



REPUBLIC OF KENYA



KENYA LAW
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Kenya Power & Lighting Co. Ltd v Makokha & another (Miscellaneous Civil Application 82 of 2023) [2024] KEHC 99 (KLR) (15 January 2024) (Ruling)

Neutral citation: [2024] KEHC 99 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION 82 OF 2023**

DK KEMEL, J

JANUARY 15, 2024

BETWEEN

KENYA POWER & LIGHTING CO. LTD APPLICANT

AND

CHRIDTOPHER MASIKA MAKOKHA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The application dated 6/9/23 is bought pursuant to the provisions of order 42 Rule 6, Order 50 Rule 5, Order 51 of the Civil procedure Rules and section 3 and 3A of the Civil Procedure Act. The same principle seeks two main prayers namely leave to lodge appeal out of time and stay of execution of the judgement/ decree in Bungoma CMCC No. 266 of 2019 pending the hearing determination of the intended appeal.
2. The application is premised on the ground inter alia that the applicant is dissatisfied by the judgement of the trial court delivered on 2/8/23 which was delivered without notice and in absence of the applicant or its advocates; that the Applicant sought for a copy of the Judgement from the trial court which took time and hence it was late by about four days in lodging the appeal; that the Applicant has a good appeal with overwhelming chances of success; that the failure to lodge appeal within time was not deliberate as there was a genuine mistake; that the application is bought in good faith and has been lodged expeditiously.
3. The application is supported by an affidavit of Justus Ododa a legal officer working at the offices of the Applicant sworn on even date wherein he reiterated the grounds on the face of the application.
4. The application is opposed by the 1st Respondent vide a replying affidavit sworn on 26/9/23 wherein he deponed inter alia; that the date of delivery of the judgement was communicated in the presence of both advocates; that there is no application for stay of execution in the lower court; that the applicant



is guilty of laches and that the delay has not been explained; that the application has been made in bad faith as it is a delaying tactic; that litigation must come to an end.

5. Learned counsel for the 1st respondent relied on the replying affidavit while counsel for the Applicant opted to file submission but however none were filed by the time of writing this ruling.
6. I have given due consideration to the application and the rival affidavits. It is trite law that the court in exercising discretion to grant leave to lodge appeal out of time as well as stay of execution, the question to be decided is whether good cause has been shown for not filing the appeal in time and whether substantial loss may result unless the stay order is granted or whether the application has been made without delay and whether the applicant has given security. see section 79G of the [Civil Procedure Act](#) and order 42 Rule 6 (2) of the [Civil Procedure Rules](#).
7. As regards the quest to lodge appeal out of time, the applicant maintains that the judgement was delivered without notice and in the absence of the applicant and/or its counsel and that the Applicant being a corporation based in Nairobi necessitated consultations on lodging an appeal which led to the delay. The first respondent on the other hand contends that the date for delivery of the judgement by the rial court was communicated to the parties in open court and hence the delay has not been explained. The 1st Respondent urged the court to peruse the lower court file and ascertain whether the Applicant had been represented in court when the date for delivery of Judgement was given. It is noted that none of parties have annexed copies of the trial court's proceedings for perusal by this court and hence it is the story of the Applicant against the 1st Respondent to be considered. Indeed, under section 79G of the [Civil procedure Act](#) an applicant seeking leave to lodge appeal out of time must give sufficient explanation as to why he/she did not lodge the appeal in time. Looking at the explanation offered by the Applicant, i find the explanation to be plausible. I accept the same. In any event, no prejudice will be suffered by the 1st Respondent if the Applicant is granted leave to lodge its appeal out of time and to have its day in court.
8. As regard the issue of stay of execution pending the intended appeal, it is noted that the Applicant was under obligation to satisfy the three conditions imposed by Order 42 Rule 6 (2) of the [Civil procedure Rules](#).
9. As to whether the application has been filed without unreasonable delay, it is noted that the impugned judgement was delivered on 2/8/23 and hence the appeal ought to haver been lodged latest by close of business on the 2/9/23. The present application was lodged om 6/9/23 which is shy by about four days. I find the four days not to be inordinate and hence this condition has been met.
10. As regard the issue of whether substantial loss will be suffered if an order of stay is not granted, the Applicant has not made any averment in that regard. It has been stated in the case of [Mukoma Versus Abuoga](#) [1988] KLR that substantial loss is the cornerstone of both judications as that is what has to be prevented because such a loss would render the appeal nugatory and hence the necessity to preserve the status quo. However, and as noted above, the Applicant is silent on whether it is likely to suffer substantial loss if an order of stay of execution is not granted. It was incumbent upon the Applicant to satisfy this condition. I find that the said condition has not been met.
11. As regard the issue of security, it is incumbent upon the Applicant to deposit security or offer security for the due performance of the decree which might ultimately be binding upon it. The Applicant has not mentioned anything to do with its readiness to furnish security either in its grounds or affidavit in support. This condition is mandatory just like the rest under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#). In the premises, i find the Applicant has not satisfied this condition.



12. In view the foregoing observation, it is my finding that the Applicant's application dated 6/9/23 succeeds only in terms of prayer number (c) and that the Applicant is ordered to file and serve its Memorandum of Appeal within seven (7) days from the date hereof. The rest of the prayers stand dismissed with costs to the 1st Respondent.

DATED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF JANUARY 2024.

D. KEMEI

JUDGE

In the presence of:

Miss Kiptoo for Kibii for Applicant

Onyando for 1st Respondent

Tarus for 2nd Respondent

Kizito Court Assistant

