



REPUBLIC OF KENYA



KENYA LAW
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Muinde v Kenya Power & Lighting Company Limited (Miscellaneous Application E035 of 2021) [2022] KEELC 2518 (KLR) (20 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E035 OF 2021**

**A NYUKURI, J
JULY 20, 2022**

BETWEEN

SAMUEL SOO MUINDE APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

RULING

Introduction.

1. This ruling is in relation to the preliminary objection dated 12th November 2021 and the Notice of Motion dated 7th June 2021.
2. By application dated 7th June 2021, the Applicant sought for the following orders;
 - a. Spent.
 - b. The court be pleased to grant leave to the Applicant to appeal out of time against the ruling made by the Hon. B. Bartoo (SRM) delivered on 15/04/2021; in MACHAKOS CMCC No. 290 of 2014.
 - c. The costs of this application be provided for.
3. The application is supported by the affidavit of Philip M. Mulwa, counsel for the Applicant sworn on 7th June 2021. The Applicant's case is that the ruling of the lower court was delivered on 15th April 2021, at a time when courts had been closed due to the Covid-19 pandemic. He stated that as the Applicant stays away in the United States, by the time his counsel got to learn of the judgment, advise him and obtain instructions to appeal, time to appeal had lapsed. Further that the Applicant will lose Kshs. 268,524/=, if the application is not allowed.



4. In response, the Respondent filed a preliminary objection dated 12th November 2021, in which they sought to have the suit struck out on the grounds that this court lacks jurisdiction to hear and determine this matter pursuant to the provisions of sections 3 (1), 170, 171, 172, 173, 174, 175, 176 and 177 of the *Energy Act* No. 1 of 2019 and Regulations 2, 4 (a), 7 and 9 of the *Energy (Complaints and Disputes Resolution) Regulations* 2012 as read together with Article 159 (1) of *the Constitution* of Kenya, 2010.
5. In addition, the Defendant filed grounds of opposition together with a replying affidavit sworn by Henry Macharia, counsel for the Respondent. The Respondent contends that the application is incompetent, frivolous, misconceived and an abuse of the court process, as the ruling sought to be appealed against is not appealable as of right under Order 43 Rule 1 of the *Civil Procedure Rules*. It is the Respondent's position that the application offends section 75 of the *Civil Procedure Act* and Order 43 Rule 1 as the same ought to have been filed before the lower court which made the order and not before this court. Further, the Respondent averred that no sufficient reasons for the delay were advanced by the Applicant, and that the delay was inordinate, and the Applicant guilty of laches, contrary to section 79G of the *Civil Procedure Act*.
6. In the Respondent's replying affidavit sworn on 12th January 2022, the Respondent deponed that the Applicant filed this suit in the subordinate court seeking several orders for Kshs. 268,524/= for damaged cypress trees and damaged coffee stems, general damages and costs of the suit; that on 1st August when the matter came up for mention to fix a hearing date, counsel informed court that parties were engaged in out of court negotiations, but the court listed the matter for hearing on 14th November 2019 and allowed the parties to continue with negotiations; that on 14th November, the suit in the lower court was dismissed for non-attendance by the Plaintiff; that the Applicant by application dated 11th December 2019 sought to have the orders made on 14th November 2019 vacated; that the trial court dismissed the application on grounds that the Plaintiff had not taken any step to prosecute the matter 5 years after filing the same; that that applicant has made this application after the statutory period allowed for filing an appeal and after the decision of the lower court was made; that the applicant is guilty of laches and the application is an afterthought for being filed 30 days after lapse of the statutory period; that this court lacks jurisdiction to hear and determine this matter by dint of sections 3 (1), 170, 171, 172, 173, 174, 175, 176 and 177 of the *Energy Act* No. 1 of 2019 and Regulations 2, 4 (a), 7 and 9 of the *Energy (Complaints and Disputes Resolution) Regulations* 2012 as read together with Article 159 (1) of *the Constitution* of Kenya, 2010 and that it would be bizarre and against the rules of natural justice to reinstate the suit on account of the Applicant's laxity to institute an appeal against the decision of the subordinate court.
7. By the directions of this court made on 16th November 2021, both the Preliminary objection dated 12th November 2021 and the application dated 7th June 2021 were directed to be heard together and that the same be canvassed by way of written submissions. On record are the Respondents submissions filed on 18th January 2022 and the Applicant's submissions filed on 24th January 2022.

