



**Kenga (Suing for and on Behalf of the Estate of Sidhani Jonathan) v Kenya Power & Lighting Company Limited (Civil Appeal 261 of 2019) [2025] KEHC 11418 (KLR) (25 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11418 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 261 OF 2019**

**G MUTAI, J  
JULY 25, 2025**

**BETWEEN**

**JOYCE RIZIKI KENGA (SUING FOR AND ON BEHALF OF THE ESTATE OF  
SIDHANI JONATHAN) ..... APPELLANT**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion application dated 16<sup>th</sup> March 2024 vide which the counsel for the appellant/applicant seeks the following orders: -
  - a. That this honourable court be pleased to review, set aside and/or vary the orders issued on the 24<sup>th</sup> April 2023 dismissing the appeal;
  - b. That this honourable court be pleased to reinstate the appeal for hearing and determination on merits; and
  - c. That the costs of this application be provided for.
2. The application is premised on the grounds stated in the body of the Motion and also the affidavit of Evans Fiki Kazungu, counsel for the appellant/applicant, sworn on 16<sup>th</sup> March 2024. The said counsel stated that the appellant/applicant, through her previous advocates, filed a Memorandum of Appeal on 17<sup>th</sup> December 2019 seeking to have the judgment and decree of the court in Civil Suit No. 1203 of 2012, as delivered by Hon. L. T. Lewa on 16<sup>th</sup> December 2016, set aside and a judgment entered in her favour. He averred that upon obtaining typed proceedings on 29<sup>th</sup> May 2023, for purposes of filing the record of appeal, the advocate discovered that the appeal was dismissed on 24<sup>th</sup> April 2023, for want of prosecution. The appellant then filed an application for the reinstatement of the appeal dated 14<sup>th</sup> July 2023. On 11<sup>th</sup> October 2023, when the matter came up before the court for directions, the previous



- counsel for the appellant made an oral application to withdraw the application, which was allowed, and the suit file was marked closed.
3. Mr Kazungu deposed that the appellant has always been keen to prosecute the appeal, and the failure by her previous advocates to attend court on 24<sup>th</sup> April 2023 was neither deliberate nor intentional, and that it was caused by the registry's failure to serve the firm with a notice to show cause.
  4. He averred that the dismissed appeal has merit, and it is only just that the same is determined on merit upon the court hearing all the parties herein.
  5. In response, the respondent filed a replying affidavit sworn by Michael O. Oloo, its counsel, on 22<sup>nd</sup> April 2025. The said counsel deposed that the appellant herein lodged a Memorandum of Appeal on 17<sup>th</sup> December 2019, after obtaining leave to be enjoined as a co-appellant and to appeal out of time.
  6. Mr Oloo further deposed that one Jonathan Karisa had also appealed, to wit, *Mombasa HCCA No.96 of 2018*, against the judgment of the trial court, which was struck out on 21<sup>st</sup> November 2023. He also filed an application dated 30<sup>th</sup> November 2023, seeking the review of the said judgment. The same was dismissed with costs of Kes.20,000/-. Mr Karisa then filed a Notice of Appeal dated 30<sup>th</sup> April 2024.
  7. He further stated that on 19<sup>th</sup> September 2018, the appellant herein sought orders in Miscellaneous Application No. 245 of 2018 to be enjoined as a co-appellant in the existing appeal *Mombasa HCCA No. 96 of 2018*, which was allowed on 9<sup>th</sup> December 2019. They were then served with the Memorandum of Appeal on 17<sup>th</sup> December 2019. He averred that *Mombasa HCCA No. 96 of 2018*, having been struck out, the appeal herein lacks standing and is a blatant abuse of court process as the appellant's joinder was premised on the existence of said appeal. There exists no basis in law for the continuation of the appeal herein. For that reason, he urged the court to strike out the appeal with costs.
  8. The application was canvassed by way of written submissions. The appellant/applicant, through her advocates, Lumatete Muchai & Company Advocates, filed written submissions dated 14<sup>th</sup> October 2024. Counsel relied on order 42 rule 21 of the [Civil Procedure Rules](#) and urged the court to find the advocate's non-attendance as an excusable mistake which ought to be resolved in favour of the innocent litigant as it was not deliberate and not in any way actuated by an intention to obstruct or prolong the course of justice.
  9. Counsel submitted that the appeal has a high chance of success and that if the orders sought are not granted, the appeal will be rendered nugatory. The appellant should not suffer due to their counsel's mistake. For that reason, it was urged that the court allow the application as prayed.
  10. The respondent, on the other hand, through its advocates, Oloo & Company Advocates, filed written submissions dated 22<sup>nd</sup> April 2025. Counsel relied on Order 45 Rule 1 of the [Civil Procedure Rules](#) and submitted that the applicant has not tendered any evidence to warrant the grant of review orders.
  11. On the principle of finality in litigation, counsel submitted that the applicant has had numerous opportunities to prosecute her appeal but had time and again failed. He contended that the application herein lacks merit and ought to be dismissed with costs.
  12. I have considered the application, the response therein and the rival submissions by both counsels. In my view, the issue that needs to be determined is whether the appeal should be reinstated. For that to happen, the appellant/applicant must show that there are sufficient grounds to warrant the review of the impugned orders.



