



**Nucon Switchgears Pvt Limited v Kenya Power & Lighting Co Limited (Civil Case 166 of 2016)
[2025] KEHC 1981 (KLR) (Commercial & Admiralty) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE 166 OF 2016
A MABEYA, J
FEBRUARY 18, 2025**

BETWEEN

NUCON SWITCHGEARS PVT LIMITED PLAINTIFF

AND

KENYA POWER & LIGHTING CO LIMITED RESPONDENT

RULING

1. This is a ruling in respect of 3 applications; Motions dated 29/2/2023, 5/3/2024 and 7/3/2024. The Motions dated 29/2/2023 and 7/3/2024 are by the defendant/judgment debtor while the one of 7/3/2024 is by the plaintiff judgment creditor.

Motion dated 29/2/2023

2. The Motion was brought under sections 1A, 1B, 3A, 63 (e) and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*. It sought the extension of the 30 days within which the defendant should have deposited with the Court a valid Bank Guarantee for the decretal sum as ordered on 30/1/2024 for the conditional stay of execution with an additional 21 days.
3. The grounds for the Motion were set out in the body of the Motion and the affidavit of Jude Ochieng of even date. These were that there was a judgment delivered on 23/5/2023 for over US\$ 2.5M against the defendant. That the defendant sought to appeal against the said judgment and sought stay. That on 30/1/2024, the Court gave the defendant 30 days to give a guarantee for the entire sum. That the said period was lapsing on 29/2/2024 when the Motion was made.
4. That the reason for the delay in complying therefor was that the decretal sum was substantial, that it required various approvals that the defendant was a public entity and stood to suffer immensurably if the orders sought were not granted.



5. The Motion was opposed vide the affidavit of Jepher Kere sworn on 31/10/2024. It was contended that the Motion was frivolous, vexatious and an abuse of the Court process. That the validity of the guarantee was to be for the entire period of the pendency of the intended appeal and it was for US\$ 5,276,052/72. That stay lapsed on 29/2/2024 but on 5/3/2024 a bank guarantee for US\$ 5,129,067/95 was served upon the plaintiff. It is valid until 3/3/2025. That it violated the conditional stay of 30/1/2024 and it was for less amount than decretal sum.

Motion dated 7/3/2024

6. It was by the defendant and brought under sections 1A, 1B and 3A, 96 of the *Civil Procedure Act*. It sought that the Notice of Appeal lodged on 29/5/23 be deemed to be properly on record and filed and served upon the plaintiff.
7. The grounds were that the defendant was aggrieved by the judgment made on 23/5/2023. That it filed a Motion for stay on 14/6/2023 which was allowed on 30/1/2024. That the conditional stay has granted and had been complied with. That although it lodged a Notice of Appeal on 29/5/2023, there was a mistake with payment of filing fees which was only discovered after the Motion dated 5/3/2024 was served. That the lack of payment of fees was due to technological hitches. That the defendant stand to suffer irreparably unless the orders sought are granted.
8. The Motion was opposed by the affidavit of Tamir Kumar sworn on 30/10/2024. That as at the time of filing the Motion dated 5/3/2024 by the plaintiff, the Notice of Appeal had not been received by the Deputy Registrar of the Court. That the fee was paid after service of the plaintiffs' Motion dated 5/3/2024. That the application's primary goal is to defeat the plaintiff's Motion dated 5/3/2024.
9. That the time for filing of the Notice of Appeal had lapsed. That the defendant was an architect of its own misfortune.

Motion dated 5/3/2024

10. This was by the plaintiff under sections 1A, 1B, 3A and Order 45 of the Civil Procedure Rules. It sought the review of the ruling of the Court of 30/1/2024. That the defendant served the plaintiff a Notice for Address of Service. That the ruling of 30/1/2024 was based on the mistaken belief that the Notice of Appeal had been properly lodged.
11. The Motion was opposed vide the affidavit of Justus Ododa sworn on 17/5/2024. That a Notice of Appeal was properly filed and served on 29/5/2023. The appeal has serious triable issues. That it was by mistake that it was not properly filed. That a guarantee has already been given as ordered for the stay. That under section 96 of the *Civil Procedure Act*, the Court could pardon the defendant for failure to have paid the fees.
12. That the defendant has since paid the fees for the Notice of Appeal and lodged Civil Appeal No. E172 of 2024, *Kenya Power & Lighting Co. v Nucon Switchgear Pvt Ltd*.
13. I have considered the parties contestations and the submissions of the parties dated 1/11/2023 and 24/5/2024; respectively. I have also considered the authorities relied in support of the respective submissions.
14. The issues for determination is whether the time for giving the guarantee should be extended by 21 days? Whether the stay given on 30/1/2024 should be reviewed and set aside and whether the Notice of Appeal lodged on 29/5/2024 should be deemed proper.



