



Kenya Power & Lightning Company v Marwa (Environment and Land Miscellaneous Application 8 of 2023) [2023] KEELC 20409 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 8 OF 2023
MN KULLOW, J
SEPTEMBER 29, 2023**

BETWEEN

KENYA POWER & LIGHTNING COMPANY APPLICANT

AND

CHRISTINE WANKIO MARWA RESPONDENT

RULING

1. By Notice of Motion dated 5th June, 2023 and filed under Certificate of Urgency, the Applicant sought for the following orders: -
 - a. Spent.
 - b. That this Honorable Court be pleased to grant the Applicant leave to appeal out of time against the Ruling delivered by the Chief Magistrate at Migori Hon. D.O. Onyango dated 13th May, 2022 in Migori CM Civil Suit No. E012 of 2021.
 - c. That there be a stay of all proceedings in Migori CM Civil Suit No. E012 of 2021 between the Applicant and the Respondent herein pending the hearing and determination of this Application and the intended Appeal by the Appellant.
 - d. That the costs of this Application be in the cause.
2. The application is based on 10 grounds thereon and the Supporting Affidavit sworn by Simon Ngara W. an Advocate of the High Court of Kenya having personal conduct of the matter on behalf of the Applicant, sworn on 5.06.2023. He averred that a Ruling on his Preliminary Objection challenging the jurisdiction of the trial court in CMCC No. E012 of 2021 was delivered on 13/04/2022 and whose effect was to dismiss the said Preliminary Objection and consequently set down the matter for pre-trial directions.



3. It is his claim that after the said Ruling; they proceeded to file a Memorandum of Appeal with a citation of the Environment and Land Court at Migori but the registry staff proceeded to cancel the ELC citation on the pleading and erroneously registered the matter as a Civil Appeal under the High Court. He further averred that despite the said erroneous registration of the matter as a Civil Appeal, he continued using the 'ELC' citation in all his pleadings in the matter and not the 'High Court' citation.
4. It was his contention that they only learnt that judgment had been delivered in the matter sometimes on 25/05/2023 by the High Court and whose effect was that the High Court had no jurisdiction to entertain the Appeal, on the basis that the same ought to have been handled by the Environment and Land Court. Consequently, the Appeal was struck out.
5. He maintained that the Applicant promptly lodged an Appeal against the decision of the trial court on time and did so with the belief that the same was an ELC Appeal as evidenced by its pleadings. It is therefore his claim that the inadvertent error on the registration of the suit as a High Court Civil Appeal should not be meted on the Applicant.
6. It was further his contention that the Applicant's core business is the supply of electricity and would therefore be greatly prejudiced should the matter proceed for hearing in the trial court without being given an opportunity to canvass its appeal on merit. He argued that the Applicant has been vigilant in prosecuting its case and maintained that the Appeal is arguable with overwhelming chances of success. He thus urged the court to allow the Application and grant the Applicant leave to file the Appeal out of time.
7. The Application was opposed. The Respondent filed a Replying Affidavit sworn on June 26, 2023, by Mr. Kerario Marwa, an Advocate of the High Court having conduct of the matter on behalf of the Respondent. He dismissed the Application as being frivolous and an abuse of the court process and the same is only meant to further delay the expeditious determination of the Plaintiff's case in the trial court.
8. It was his claim that the Preliminary Objection was properly dismissed and the Applicant being aggrieved with the said decision, filed Civil Appeal No. 47 of 2022 which was also dismissed for want of jurisdiction.
9. It was his contention that there was no error on the part of the registry in the registration of the Appeal as a Civil Appeal as alleged but maintained that the mistake was on the part of the Applicant and the said mistake is inexcusable. He thus urged the court to dismiss the Application with costs.
10. The Application was disposed of by way of written submissions. Both parties filed their rival submission together with authorities which I have read and considered in arriving at my decision as hereunder;

Analysis and Determination

11. This court is of the considered opinion that the sole issue arising for determination is whether the Applicant is entitled to the grant of leave to appeal out of time and stay of proceedings in Migori CM Civil Suit No. E012 of 2021.
12. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against whereas section 95 of the said Act gives the court discretion to enlarge the said timelines as it deems fit even though the time originally fixed may have expired.



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. Following the above; section 79G of the *Civil Procedure Act* thus requires that before the Court enlarges the time for lodging an Appeal, the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time.

15. The principles to be considered in exercising the court’s discretion on extending/enlarging time to file an appeal were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangeri* Mwangi Civil Appeal 255/1997, where the court in considering the exercise of discretion to extend time, held 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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

16. Further, the Supreme Court in *Nicholas Kiptoo Korir Arap Salat v. IEBC & 7 others* [2014] eKLR also laid down pertinent guiding principles for the extension of time to lodge an appeal as follows: -

“(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.”

17. With these principles in mind, I will therefore proceed to address each of the grounds outlined in the above-mentioned cases and establish whether the Applicant has satisfactorily met each of the said principles. Even though there is no maximum or minimum period of delay set by the law, anyone



seeking this relief must satisfactorily explain the cause of the delay. See [Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet](#) [2018] eKLR.