13. The court in the case of *Simon Wachira Nyaga v Patricia Wamwirwa* [2018] KEHC 8352 (KLR) stated: -

“3. For a court to reinstate or refuse to reinstate is an exercise of discretion. The discretion must be exercised fairly and judicially. It must be based on a good reason and not on mere allegations.”

14. The matter herein was listed for dismissal on 24<sup>th</sup> April 2023. When it came up, the parties were absent, and as a result, the court dismissed it for want of prosecution. The matter was fixed for directions on the application dated 14<sup>th</sup> July 2023, seeking reinstatement of the appeal, for 11<sup>th</sup> October 2023. When the matter came up on 11<sup>th</sup> October 2023, Mr Okanga, counsel for the appellant, told the court that the judgment in *HCCA 96 of 2023* was slated for 24<sup>th</sup> October 2023, and that they were praying for the withdrawal of the said application. The court marked the application as withdrawn, and the file was closed.

15. In striking out appeal No. 96 of 2018, Hon. Mr Justice Kizito Magare, in his judgement of 21<sup>st</sup> November 2023, stated that: -

“The appeal herein is an edifice built on quicksand. The court cannot deal with an appeal that is filed out of time. It is an incompetent appeal. An incompetent application will be a nullity... The appeal herein is not an appeal. There is no appeal to be argued. Nothing can be added to it. To save the appeal from the ignominy of its incompetence, the court must act judiciously and strike it out. The same was erroneously admitted. Consequently, I strike out the suit in limine. Given that the issue was not raised, each party shall bear its costs.”

16. The appellant, in HCCA No. 96 of 2018, filed an application dated 30<sup>th</sup> November 2023 seeking to have the orders of the court set aside and the appeal reopened for hearing and determination. On 18<sup>th</sup> April 2024, Hon. Mr Justice Kizito Magare dismissed the said application with costs of Kes. 20,000/- and directed the appellant to move to the Court of Appeal if they think the court’s decision was wrong.

17. I have perused the court file. It is my view that the applicant has had sufficient time and opportunity to prosecute the appeal, which she did not utilise. The records also show that the appellant, as well as her co-appellant, was not keen on attending court or prosecuting their appeals. In the circumstances, I am of the view that the appellant has not given sufficient reasons to warrant reinstatement of the appeal. I am guided by the case of *Philomena Waithera Njoroge v Peter Munyambu Gitau* [2021] KEHC 4263 (KLR) where the court stated that: -

“Under the latter provision, the court has inherent power to reinstate an appeal dismissed for want of prosecution. In so doing, the court exercises judicial discretion and the onus is upon the Appellant to persuade the court that there are sound reasons to warrant the exercise of the court’s discretion in her favour.”

18. I agree with the observation made by LW Gitari, J, in the case of *Simon Wachira Nyaga v Patricia Wamwirwa* [2018] KEHC 8352 (KLR) that: -

“Equity helps the vigilant but not the indolent. The law encourages a speedy resolution of every dispute. A court of equity has always refused its aid to stale demands, where a party has slept on his right and acquiesced for a great length of time. The appellant slept on his rights even after being offered a warning by the Court.”



19. Flowing from the foregoing, I find and hold that the Notice of Motion application dated 16<sup>th</sup> March 2024 lacks merit and is an abuse of court process. The same is hereby dismissed with costs.
20. It is so ordered.

**DATED AND SIGNED IN MOMBASA, THIS 25<sup>TH</sup> DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr Busieka, holding brief for Mr Oloo, for the Respondent;

Ms Ziwa, holding brief for Mr Lumatete, for the Appellant/Applicant; and

Arthur - Court Assistant.