15. On the extension of time for the issuance of the guarantee, the time sought is 21 days. It was contended that the amount involved was colossal. That being a public entity, there were a lot of approvals required before the same could be perfected. That in any event the guarantee had finally been issued and was in place.
16. Having considered the reasons advanced, I am satisfied that the defendant is a public entity. I take judicial notice of the bureaucratic processes attendant to such entities. That the amount involved is huge. That the delay was not deliberate and or of the Court order. There was no evidence that the delay had prejudiced the plaintiff in any way. Any prejudice can be atoned by an order for costs.
17. Accordingly, I grant the extension sought. However, the defendant has to increase the sum of the guarantee upto US\$ 5,276,052/75 at the time the guarantee falls for renewal. Further, that the same shall be effective for the entire period of the pendency of the appeal.
18. The 2nd issue is intertwined with the 3rd. Those are whether the Notice of Appeal dated 29/5/2023 should be deemed properly filed and served or the order of 30/1/2024 should be reviewed and set aside as there was no proper Notice of Appeal at the time.
19. The parties' contestations on the issues are diametrically divided. The plaintiffs contend that there was no proper Notice of Appeal at the time while the defendants contend that due to some technological challenges the Notice of Appeal was not paid for. The plaintiff contends that the defendant only sprung to action after being served with the application for review.
20. It is not in dispute that there was a Notice of Appeal dated 29/5/2023 that was filed and served upon the plaintiff. By so doing, the defendant evinced a desire to appeal against the impugned judgment. It is not in dispute that the same was not properly paid for in accordance with the law. It therefore remained to be a mere piece of paper until regularized.
21. I have clear understanding of order 45 and section 80 of the *Civil Procedure Act* on review. It is clear that the order of stay of 30/1/2024 was made on the mistaken understanding that there was a proper Notice of Appeal that had been filed and served. It has now turned out that the same had not been paid for and it was therefore not a Notice of Appeal properly so called. The question is, should the stay granted on that basis be set aside.
22. The circumstance of the case before Court is that, the defendant thought that it had filed and served a proper Notice of Appeal. It only discovered after it was served with an application for review. It immediately swung into action and paid the filing fees. It has also since filed a proper appeal on which the Notice is predicated upon.
23. It is not disputed that under section 96 of the *Civil Procedure Act* this Court can accept fees after a pleading has been filed. Such fees have been paid for the Notice of Appeal, albeit, 1 year later. Further, it is not in dispute that this Court has the discretion to extend the time for filing and service of a Notice of Appeal under section 7 of the *Appellate Jurisdictions Act*.
24. In this regard, I have considered the amount of the decree which is in excess of US\$ 5.2M. The same is colossal. The defendant is a public entity and any funds payable by it is a charge on the public. Therefore, this is a matter of public interest. That the defendant has already regularized the mistake by paying the filing fees that had not been paid. That failure to pay the fees was not deliberate or fraudulent.
25. I have also considered that the defendant has already filed the substantive appeal and it is only awaiting directions by that harrowed Court of Appeal. I have also considered that the prejudice to be suffered by



the plaintiff can be ameliorated by an order for costs as opposed to the defendant who may be forever barred from exercising its right of appeal thereby impeding its right to access to justice under Article 48.

26. In view of the foregoing, I have come to the conclusion that the defendants' applications dated 29/2/2023 and 7/3/2024 be allowed and the plaintiff's application dated 5/3/2024 is dismissed on the following conditions: -

- a. The defendant is to pay costs of Kshs. 50,000/= within 30 days.
- b. The Notice of Appeal dated 29/5/2024 is hereby deemed to have been properly filed and served.
- c. The time for lodging the guarantee ordered on 30/1/2024 is extended for an additional 21 days but the amount thereof is to be increased to US\$5,276,052/75 from the date of renewal until the appeal is fully determined.

It is so ordered.

SIGNED AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

