



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 104 OF 2017**

**CASABLANCA HOLDINGS LIMITED..... APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD..... RESPONDENT**

**RULING**

1. The applicant has brought an application by way of Notice of Motion dated 22<sup>nd</sup> May, 2017, under the provisions of section 79G and 3A of the Civil Procedure Act. It seeks the following orders:-

(i) That the time for filing of an appeal against the ruling and order of the Chief Magistrate's Court (Hon. N. Njagi, Senior Principal Magistrate) given on 29<sup>th</sup> April, 2016 be extended to 19<sup>th</sup> May, 2017; and

(ii) Costs of the application be provided for.

2. The application is supported by the affidavit of Paul Amuga Advocate sworn on 22<sup>nd</sup> May, 2017. The respondent's Advocate, Priscah Obura filed a replying affidavit sworn on 2<sup>nd</sup> June, 2017, opposing the application.

3. Mr. Amuga, Learned Counsel for the applicant submitted that the ruling the subject of the present application was scheduled to be delivered on 13<sup>th</sup> April, 2016 and he dutifully attended court. He avers in paragraph 3 of his affidavit that the Court Clerk attending the Hon. Magistrate informed him that the ruling was not ready and parties would be notified when the same would be ready for delivery. It was the Counsel's averment that at about the same time the Magistrate was transferred. As such, he kept on making a follow up of the ruling with the Court Clerk who had been serving the Hon. Magistrate. Counsel further deposed that he came to learn that the ruling had been delivered when the applicant's Manager informed him that power supply to the applicant's business premises had been disconnected on the 10<sup>th</sup> May, 2017. Counsel further averred that he perused the Court file and noted that the ruling was delivered on 29<sup>th</sup> April, 2016.

4. Mr. Amuga therefore sought extension of time to file an appeal against the ruling and order of Hon. N. Njagi. He relied on 3 authorities which show that the court has a wide discretion to grant the orders sought. He prayed for the application to be allowed.

5. Ms. Layoo, Learned Counsel for the respondent opposed the application. She submitted that they were also not served with a notice for delivery of the ruling. She indicated that they perused the court file and

made an application to amend the defence on 19<sup>th</sup> May, 2017. The said application was served on the applicant on 10<sup>th</sup> June, 2016. She stated that the Counsel for the applicant filed their grounds of opposition on 23<sup>rd</sup> June, 2016, for the said reason, the applicant's Counsel cannot be heard to say that he was not aware of the delivery of the ruling. In her view, he should have perused the court file or written to the Executive Officer requesting for mention of the case.

6. Counsel further stated that they filed a preliminary objection challenging the jurisdiction of Magistrate's court and therefore the file was active. She added that although the applicant seeks leave to file the memorandum of appeal on 23<sup>rd</sup> May, 2017, his application is for the time for filing of a memorandum of appeal against the ruling delivered on 29<sup>th</sup> April, 2016 to be extended to 19<sup>th</sup> May, 2017. In her view, the applicant should have been asked to have the memorandum of appeal deemed as properly filed.

7. She referred to her list of authorities which shed light on the principles which courts should consider when dismissing or allowing such applications. She contended that no good reason had been given for the delay in filing of an appeal.

8. In response to the foregoing, Mr. Amuga stated that his application seeks leave to extend time for filing of an appeal and for the court to deem the memorandum of appeal filed, to be properly on record. He admitted that he did not peruse the court file but the mistake should not be visited on an innocent client. He submitted that the respondent can be compensated with costs.

## **ANALYSIS AND DETERMINATION**

**The issue for determination is if the memorandum of appeal filed out of time should be deemed as properly on record.**

9. An application of this nature is ordinarily granted apart from when the court is of the view that there has been inordinate delay in filing an application seeking leave to appeal out of time. In the present case, the ruling by Hon. Njagi, Senior Principal Magistrate was to be delivered on 13<sup>th</sup> April, 2016 but it was delivered on 29<sup>th</sup> April, 2016 without notice to the Advocates who were representing the parties therein. The respondent's Counsel came across it when perusing the court file and their law firm filed an application thereafter. Counsel for the applicant became aware of the ruling on 11<sup>th</sup> May, 2017 which was almost 11 months after delivery of the same. The reasons given by Counsel for the applicant for not filing an appeal on time is that they were never notified of the delivery of the ruling by the Hon. Magistrate who had been transferred to another station. Inquiries made to the said Magistrate's Court Clerk yielded nought.

10. In the case referred to by Counsel for the respondent of **Patrick Kivuja Kithinji vs Victor Mugira Marete** [2015] eKLR, the Court of Appeal stated as follows:-

***“The factors that the court must take into account in the exercise of its discretion in an application of this nature are well settled. They include the length of the delay, the reason for the delay, the chances of success of the intended appeal; and the degree of prejudice that is likely to be occasioned to the respondent if the application is allowed.”***

11. The Supreme Court of Kenya in the case of **Nicholas Kiptoo arap Korir Salat vs IEBC and 7 others** [2014] eKLR, laid down the following principles for extension of time for filing appeals:-

***(i) Such extension is not a right but only an equitable remedy available to a deserving party at the Court's discretion;***

***(ii) A party seeking extension must lay a basis for the same to the satisfaction of the Court;***

***(iii) Where there is delay, the same must be explained to the satisfaction of the Court;***

**(iv) Whether any prejudice will be caused to the respondents if extension is allowed; and**

**(v) The circumstances of each case must be considered.**

12. This court notes that a period of 11 months is not a short duration of time. I however consider that the circumstances surrounding this case were triggered by the transfer of the Hon. Magistrate, which is an inevitable occurrence in the Judiciary, and the lack of communication of the date when the ruling in issue would be delivered. Counsel for the respondent was correct in stating that the Counsel for the applicant should have perused the court file. He however did not do so as he was waiting to be served with a notice for delivery of the ruling.

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”.*** (emphasis added).

14. In **Gerald M. Limelane vs Joseph Kangangi** [2009] eKLR the court stated thus:-

***“My understanding of the proviso to section 79G is that an applicant seeking an appeal to be admitted out of time, must in effect file such an appeal and at the same time seek leave of the court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period. To do so would actually be an abuse of the court’s process under section 79B.”***

15. In this case, the appellant filed a memorandum of appeal on 23<sup>rd</sup> May, 2017. I find the reasons he has given for the delay in filing the appeal plausible. Counsel for the respondent did not disclose if any prejudice would be occasioned to the respondent if the orders sought are granted. I therefore allow the application dated 22<sup>nd</sup> May, 2017, with the end result being that the memorandum of appeal filed on 23<sup>rd</sup> May, 2017 is deemed as being properly on record. The costs of this application will abide by the outcome of the appeal.

**DELIVERED, DATED and SIGNED at MOMBASA on this 31<sup>ST</sup> day of JULY, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Amuga for the applicant

No appearance for the respondent

Mr. Muriithi - Court Assistant