited, Court of Appeal Civil Application No.55 of 2020*. It was their



submission that the reasons explained in their Application was that counsel for the Appellant was not present when the said Ruling was delivered to seek leave and that by the time instructions to appeal were issued by the Client, the statutory time had already passed. They further submitted that the Application was made 24 days after the ruling was delivered, a period that they deemed not inordinate, citing the case of *Housing Finance Company of Kenya Ltd vs Amina Achieng Ochieng* [2021] eKLR to argue that the period of 24 days herein was not inordinate. Counsel further highlighted the fact that the lower court in their ruling at page 3 acknowledged the fact that the Defendant had moved to court quickly.

15. On whether their intended appeal had chances of success, Counsel submitted that what the Appellant was required to demonstrate was that it has an arguable case and not necessarily one with high chances of success. To buttress this, they cited the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another* [2018] eKLR. Counsel contended that the lower court erred in finding that the Appellant could seek recourse at the conclusion of the matter and that there was no need to appeal at an interlocutory stage. Further, they laid emphasis on the fact that the issue at hand touched on jurisdiction, which was a fundamental issue. They cited the case of *Owners of Motor Vehicle "Lilian S" v Caltex Oil (Kenya) Ltd* (1989) wherein it was emphasized that without jurisdiction, a court has no power to make one more step. Counsel maintained that the lower court had no jurisdiction to hear and determine the suit as the suit ought to be heard by the Energy & Petroleum Tribunal.
16. Counsel argued that any prejudice that may be suffered could be compensated in costs. Counsel placed reliance on the case of *George Kianda & Another v Judith Katumbi Kathenge & Another* [2018] eKLR. In this authority, the court was of the view that it was rare to come across an instance where a party has been put in a place where the healing medicine of costs cannot cure. They argued that since the Respondent's main prayer as per the Complaint was compensation, any prejudice suffered can be adequately compensated by costs.
17. In conclusion, Counsel emphasized that the right to appeal is a Constitutional right and urged the court to allow them an opportunity to exercise the right. To emphasize this, they cited the case of *Charles Kinyanjui Kimani (Suing as the Legal Representative of Jason Kimani Mwangi (Deceased) vs Thabitha Rinka & 4 Others* [2022] where the court was of the view that the right of appeal should not be taken away by procedural technicalities.
18. On whether the proceedings in Machakos ELC E374 of 2021 should be stayed, Counsel acknowledged the fact that stay of proceedings is purely at the court's discretion that is exercised from case to case. They urged the court to exercise the discretion in favour of the Appellant and argued that should the Appeal succeed; the proceedings will amount to a waste of the court's time. They cited the case of *Nicholas Kiptoo Korir Salat vs I.E.B.C & 7 Others* [2014] eKLR and relied on the principles laid therein, arguing that the order sought by the Appellant were merited.

Submissions by the Respondent

19. Counsel for the Respondent set out two issues for determination by the court, namely;
 - a. Whether leave can be granted to appeal out of time.
 - b. Whether an order for stay of proceedings can be granted in Machakos E374 of 2021.
20. On whether leave can be granted to appeal out of time, Counsel cited the decision in the case of *Nyutu Agrovet vs Airtel Networks Ltd* [2015] wherein the court held that where there is no automatic right to appeal, then an appellate court has no jurisdiction to hear or determine an appeal unless the leave is first sought and granted.



21. On whether the Appellant is entitled to extension of time to lodge its appeal out of time, they argued that extension of time was at the discretion of the court and that the factors to be considered in exercising the discretion are as laid out in the case of *First African Bank of Kenya vs Gulab P. Shah & 2 Others* [2002] eKLR. As regards the explanation given for the delay, Counsel argued that the reasons given by the Appellant in Paragraph 3 of their supporting Affidavit do not suffice since it is not true that the Appellants counsel had requested the respondent's counsel to hold their brief on the date of the Ruling, nor is it professional for counsel to hold brief for both sides. Counsel further submitted that this notwithstanding, they had sent a copy of the Ruling to the Appellant's counsel on the material day of which he acknowledged receipt but took no action on it.
22. On whether the Respondent was bound to suffer prejudice if the Application to appeal out of time is allowed, they submitted that the Appellant did not inform the court if the Respondent suffers prejudice whether the same can be compensated by an award of damages.
23. On the merits of the contemplated action and whether the Appeal is arguable, the Respondent cited sections 46 and 47 of the *Energy Act*, which require the Appellant to seek consent of the owners of any land before entry therefore for purposes of connecting an electric supply line or carrying out survey. Counsel contended that the Appellant had entered into the suit property without first seeking their consent, hence the suit was for trespass since the Energy Regulation Commission would have only been involved by the Appellant had the Respondent refused to give consent after being requested to.
24. Counsel concluded by submitting that the Respondent had a right to approach the court for a remedy against the Appellant, being a trespasser. They made reference to the case of *Swaminarayan Flats Limited v Kenya Power and Lighting Company Ltd & 3 Others* (2019) eKLR.

Analysis and Determination

25. Having considered the Appeal, the submissions by the parties, and the entire record of the lower court, it is clear that the appellant has challenged the trial court's exercise of discretion. This court sitting as an appellate court will normally not interfere with exercise of discretion by the lower court unless it is demonstrated that the trial court was wrong in principle in the exercise of its discretion or that it arrived at an erroneous decision due to failure to guide itself properly. Indeed, it was held in the case of *Mbogo & Another vs Shah* [1968] EA at p.15 as follows;

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.
26. Consequently, this court is of the view that the sole issue for determination herein is whether the lower court correctly applied the law and the facts in its discretion in declining to stay proceedings and enlarge time for appeal against the decision dismissing the appellant's preliminary objection.
27. The power of the court to enlarge time is provided in Section 95 of the *Civil Procedure Act* CAP 21 as follows;

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.
28. Besides, Order 50, rule 6 of the Civil Procedure Rules 2010 provide for extension of time 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 the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

29. In considering an application for extension of time the court ought to consider inter alia; the period for the delay; the reason for the delay; the likely prejudice that may be suffered by the opposite party and whether the matter touches on issues of public importance. Extension of time is not a right of any party, it is an equitable remedy which is granted upon judicious exercise of the discretion of the court.

30. In the case of *Edith Gichungu Koine v. Stephen Njagi Thoithi* [2014] eKLR, the Court of Appeal discussed the factors to be considered in an application for extension of time and held as follows;

Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court, including but not limited to, the period of delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.

31. Similarly, In the case of *Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others* SC App. No. 16 of 2014; [2015] eKLR the Supreme Court of Kenya held as follows;

It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the Applicant.

..we derive the following as the underlying principles that a court should consider in exercising such discretion.

1. extension 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 would 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.

32. The court of Appeal in *Filippo Fedrini v Ibrahim Mohamed Omar* [2016] eKLR had this to say as regards delays;

Finally, it is not every delay in taking any appropriate step required under the rules or directed by the court that would disentitle a party the right to seek to challenge any decision to this Court. It is only



unreasonable and unexplained delay that is culpable. And whether or not a delay is unreasonable will largely depend on the circumstances of each case. See *Wasike V Khisa*(2004)KLR 197.

33. On the question of enlargement of time, the trial court found that the defendant moved to court quickly, but that, that ought to be weighed against the prejudice likely to be suffered by either party. The trial court also anchored its decision on the finding that matters at hand involve land which is a very sentimental issue to many not to forget the economic benefits derived from use and occupation thereto. It further found that the Defendant (Appellant herein) had not demonstrated an arguable case against the ruling on the preliminary objection. Counsel for the appellant faulted these findings and argued that since it was evident that the appellant had moved the court without undue delay, it was deserving of orders for extension of time.
34. The question therefore that ought to be addressed is whether the trial court in the exercise of its discretion took into account relevant matters. From the impugned ruling it is clear that the trial court considered the period of delay and found it not to be inordinate. I note that the ruling in respect of the preliminary objection was delivered on 10th March 2022 and the application for leave to enlarge time was filed on 4th April 2022. Since the Appellant had 14 days to seek leave to appeal, it means that the 14 days lapsed on 24th March 2022, and therefore by filing the application on 4th April 2022, the appellant's delay was for a period of 11 days. The reason given for the delay was that counsel for the appellant inadvertently failed to seek leave to appeal, as no automatic right of appeal existed and that pending confirmation of instructions to appeal, the Appellant's external advocate sought for typed proceedings and certified ruling, but that formal instructions to appeal were given on 28th March 2022 and that this was due to the appellant's counsel's error in computation of time. Having considered the reasons given for the delay, which delay was occasioned by the appellant's counsel's wrong computation of time and the delayed communication on instructions to appeal between the appellant and its external advocates, in my view the reasons given are excusable in the circumstances of this case. Having considered the impugned ruling, I note that the reasons for delay given by the appellant were not given due consideration by the trial court, which in my view was an error on the part of the trial court.
35. The court took into consideration the issue as to whether the appellant had demonstrated an arguable case. A right to appeal is a constitutional right which ought not be hindered unless the interest of justice dictate so. In my considered view, a court that has already determined a matter which the losing party seeks to appeal against, having already determined the issues, may not be the right forum in determining whether the appeal is arguable because it has already determined the matters that the appellant is aggrieved with and is functus officio. The arguability or merit of the intended appeal or lack thereof can be well determined by an appellate court which has not interrogated the issues in controversy yet. And therefore using the test of whether the appellant's intended appeal was arguable as the only test in determining the question of whether or not to extend time, was in my considered view erroneous, since the right of appeal just like the right to sue is protected in *the constitution*.
36. On the period of delay being 11 days, in view of the explanation given by the Appellant's counsel, in my view, is not inordinate and the trial court rightly found as much.
37. The trial court found that granting extension of time will prejudice the parties since land is sentimental and that the matter should be concluded so that whoever is aggrieved can appeal after the conclusion of the case. In that respect, and in supporting the trial court's finding, the Respondent's counsel argued that the intended appeal was frivolous and would only lead to delay in the course of justice. What constitutes prejudice? The Black's law Dictionary defines "prejudice" as damage or detriment to one's legal rights or claims. In my view, it is a disadvantage or an apparent injustice suffered by one party due to the actions of the opposing party. However, when in the court's opinion, a party faces the risk of