18. The Applicant in explaining the delay in lodging the Appeal stated that he promptly lodged an Appeal against the Ruling delivered on 13/5/2022. However, due to an error on the part of the court registry, the same was erroneously registered as a Civil Appeal *vide* High Court Civil Appeal No. 47 of 2022 and thus the same was heard and determined by the High Court. The High Court rendered its decision on the said Appeal on the 25/05/2023, whose effect was to strike out the Appeal for want of jurisdiction. He solely blamed the court registry for the said error and asked the court not to visit the said mistake on the Applicant.
19. The Respondent on his part dismissed the Application as being a delaying tactic by the Applicant and maintained that there was no such mistake on the part of the registry. He averred that the Applicant's Advocate was fully aware throughout the proceedings that the Appeal had been lodged as a Civil Appeal. It was his contention that such mistake is inexcusable and urged the court to dismiss the Application and allow the suit in the trial court to proceed on merit.
20. I have keenly looked at the said High Court Civil Appeal No. 47 of 2022 in considering the allegations raised by the Applicant of the inadvertent error on the part of the court registry. The Memorandum of Appeal indeed has a white-out mark on the citation and the words in the 'high Court Of Kenya At Migori, Civil Appeal' can be seen to have been included as alleged. This however, does not point without doubt that the said cancellation and inclusion was done by a staff at the registry. It is not ordinary that the staff at the registry would out of their own volition proceed to cancel out the pleadings by an advocate and its place include other details not intended.
21. Be as it may, from a further perusal of the record; I noted that subsequent correspondences and pleadings in the file were prepared and lodged using the 'High Court Civil Appeal' citation. To be precise, various directions were served upon the parties through their Advocates on the 14/9/2022 and 10/11/2022 using the reference number of "HCCA No. 47 of 2022". Further, the Applicant herein filed a Notice of Motion Application dated 22/11/2022 using the High Court Civil Appeal citation. The Record of Appeal also bears the High Court citation. It is therefore not true for the Applicant to allege that he only became aware that his appeal had been lodged in High Court after the delivery of judgment in the Appeal on 25/5/2023 whereas he had all along been aware that the same was lodged in the ELC. The orders sought herein are discretionary in nature and the Applicant has a duty to approach the court in good faith and with clean hands.
22. Chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. However, I do also acknowledge that the Ruling which the Applicant seeks to challenge is that of a Preliminary Objection, touching on the jurisdiction of the trial court to entertain the suit as filed. Jurisdiction goes to the root of a case and therefore on that account alone, I find that the intended Appeal is arguable.
23. The third limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The Respondent dismissed the Application as being frivolous and a delay tactic used by the Applicant to further delay the hearing and determination of the trial court case.
24. This in my view is not the position. The earlier Appeal filed *vide* High Court Civil Appeal No. 47 of 2022 was not determined on merit but the same was struck out for want of jurisdiction. The effect of the said decision is that the Appellant in the said Appeal is at liberty to lodge an Appeal in the appropriate forum. It is therefore my considered view that the same would not be prejudicial to the Respondent herein since the same seeks to determine the issue of jurisdiction on merit



25. In view of the foregoing, I will proceed to grant the Applicant herein the benefit of doubt, owing to the nature of the dispute and in the interest of justice by extending time within which to file the Appeal.

Stay of Proceedings.

26. The elements to be considered in an application for stay of proceedings are well settled. The same were espoused *In Re Global Tours and Travels Ltd.*: Winding Up Cause No.43 of 2000 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 cases, 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” (emphasis mine)

27. Further, in *Niazons (Kenya) Ltd. v China Road & Bridge Corporation (Kenya) Ltd.* Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

28. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice. Having granted the Applicant herein Leave to file his Appeal, I find that there is need to stay the proceedings in Migori Civil Suit No. E012 of 2021, since the intended Appeal seeks to challenge the jurisdiction of the trial court to determine the suit.

29. In the upshot, I accordingly find that the Application dated June 5, 2023 is merited and I proceed to allow the same on the following terms: -

- a. Leave be and is hereby granted to the Applicant to appeal out of time against the Ruling delivered by the Chief Magistrate at Migori Hon. D.O. Onyango dated May 13, 2022 in Migori CM Civil Suit No. E012 of 2021.
- b. The Applicant be and is hereby directed to file the Memorandum of Appeal within 14 days from the date of this Ruling.
- c. Consequently, an Order for Stay of Proceedings in Migori CM Civil Suit No. E012 of 2021 between the Applicant and the Respondent be and is hereby issued pending the hearing and determination of the Intended Appeal.
- d. Failure to comply with order (b) hereinabove, Order (a) and (c) hereinabove shall automatically lapse.
- e. Costs of the Application to abide the Appeal.

DATED, SIGNED AND DELIVERED IN VIRTUALLY AT MIGORI THIS 29TH DAY OF SEPTEMBER, 2023.



MOHAMMED N. KULLOW
JUDGE