Submissions

8. The Applicant submitted that the issues for determination were whether this court has jurisdiction to determine this matter and whether the appeal may be filed out of time. Counsel argued that by virtue of the provisions of Article 162 (2) (b) of *the Constitution*, and section 13 of the *Environment and land court Act*, this court has original and appellate jurisdiction to determine matters relating to the environment, use and occupation of, and title to land. Counsel referred to the case of *Ken Kasing'a v Daniel Kiplangat Kirui & 5 Others* [2015] eKLR, which this court has considered.



9. On whether the appeal may be filed out of time, counsel submitted that under sections 79G and 95 of the *Civil Procedure Act*, the Court has power to extent time for filing appeal out of time. Reliance was placed on the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & Another* [2020] eKLR, where the court took into account the fact that the downscaling of court operations during covid-19, created uncertainty which could have contributed to delay and which delay is excusable. Counsel prayed for an opportunity for the Applicant to file his appeal.
10. On the other hand, according to the Respondent, the issues for determination were whether this court has jurisdiction to determine this suit and who bears the costs.
11. Counsel for the Respondent submitted that this court lacks jurisdiction pursuant to the provisions of sections 3 (1), 170, 171, 172, 173, 174, 175, 176 and 177 of the *Energy Act* No. 1 of 2019 and Regulations 2, 4 (a), 7 and 9 of the *Energy (Complaints and Disputes Resolution) Regulations* 2012 as read together with Article 159 (1) of *the Constitution* of Kenya, 2010. It was counsel's position that this dispute ought to be determined by the Energy and Petroleum Regulatory Authority, which has power to investigate and determine complaints or disputes between parties relating to licenses and licence conditions under the Act.
12. Further, counsel contended that the application offends the provisions of Order 43 Rule 1 (3) of the *Civil Procedure Act*, as an application for leave to appeal under section 75 of the *Civil Procedure Act*, must first be made in the court that made the order that is sought to be appealed against, at the time of making the order or within 14 days of the date of such order.
13. Counsel relied on the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR for the proposition that a Preliminary Objection shields the objector and saves precious court's time and the Preliminary Objections should not be used as a sword, to win a case. Arguing that jurisdiction is everything and it flows from *the Constitution* or statute or both, counsel cited the cases of *Motor Vessel Lilian v. Caltex Oil (Kenya) Limited* (1989) KLR and *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others* [2012] eKLR.
14. The Respondent referred to 14 court decisions, which this court has considered, for the proposition that where there is a clear procedure for redress provided by *the Constitution* or statute, that procedure should be strictly followed.

Analysis and Determination

15. I have considered the Application, grounds of opposition, replying affidavit, the preliminary objection, as well as the parties submissions. In my considered view, the issues that arise for determination are as follows;
 - a. Whether this court has jurisdiction to extend time for filing appeal against the lower court decision made on 15th April 2021; and
 - b. Whether the application for leave to file an appeal out of time is merited.
16. On the question as to whether this court has jurisdiction to determine the application herein, Counsel for the Respondent argued that this court lacks jurisdiction to determine this matter by dint of sections 3 (1), 170, 171, 172, 173, 174, 175, 176 and 177 of the *Energy Act* No. 1 of 2019 and Regulations 2, 4 (a), 7 and 9 of the *Energy (Complaints and Disputes Resolution) Regulations* 2012, as read together with Article 159 (1) of *the Constitution* of Kenya, 2010. According to the Respondent, the Applicant's prayer in the Plaint in the lower court, can only be determined by the Energy and Petroleum Regulatory



Authority and not this court, as the said Authority has power to investigate and determine complaints or disputes between parties relating to licenses and licence conditions under the Act.