prejudice if the prayers sought by the opposite party are allowed, the court will usually consider whether the prejudice can be cured by an award of costs, for the sake of facilitating the interests of substantive justice. It is only where costs are not sufficient to compensate a party who has suffered prejudice, that such prejudice can be reason enough for the court to deny an applicant of a discretionary relief like extending time to appeal. Having said that, with due respect, I do not agree with the trial court that the fact that land has sentimental value to some people is enough prejudice that may not be compensated by an award of costs. In that regard therefore, I find and hold that the trial court erred in principle in determining that the appellant ought to wait until the case is conclusively heard to appeal.

38. Having considered the circumstances of this case and in view of the proviso to Order 50 Rule 6 of the Civil Procedure Rules that provides for a person seeking extension of time to bear the costs of their application, I do not think that the prejudice that may be suffered by the Respondent cannot be cured by an award of costs.
39. In the premises, I find and hold that the trial court erred in denying the appellant an order for the extension of time.
40. On the question of stay of proceedings, counsel for the appellant argued that it would be a waste of courts time to proceed with the proceedings before the trial court when there is a possibility of the appellate court overturning the ruling on the preliminary objection.
41. Suits are filed to be heard and not stayed, because justice ought not be delayed as required under Article 159 of *the Constitution*. However stay of proceedings can be granted sparingly and in clear cases where it will not serve the interests of justice or it will not be an efficient use of the precious court's time to proceed with a matter. I associate with the decision in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, where the court held that: -

Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.
42. Similarly, in *Re Global Tours & Travel Ltd HCWC No.43 of 2000* the court held as follows;

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.
43. In the instant suit, the Appellant having demonstrated that it deserves an opportunity to be heard, and having been granted an extension of time to file appeal, means that there is a possibility of the decision of the trial court being set aside. That being the case it would not be a prudent use of court's precious time to proceed and have the suit before the trial court heard before the determination of the intended appeal. In the premises, it is in the interests of justice that the proceedings in Machakos SPMCC ELC NO. 374 of 2021 are stayed pending hearing and determination of the pending appeal.
44. For the above reasons, the appeal succeeds and is therefore allowed. The ruling and order of the Honourable magistrate delivered on 28th July 2022 in Machakos Magistrate Court ELC E374 of



2021 be and is hereby set aside and the same be and is hereby substituted with an order allowing the application dated 31st March 2022. For avoidance of doubt, the Appellant herein is granted leave to appeal against the ruling delivered on 10th March 2022 in Machakos Magistrates Court ELC E 374 of 2021 within fourteen days of this judgment. The proceeding in Machakos Magistrates Court ELC E 374 of 2021 be and are hereby stayed pending determination of the intended appeal. Considering the fact that the delay was occasioned by the Appellant and in view of the proviso to Order 50 Rule 6 of the Civil Procedure Rules, I order the Appellant to bear the costs of this appeal as well as those of the application dated 31st March 2022 filed in the lower court.

45. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of:

Ms. Khayesi for Appellant

No appearance for Respondent

Abdisalam – Court Assistant

