



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 640 OF 2016**

**KENYA POWER & LIGHTING**

**COMPANY LIMITED .....APPELLANT/RESPONDENT**

**VERSUS**

**ERIC MLONGO OWINO (Suing on his own behalf and as**

**Personal Representative of the**

**Estate of JOHNSTONE OWINO (DECEASED).....RESPONDENT/APPLICANT**

*(Being an Appeal from the Judgment of the Senior Principal Magistrate Hon. G. Mmsai (Mrs) delivered on the 23<sup>rd</sup> day of September, 2016 in CMCC NO. 1057 OF 2013 at Nairobi)*

**RULING**

This is an application by way of Notice of Motion under Sections 63 (e), 79G, 95 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules for orders that leave be granted to the applicant for the filing of a cross appeal against the judgment of the trial court and that the draft memorandum of cross appeal be deemed as properly filed upon payment of requisite filing fees.

The grounds upon which the said orders are sought are that the applicant is dissatisfied with the decision of the lower court delivered on 23<sup>rd</sup> September, 2016 and in particular the mode of computing damages. It is the applicant's position that no prejudice will be caused to any party by these prayers being granted.

There is a supporting affidavit sworn by the applicant herein. The application is opposed and there is a replying affidavit sworn by the advocate for the respondent.

Following the delivery of the lower court judgment, the memorandum of appeal was filed on 19<sup>th</sup> October, 2016 within the time allowed to file the same. The record of appeal was filed on 11<sup>th</sup> April, 2018 and five months thereafter, the present application was filed.

The record shows that the appeal was admitted to hearing on 21<sup>st</sup> May, 2018 followed by directions on 8<sup>th</sup> June, 2018. When directions were being given, the advocate for the applicant was present. It will be noted that it is 4 months thereafter that this application was filed.

The record also shows that a hearing date had actually been taken for 25<sup>th</sup> September, 2018 which means, the present application was filed just 8 days to the hearing date. I note from the record that the applicant was represented by the same firm of advocates right from the lower court to this court. One would expect therefore that the said advocates were fully seized of the applicant's instructions and above all, the decision of the lower court. I say this because, if indeed the applicant was aggrieved by the judgment of the lower court, it should not have taken two years to conceive that a cross appeal was necessary in the circumstances of the case.

The record of appeal which includes the lower court judgment must have been served upon the applicant soon after the filing thereof. Due diligence should have been exercised to avoid the late filing of the application, which delay has not been sufficiently explained.

I have considered the submissions of the parties, provisions of law and the attendant circumstances in this case. The orders sought call for the discretion of a court. Having considered the material presented, I believe the orders sought should not be granted because they will cause more delay in the circumstances of this case and further, the issues raised can also be canvassed during the hearing of the appeal. Accordingly, this application is dismissed with costs to the appellant/respondent.

Orders accordingly.

**Dated, signed and delivered at Nairobi this 10<sup>th</sup> Day of April, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**