17. On the question of jurisdiction, I must point out that the Respondent's counsel missed the point. The issue now before this court, is whether this court should grant leave to the Applicant to file appeal out of time, against the lower court decision, dismissing his application that sought to reinstate the suit which had been dismissed for want of prosecution. At this point, the issue is not whether the prayers sought in the plaint before the lower court should be granted.
18. As to whether this court has jurisdiction to determine this matter, Section 79G of the *Civil Procedure Act* is the legal provision that provides for the power of the court to extend the time to file an appeal. That section refers to the court that ought to be satisfied as to the sufficiency of the reasons for the delay, to be the court that admits the appeal, in this case, it is this court in its appellate jurisdiction that can admit an appeal. Therefore, an application to extend time for filing an appeal out of time against the decision of the Magistrates Court under Order 12 Rule 7 cannot be determined by the Energy and Petroleum Regulatory Authority. In the premises, I find and hold that the preliminary objection raised by the Respondent has no bearing on this application, and its fate is dismissal for lack of merit.
19. In addition, in the grounds of opposition as well as the replying affidavit, the Respondent also raised another objection to the application that the same is incompetent for offending the provisions of Order 43 Rule 1 of the *Civil Procedure Rules*. In that regard, the Respondent contends that no leave to appeal was obtained. As was with the preliminary objection, again the Respondent missed the mark for the second time. The application herein is for leave to file appeal out of time. It is not a prayer for leave to appeal as envisaged under section 75 of the *Civil Procedure Act*. Even if it were an application under section 75 of the *Civil Procedure Act*, that would be superfluous as the order sought to be appealed against was issued pursuant to the provisions of Order 12 Rule 7, which provides for setting aside of judgment or dismissal for nonattendance. Under Order 43 Rule 1 (h) of the *Civil Procedure Rules*, an appeal against a decision made under Order 12 Rule 7 shall lie as of right. This means that the Appellant does not need leave of court to appeal against the decision of the lower court dated 15th April 2021.
20. Having addressed the preliminary issues, I now turn to the application. Section 79G of the *Civil Procedure Act* grants the court the power to grant leave for filing appeal out of time where sufficient cause is shown. The same 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.
21. Under section 95 of the *Civil Procedure Act*, the court has discretion to enlarge time for doing any act under the Act. The same provides 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 been expired.
22. The power of the court to extend time for filing an appeal out of time pursuant to the provisions of sections 79G and 95 of the *Civil Procedure Act* is discretionary, and the court, in determining whether or not to extend time for filing appeal, ought to take into account the circumstances of the case



including the duration of the delay, the applicant's explanation for the delay, as well as the prejudice occasioned by the delay. In the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR, the Supreme Court held as follows;

- a. Extension of time 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

23. In the instant matter, I note that the decision of the lower court was made on 15th April 2021, while the application herein was made on 7th June 2021. That means that the appeal ought to have been filed in 30 days, namely on 15th May 2021. Therefore, the application herein was filed 23 days after lapse of the time allowed for appeal. The applicant explained that at the time the ruling was made, courts were closed due to Covid-19 pandemic. Incidentally no substantive response was made by the Respondent on the issue as to whether the Applicant deserves leave to appeal out of time.

24. While the Respondent has argued that the delay is inordinate and that the application is an afterthought, and ought to have been filed before expiry of the statutory period, I find and hold that a delay of 23 days cannot be termed as inordinate, in view of the fact that a greater part of the year 2021 was affected by the Covid-19 pandemic and it was not business as usual, as court operations were not spared the effects of the pandemic. I find and hold that the delay of 23 days was not inordinate and the explanation given by the applicant is excusable in the circumstances of this case. Besides, the Respondent has not shown what prejudice he may suffer if the orders sought are granted.

25. In the premises, I find and hold as follows;

- a. The preliminary objection dated 12th November 2021 has no merit and the same is dismissed.
- b. The application dated 7th June 2021 is allowed and the Applicant is granted leave to file and serve his appeal within 14 days of this ruling.
- c. Costs of the application shall be borne by the Applicant.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;



Mr. Macharia for the Respondent

No appearance for the Applicant

Ms Josephine Misigo - Court Assistant

