



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL MISC. APPLICATION NO. 102 OF 1997**

**ONESMUS MUTUA LEVA ::: PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING CO.LTD.:::::::::::::::::::::::::::::: 1 ST DEFENDANT**

**GABRIEL MBINGA ::: 2 ND DEFENDANT**

Coram: J. W. Mwera J.  
 F. Mulwa Advocate for Applicant  
 Sila Advocate for Respondent  
 C.C. Muli

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**RULING**

By an amended application brought under SS. 79 G, 3A Civil Procedure Act the intending appellants, who were defendants in the lower court pray that they be granted leave to appeal out of time. The amended application was dated 15.3.2000.

Mr. F. Mulwa argued that the delay in filing the intended appeal in time was caused by failure to obtain lower court proceedings in time. He relied on the affidavits of Mr. Itonga, Advocate sworn on 13.11.97 together with that of Mr. Ng’ang’a Advocate sworn on 10.3.98.

That judgement was delivered on 13.5.97 and certified copies of proceedings were applied for on 30.5.97. To stop here for a while, under S.79G Civil Procedure Act one is obliged to appeal within 30 days. This is by filing an appeal itself which is normally proceeded with a notice of appeal. It is not said whether a notice of appeal was filed even as at 27.8.97 when the applicants were notified that the certified proceedings were ready – some 3 months from the date of the judgement. However Mr. Mulwa stressed that on appeal they will argue, inter alia that if given leave to do so, that general damages were inordinately higher in the light of soft tissue injuries. Mr. Sila on his part wondered whether or not the applicants were keen on appealing the slower court decision because if they collected certified proceedings on 27.8.97 why it took them up to 14.11.97 – about 3 months to file this application to enlarge time within which to appeal. That in fact the proceedings had been ready a whole month before 27.8.97 and the Respondent wrote to the applicants on 4.11.97 on the subject. The applicants did not see any value in this letter of 4.11.97. Mr. Ng’ang’a in his affidavit added that due to large volume of office work, they overlooked to collect the proceedings and get instructed. There is however no evidence that instructions to appeal were obtained on/about 14.11.97. But one can assume that by asking for certified proceedings on 30.5.97 it was clear that they were intended for an appeal. The letter of that date say so. So is the stand 20 by the applicants really honest? Anyway may we revert to S.79G Civil Procedure Act.

“79G. 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

anytime 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 judgement in the lower court was delivered on 13.5.97. Thirty days expired on or about 13.6.97. No appeal, let alone a notice of appeal was filed. Lower court 10 proceedings were collected on/about 27.8.97. If it took that long to prepare them the appellant was still covered, armed with a certificate of delay from the lower court, to file his appeal. This did not happen – some three and a half months since the judgement. It is not explained why the applicants did not take this course.

Then it took another 3 months to file the initial application to enlarge time. This delay is not explained. The excuse that instructions to appeal were yet to issue upto 14.11.97 fall flat on the face in the light of the applicant’s lawyers letter of 30.5.97 bespeaking certified copies of proceedings and judgement:

“..... for purposes of filing an appeal in the High Court.”

Then is there a good and sufficient cause given for not filing the appeal in time? From all the foregoing this court cannot see any and no material has been placed before it to evince any.

The application is dismissed with costs.

Orders accordingly.

Delivered on 28th February 2001.

**J. W. MWERA**

**JUDGE**