



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Power & Lighting Company Ltd v Wasike (Civil Appeal
557 of 2016) [2024] KEHC 1186 (KLR) (Civ) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 557 OF 2016

JN MULWA, J

FEBRUARY 8, 2024

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD APPLICANT

AND

JOSEPH SIMIYU WASIKE RESPONDENT

RULING

1. The Application before the court is dated 8th March 2023. It is brought by the Appellant under Sections 1A,1B,3,3A,63(b) & (e),75,79G & 95 of the Civil Procedure Act and Order 22 Rule 52, Order 42 Rule 6, Order 43 Rule 1, Order 50 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules,2010.
2. The Applicant seeks the following orders; -
 1. Spent
 2. That this Honourable court be pleased to grant a stay of Execution of the ruling rendered by the Honourable Lady Justice Janet Mulwa on 23d February, 2023 and all consequential orders arising therefrom pending the hearing and determination of the application herein.
 3. That the Honourable court be pleased to reinstate the Memorandum of Appeal dated 24th August, 2016 and filed in court on 25th August, 2016 and the same be deemed as duly filed.
 4. That the Honourable court be pleased to grant the Applicant leave to file its Record of Appeal out of time against the Judgment and Decree of the Honourable Mrs. A. M. Obura delivered on 28th July, 2016 in Milimani Magistrate's Court Civil Case No 2025 of 2011 Joseph Simiyu Wasike v Kenya Power & Lighting Company Limited & The Honourble Attorney General and the same be admitted for hearing once the record is ready and consequently allow the Applicant to serve the said Notice of Appeal out of time



5. That the costs of this Application be in the cause.

The Application is based on the grounds appearing on its face and supporting affidavits sworn by one Justus Ododa on 8/3/2023 and 8/6/2023.

3. In opposition to the Application, the Respondent filed his Replying Affidavit sworn on 8/6/2023 in which he has urged for dismissal of the Application for lack of merits.
4. I will start from where I left in my ruling dated 23/02/2023. I need not go back for obvious reasons being repetition and finding no new matters introduced in the instant application demanding re-examination of the findings and reasons for the impugned ruling for the dismissal of the Appeal. I shall also adopt the said ruling and only to add few comments.
5. I have perused the affidavit in support and the submissions by the applicant. In my view, it is a veiled Appeal against the impugned ruling dated 23/02/2023 as the said grounds for the application were clearly the same grounds in opposition to the application dated 21/08/2019 upon which the impugned ruling was determined.
6. In the said application dated 21/08/2019, the Respondent had sought orders to dismiss the Appeal for want of prosecution.

The Applicant herein in its Replying Affidavit sworn on 18/11/2019 by one Henry Macharia Advocate stated the same reasons for delay in filing the Record of Appeal failure by the court to provide it with typed proceedings and judgment despite numerous requests. In his oral submissions, the Applicant told the court that as at 10/05/2021, the certified copies of the judgment and proceedings of the trial were ready for collection to facilitate filing of the record of Appeal See par. 8 of the impugned ruling.

7. Additionally, the Applicant submitted that it had not been indolent and faults the Respondent in its submissions that several chances had been granted to it but it failed to present the Appeal as misguided and factually incorrect (paragraph 10 of the submissions.)

In effect and without a doubt, the grounds for the appeal are but an attempt to argue a non-existent appeal against the ruling delivered on 23/02/2023 as clearly sworn in the further Affidavit by Justus Odada on 13/10/2023.

8. Further by the supporting affidavits and submissions the applicant cites legal Provisions to wit Order 42 Rule 35(1) Order 42 Rule 14(4) for the proposition that a judge ought not allow a matter to proceed for hearing unless the Record of Appeal is duly filed and directions are taken and/or upon three months after taking directions and the Appeal is not set down for hearing may be dismissed for want of prosecution.

A careful reading of the impugned ruling shows that the issues raised were dealt with by the court and therefore cannot be re-litigated before me, save under an Application for review under the circumstances may allow.

9. The decisions cited in the applicants Application may be useful if the matter was on Appeal but not on a similar application that this court granted the orders now being sought again but failed to comply by filing the record of appeal; and has cited numerous court decisions on the courts exercise of its discretion in the matter of dismissal of appeals for want of prosecution as well as several legal provisions which the court in the impugned ruling has stated - see *Thuita Mwangi v Kenya Airways Limited* [2003]eKLR; *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (unreported)



10. In my opinion, what the applicant seeks is to urge this court to set aside its dismissal order and allow it to file the Record of Appeal upon grounds already litigated in at least two applications dated 9/01/2017 and 17/01/2017 and therefore caught up with the principle of *res-judicata*, as provided under Section 7 of the *Civil Procedure Act* and *Diocese of Eldoret Trustees (registered) v Attorney General & another* [2020]eKLR wherein the court held that courts must be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of *res-judicata*.

Interestingly, the Applicant has gone ahead to craft issues for the court's determination which for all purposes and intent are very good grounds to sustain an appeal against the ruling dated 23/02/2023.

11. Following are the four issues flagged for determination by the Application before me.
- a. Whether the Applicant had reasonable cause for not filing the Record of Appeal by the time the Appeal was dismissed.
 - b. Whether the Applicant will suffer prejudice if execution is not granted.
 - c. Whether the applicant is deserving of the order of re-instatement of Appeal
 - d. Whether the Application has been brought without inordinate delay.
12. On the part of the Respondent, it is submitted that the application dated 8/03/2023 is Res-Judicata for being similar in all aspects to the applications dated 9/01/2017 and 17/01/2017 which applications were heard and determined. It is its further argument that for 6 years and 6 months the Applicant had failed to file the Record of Appeal despite the opportunity having been granted to it by the court and further the Applicants' confirmation by its advocates that they had indeed received the typed and certified proceedings by 21/10/2016 as shown on stamped endorsement, and not on 21/06/2022 and 26/07/2022
13. In my view, the impugned ruling dated 23/02/2023 is not in any way challenged by the Applicant but rather the Applicant seeks a second bite at the cherry, by same arguments same legal provisions and legal principles to the extent that nothing new has been brought before the court to persuade it to re-consider its findings and orders – Order 45 Rule 1 Civil Procedure Rules.
14. For the foregoing, I find and hold that his Application is Res-judicata and an attempt to urge this court to sit on Appeal over its ruling dated 23/02/2023, and also that it is a blatant abuse of court processes.
- I decline to accept the Applicant's invitation to go its way; and find that the Application dated 8/03/2023 is misdirected, misconceived and an abuse of the court process.

The application is dismissed with costs to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE

