



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**MISCELLANEOUS CIVIL APPLICATION NO. 39 OF 2018**

**KENYA POWER AND LIGHTING COMPANY LIMITED.....APPLICANT**

**VERSUS**

**ALICE WANJIRU GUCHANE.....RESPONDENT**

**RULING**

The Notice of Motion before me is brought under Sections 1A, 1B, 3A, 65(1) and 79G and 95 of the Civil Procedure Act Cap 21 laws of Kenya and Order 42 rule 2 and order 51 rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law.

The main order sought is that the court be pleased to grant the applicant enlargement of time to file Memorandum of Appeal against the ruling of the Hon Wendy Kagendo, Chief Magistrate in Nyeri **CMCC 301 of 2017 Alice Wanjiru Gichane vs KPLC** on 14<sup>th</sup> February 2017 dismissing the applicant's preliminary objection challenging the jurisdiction of the court to hear and determine the suit.

It is the applicant's contention that its failure to file the memorandum of appeal in time was caused by the lower court.

The applicant's version of events as contained in the supporting affidavit sworn by Charles Benedict Mwangela advocate on 23<sup>rd</sup> April 2018, and the face of the Motion is that on the 14<sup>th</sup> February it sought stay of proceedings for 30 days pending appeal and the same was granted together with an order for supply of ruling and proceedings. However, the latter only became available on 29<sup>th</sup> March 2018 and were collected on 4<sup>th</sup> April way beyond the 30 days within which an appeal ought to be filed.

The respondent opposes the motion vide grounds of objection filed on 29<sup>th</sup> May 2018 to the effect that the applicant has not sought leave as required under order 43(2) of the CPR, 2010, not laid satisfactory ground for delay and the application lacks merit. Her version of the events are set out in the affidavit sworn by James Nyiha Advocate on 25<sup>th</sup> May 2018, and it is clear there is no dispute on the dates, except to reiterate that the applicant has not established grounds for the delay, and the need to have the suit heard on its merits in the lower court.

Parties agreed to file written submissions each to persuade the court to take its position.

I have perused the rival submissions and authorities cited.

The issue is whether the applicant has established sufficient and good cause for the delay as required by law.

There are numerous authorities on this issue.

The law under s. 79G of the CPA is that

**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.**

The applicant's explanation for the delay is that the lower court delayed in supplying the certified proceedings and judgement. From the wording of section 79G that is not an acceptable ground. The only ground provided for is any delay in **the preparation and delivery to the appellant of a copy of the decree or order** appealed from. There is no evidence at all that the applicant applied for a copy of the decree or order of the lower court or any certificate of delay to that effect. The blame laid on the court is there for unfair. See **Ndegwa Kamau t/a Sideview Garage vs. Fedrick Isika Kalumbo [2016] eKLR** where the judge cited from **Kyuma vs. Kyema (1988) KLR 185** delay in the

supply of proceedings and certified judgment is not what is contemplated under s. 79G.

The applicant is expected to satisfy the court that he had good and sufficient cause for not filing the appeal in time. From what it has place before me, no such cause has been place before me.

The applicant relied on **Apa Insurance Limited vs. Michael Kinyanjui Muturi [2016] eKLR.** Although a 'draft memorandum of appeal' has been filed, there is no application to file the appeal out of time. Secondly, the order to allow an appeal out of time is dependent on there being sufficient cause for the delay. I have pointed out that the applicant has not discharged that burden. The application must fail. Costs to the respondent.

**Dated, delivered and signed at Nyeri this 25<sup>th</sup> day of January 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of

Court Assistant- Jerusha

Ms.Mwikali holding brief Mr.C.B.Mwongela for Applicant

Mr.Ombwongi holding brief for Ms.Mathenge for respondent.

**Mumbua T Matheka**

**Judge**

**25/1/19**