



JN (Suing as the Next Friend and Mother to LZ - Minor) v Kenya Power & Lighting Company Limited (Miscellaneous Civil Application E362 of 2023) [2024] KEHC 6995 (KLR) (Civ) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6995 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION E362 OF 2023

CW MEOLI, J

JUNE 13, 2024

BETWEEN

JN (SUING AS THE NEXT FRIEND AND MOTHER TO LZ - MINOR) APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

RULING

1. For determination is the Notice of Motion dated 7th June, 2023 (the Motion) brought by JN (hereafter the Applicant) in her capacity as the next friend and mother to LZ (the Minor) and seeking leave to file an appeal out of time as against the judgment delivered by the lower court on 26th August, 2022 in Milimani CMCC No. E508 of 2021, in favour of Kenya Power & Lighting Company Limited (hereafter the Respondent) . The Motion is expressed to be brought under Sections 1A, 3A, 79G & 95 of the Civil Procedure Act (CPA); Order 42, Rule 6 of the Civil Procedure Rules (CPR) and Article 159 of the Constitution.
2. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by advocate Gaudencia Kedogo, who averred that the Applicant wishes to challenge the award by the trial court in respect of general damages, by way of the intended appeal. The advocate averred that the delay in lodging the intended appeal was occasioned by the time taken in obtaining certified copies of the judgment and decree, which judgment only made available to the Applicant’s advocate on 6th June 2023 despite numerous follow-ups with the lower court registry. The advocate further averred that the intended appeal raises arguable grounds regarding issues of law and fact, primarily relating to the nature and extent of the injuries sustained by the Minor and the general damages awarded by the trial court, viewed by the Applicant as inordinately low.



3. The Respondent opposed the Motion through the replying affidavit sworn by its advocate Moses Ngaywa on 17th November 2023. Therein, the advocate termed the Motion as fatally defective and incompetent. The advocate deposed that the delay on the part of the Applicant in filing the appeal is inordinate and inexcusable, and that the Applicant has shown indolence in pursuing an appeal. He views the Motion as an afterthought and that the Applicant, the decretal sum and costs of the suit having already been settled by the Respondent's insurers. On those grounds, the Respondent's advocate urged that the Motion be dismissed with costs.
4. During the hearing of the Motion on 16th April, 2024 it was agreed between the parties that the Motion be determined on the basis of the affidavit evidence on record.
5. The Court has therefore considered the rival affidavit material on record. Before proceeding to consider the merits thereof, the court observed that among the averments raised in the reply to the Motion was one challenging the competency of the Motion on the ground that the decretal sum had already been settled in full. And hence the Respondent would be greatly prejudiced if the order sought thereon is granted. This averment raises the question whether the settlement of the judgment sum awarded by the trial court necessarily precludes or bars the Applicant from pursuing an appeal against the judgment. In the court's view, the mere settlement of a decree does not in and of itself, legally or procedurally bar a party from exercising his or her right of appeal against an award arising therefrom.
6. On the merits of the Motion, the key prayer is for leave to appeal out of time. The power of the court to enlarge time for filing an appeal out of time is expressly donated by Section 79G of the [CPA](#), as well as Section 95 of the same Act. The proviso of Section 95 is echoed under Order 50, Rule 6 of the [CPR](#).
7. Section 79G provides that:

“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.”
8. Under the provisions of Section 95 of the [CPA](#) and Order 50, Rule 6 of the [CPR](#), courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
9. The principles governing leave to appeal out of time are settled. A successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the [Court of Appeal Rules](#) which was in pari materia with Section 79G of the [Civil Procedure Act](#), reiterated its decision in [Mutiso v Mwangi](#) [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”



10. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v John Ochanda* and 996 Others [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....”

See also *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR.

11. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

12. On the length of delay, it is not in contention that the lower court judgment was delivered on 26th August, 2022 and the Motion brought almost one year later, on or about the 7th of June, 2023. In the court’s view, the delay is inordinate in the circumstances considered below.
13. The reasons advanced for the delay, are that there was delay in obtaining certified copies of proceedings and judgment of the trial court taken in obtaining a certified copy of the impugned judgment, by which period the timelines for lodging an appeal had lapsed. The Respondent asserted that no reasonable explanation has been given by the Applicant for the delay.



14. In supporting her explanation, the Applicant’s advocate annexed correspondence, namely, copies of letters to the lower court dated 29th August 2022 (Annexure GK-4); 1st March, 2023 (Annexure GK-3) and 28th April, 2023 (Annexure GK-2) all being formal requests for the supply of the certified copies of the typed court proceedings as well as the judgment and resultant decree. There is no explanation for the six-month hiatus between the letters dated 29th August 2022 and 1st March 2023 and even though the proceedings were eventually supplied on 6th June 2023, there is no telling if follow ups in that window would have yielded earlier success.
15. Moreover, it appears from the Applicant’s affidavit that what was being sought from the lower court were certified copies of the proceedings and judgment, but from the undisputed averments by the Respondent, payment of the decretal sums was processed after judgment and before the instant motion, which means that a copy of the judgment was available for the purpose. And which copy could well have been used by the Applicant to compile her grounds of appeal, and file the appeal in good time, or at least make this application within reasonable time. Unless, as the Respondent alludes, the Applicant was deliberately tarrying to receive payment on the judgment before taking any adverse action against the Respondent. In the court’s view, the delay of 10 months is inordinate and the reasons advanced do not appear plausible.
16. The draft memorandum of appeal marked as annexure GK-5, is essentially challenging the trial court’s assessment on general damages and cannot be said to be unworthy of the court’s attention. Further, based on the language employed in *Mutiso v Mwangi* (*supra*) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone* [2006] Limited [2020] eKLR stated that such appeal:
- “... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”
17. The Respondent has obliquely indicated likelihood of prejudice having settled the decretal sums. But in my view, extended delay alone results in prejudice to the party dragged to court, through inter alia increased litigation costs. Inordinate delay that is not satisfactorily explained, as in this case, runs afoul of the overriding objective. At the time of this ruling, roughly one year and ten months have lapsed since the judgment sought to be appealed was delivered. While the Applicant may have an arguable appeal, it was upon her to demonstrate diligence in pursuit of her right of appeal by taking prompt and judicious steps rather tarrying and in the process, losing 10 months and then blaming the trial court.
18. Parties and counsel are equally duty bound to co-operate with the court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the *Civil Procedure Act*. In *Karuturi Networks Ltd & Anor. v. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 the Court of Appeal had this to say concerning the application of the overriding objective in Section 1A and 1B of the *Civil Procedure Act*:
- “The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court”.



19. In the circumstances of this case, the court is not persuaded to exercise its discretion in favour of the Applicant. Consequently, the Notice of Motion dated 7th June, 2023 is found to be without merit and is hereby dismissed. However, given the circumstances, each party will bear its own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Mugo

For the Respondent: N/A

C/A: Erick

