



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kenya Power & Lighting Company Ltd v Murungi (Miscellaneous Application
E004 of 2023) [2024] KEELC 3692 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 3692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS APPLICATION E004 OF 2023**

CK YANO, J

FEBRUARY 1, 2024

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD APPLICANT

AND

ASTERIA KAWIRA MURUNGI RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 11th September, 2023 by the Applicant. The application is brought under Section 3A & 79 G of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and all enabling provisions of the Law and seeks for orders that the Honourable court be pleased to enlarge the time limited for filing an appeal to enable the applicant appeal against the entire decision of the trial court delivered on 13th July 2023 by Hon. Ezra Ayuka in Nkubu PMCC No. 55 of 2018 plus costs.
2. The application is premised on the grounds thereon and supported by the affidavit of Anguche Beverline Nechesa, the applicant Counsel, sworn on 11th September 2023. The applicant's Counsel avers that on 13th July 2023, Hon. Ezra Ayuka delivered judgement in Nkubu PMCC No.55 of 2018: *Asteria Kawira Murungi v Kenya Power & Lighting Company Limited* against the applicant for the sum of Kshs.421,867/= plus costs of the suit and interest. That at delivery of the judgement she orally applied for 30 days stay of execution which she was granted. That the judgement was delivered virtually since the Honourable magistrate had been transferred to Bungoma Law Courts hence the court file was not available at Nkubu Law Courts registry.
3. The Applicant's counsel further averred that the judgement had not been availed to Nkubu registry or the court by 10th August 2023 and she wrote a letter to the executive officer on the same day requesting for a certified copy of the judgement and typed proceedings which was availed on 21st August 2023 more than a month after the delivery of the judgement. That she shared a copy of the judgement with the applicant together with an opinion and thereafter she waited for formal instructions.



4. The Applicant's counsel states that on 4th September 2023 the applicant's Chief Legal Officer informed them on telephone to appeal against the judgement.
5. The Applicant's counsel contention is that the delay in filing the Memorandum of Appeal was occasioned by administrative lapse on the part of the lower court in supplying the applicant with a certified copy of the judgement appealed against and further that time was expended as the applicant considered the judgement to decide whether to instruct its advocates to appeal.
6. It is contended that the applicant stands to suffer grave injustice if time limited to file the memorandum of Appeal is not enlarged.
7. The Applicant's counsel avers that the application was brought in good faith and without undue delay and that the intended Appeal raises triable issues which are arguable and has reasonable chances of success and prayed that the orders prayed for herein be granted.
8. The Applicant's counsel has annexed documents marked "B.N.A" containing certified judgement dated 13th July 2023, letter dated 10th August 2023 and a draft memorandum of Appeal.
9. The Applicant's counsel avers that no prejudice will be occasioned to the Respondent if the prayers sought are granted as the Respondent can be adequately compensated in costs.
10. The Applicant's counsel states that the applicant is ready and willing to abide by reasonable conditions to be set by the court such as depositing the decretal sum into court pending the outcome of the appeal.
11. The application is opposed by the respondent through a replying affidavit sworn on 29th September, 2023 in which she depones *inter alia*, that from the onset the Application is ill conceived and a waste of judicial time and an abuse of the court process. That the application is disguised to unsettle the judicial course of the matter further. That the Applicant approached the court with dirty hands as the judgment it seeks to appeal was delivered on 13th July 2023 in the presence of the counsel for the Applicant herein and in the absence of both the respondent and or her counsel and has annexed a copy of the said judgment marked AKM-01.
12. The respondent states that she is convinced that the Applicant is not keen on settling the matter as the record indicates that on 16th August 2023 the said Applicant moved the magistrate court at Nkubu seeking to have the thirty days stay of execution order issued on 13th July 2023 to be extended for additional sixty (60) days to enable the Applicant to study the judgement and determine whether to settle the amount or to appeal and has annexed a copy of the said Application dated 16th August 2023.
13. The respondent further states that the said Application dated 16th August 2023 was coming up for directions on 17th October 2023 at Nkubu Law Court's. That the Applicant now wants to waste the court's more time by filing a frivolous, scandalous and vexatious application after another.
14. The respondents avers that the applicant has not justified its inordinate delay between the delivery of the judgement on 13th July 2023 and their making of the present application two (2) months down the line which only speaks to the indolence of the Applicant which ought not to be aided by the doctrine of equity nor the discretionary powers of the court. It is the respondent's contention that the application raises no triable issues as the whole judgement was read in presence of the counsel for the Applicant that and it is trite law to say that the Applicant ought to have filed a memorandum of appeal within the stipulated 30 days upon delivery of judgement.
15. The respondent states that she is advised by her advocate on record that filing of a Memorandum of Appeal is different from filing a record of Appeal and that filing a memorandum of appeal does not



- require typed copies of proceedings nor certified copy of the judgement as the case was, in reference to the applicant's letter to the Nkubu law Courts dated 10th August 2023 annexed and marked AKM-3.
16. The respondent avers that she is aware that the advocate for the applicant attended court on 13th July 2023 when the judgement intended to be appealed on was read in court and they should have been able to craft grounds of Appeal which could be amended later and that nothing stopped the Applicant from filing a memorandum of Appeal within the stipulated 30 days and if need be, upon the receipt of the typed proceedings and a copy of the judgement apply to make amendments to their memorandum of Appeal.
 17. The respondents further averred that the applicant's application dated 11th September 2023 should fail on the grounds alluded hereinabove and ought to be dismissed with costs.
 18. Relying on advice, the respondent avers that it is trite that the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his judgement.
 19. The respondent states that the present Application whichever way it is looked at seriously is wanting in merits and therefore it should fail for reasons that the same is an afterthought and lacks justification or merit and is not properly supported or proved or is otherwise incompetent or fatally defective and is a classical abuse of the process of the court and or waste of courts time.
 20. The respondent contends that from the chronology of the issues raised both before the court and the trial court at Nkubu which are applications pending for hearing and determination it is correct to say that the Applicant is on a spree to forum shop with no regard to the crucial judicial time and resources.
 21. The respondent urged the court to dismiss the instant application with costs to her.
 22. The application was heard by way of written submissions which were duly filed by both parties. The Applicant Submission were filed on 11th October 2023 by the firm of C.B Mwangela & Co while the respondent's submission was filed on 20th November 2023 by the firm of Kiautha Arithi & Company Advocates.
 23. The applicant submitted that the only issue for determination is whether the court should grant extension of time to the applicant to file the memorandum of Appeal against the decision of Hon.Ezra Ayuka in Nkubu PMCC No.55 of 2018.
 24. The Applicant's counsel cited provision of section 79 G of the *Civil Procedure Act* and Article 159 (2) (d) of the *Constitution* and further relied on the cases of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* (2014)eKLR, *Fakir Mohammed v Joseph Mugambi & 2 others* (2005)eKLR, *George Kiptabut Lelei & Another v Fanikiwa Limited* (2019)eKLR, *Charles N.Ngugi v ASL Credit Limited* (2022)eKLR, *MFI Document Solutions Ltd v Paretto Printin Works Limited* (2021)eKLR, *Almas Haliers Ltd v Abdulnasir Abukar Hassan* (2017)eklr, *County Executive of Kisumu V County Government of Kisumu & 8 others* (2017)eKLR, *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*,eKLR (2014) and *Andrew Kiplagat Chemaringo v Paul Kipkorir Kiber* (2018)eKLR, and submitted that the application is merited and should be allowed. .
 25. The respondent's counsel also cited Section 79G of the *Civil Procedure Act* and submitted that the provision only gives power to admit an appeal out of time and not for extension of time and leave to file appeal out of time. That the application is fatally and incurably defective and bad in law and ought to be dismissed with costs.



26. The respondent relied in the cases of *Fabim Yasin Twaha v Timamy Issa Abdalla* (2015)eKLR and *Aviation Cargo Support Limited v St.Mark Freight services Limited* (2014) and submitted that the applicant has not met the necessary threshold to be granted the orders sought herein.

Analysis and Determination

27. I have considered the application, the response and the submissions made. My mandate to intervene has been invoked substantively under Section 79 G of the *Civil Procedure Act* which provides:

“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.”

28. The principles that guide the court in the exercise of its mandate under the said section are set out in the case of *Nicholas Kiptoo Arap Korir Salat – v - Independent Electoral & Boundaries Commission & 7 Others* (*Supra*), where the Supreme Court stated;

“..... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.....

“....we derive the following as the underlying principles that a court should consider in exercising such discretion:

- 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 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 respondent if the extension is granted.”

29. Therefore, the factors to consider in exercising discretion are that, I am supposed to take into consideration the length of the delay, reason for the delay, possibly, the arguability of the intended appeal and any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

30. Starting with the period of delay, it is evident from the record that the impugned judgment was delivered on 13th July 2023. The application under consideration which seeks the court’s intervention was filed on 11th September, 2023, being a period of about one month from the time the appeal ought to have been filed. It is my opinion that the delay is not inordinate.



31. The next factor falling for consideration is the explanation that the applicant has proffered for the failure to file the appeal timeously. The reason given by the applicant is attributed to the delay on the part of the lower court in supplying the Applicant with a certified copy of the judgement appealed against as well as time taken by the Applicant in communicating its decision to its lawyers to appeal. I find the reason for the delay well explained and excusable.
32. On the chances of the appeal succeeding, I have perused the memorandum of appeal herein. The applicant intends to challenge the entire decision of the trial Court. In law, an arguable appeal/intended appeal is one that need not succeed but one that is not frivolous and warrants the court's interrogation on the one hand and the court's invitation to the opposite party to respond thereto. In my view the issues raised in the intended appeal are not frivolous and are arguable.
33. The respondent's counsel submitted that her client will suffer prejudice if the application is granted as that would result in the respondent not enjoying the fruits of her money during the pendency of the Appeal. In my view, the respondent can adequately be compensated in form of costs and interest in the event the intended appeal will be in her favour.
34. On the totality of the above assessment and reasoning, I am satisfied that the applicant has satisfied the prerequisite for granting of a relief under Section 79 G of the Civil Procedure Act.
35. Consequently, I find merit in the application dated 11th September, 2023. I do allow the application in the following terms:-
 - (a) Leave is granted to the applicant to file appeal out of time against the Judgment delivered in Nkubu PMCC No. 55 of 2018.
 - (b) The applicant to file and serve its Memorandum of Appeal within Fourteen (14) days hereof.
 - (c) Costs of the application to abide the outcome of the appeal.
36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF FEBRUARY, 2024.

C.K YANO

JUDGE

In the presence of

Court Assistant: Kiragu

Ms. Angache for applicant

Ms. Kerubo for respondent

