



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL. NO. 178 OF 2018**

**SALIM ALI SHEIKH.....APPELLANT/APPLICANT**

**VERSUS**

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

**RULING**

**The Application**

1. The Applicant's application is contained in the Notice of Motion application dated 5<sup>th</sup> September, 2018. The motion prays for the following orders:

a) Spent.

b) This Honourable Court do grant leave to the proposed Appellant to appeal out of time against the Ruling of Honourable Mutunga Resident Magistrate, delivered on 1<sup>st</sup> August, 2018 at Mombasa.

c) The Memorandum of Appeal in Civil Appeal No. 178 of 2018 be deemed as duly filed and served.

d) Costs of this Application be awarded to the Proposed Appellant.

2. The motion is premised on the grounds set out therein and is supported by a Supporting Affidavit sworn by *Salim Ali Sheikh*.

3. The Applicant avers that the lower court suit CMCC No. 939 of 2009 was scheduled for Ruling on 30<sup>th</sup> April, 2018 but that on the same date, the Ruling was not ready. The Honourable Magistrate then directed that the same would be delivered on Notice which was never received by the Applicant until 30<sup>th</sup> August 2018 when the Proposed Respondent served the Intended Appellants Advocates with a Letter indicating that the Ruling in the Lower Court file had been delivered on 1<sup>st</sup> August, 2018.

4. The Applicant further avers that he was dissatisfied with the Ruling and intends to Appeal against the same but time has since lapsed. He therefore seeks leave of this Court to file his Appeal.

**The Response.**

5. The Respondent in response to the Application filed a Replying Affidavit dated 18<sup>th</sup> October, 2018.

6. The Respondent avers that both parties did not receive any notice on the delivery of the Ruling and that the same was delivered in the absence of both parties. That it is after the perusal of the same that the Intended Respondents went ahead to inform the Intended Appellants of the Ruling vide a letter dated 30<sup>th</sup> August, 2018.

7. The Respondent contends that even if leave to appeal out of time is granted, the Appeal would be fatally defective as leave of the Honourable court was not sought prior to filing the appeal. That the Preliminary Objection was upheld on jurisdiction and an appeal does not lie as a matter of right from the said decision.

**Submissions**

7. The Application came up for hearing on 21<sup>st</sup> January, 2019 where both parties submitted.

### **Analysis & Determination**

8. I have carefully considered the application, the affidavits and the submissions by the Parties. The only issue that is before the court for determination is whether the Court ought to grant leave to Appeal out of time to the proposed Appellant.

9. Section 79G of the Civil Procedure Act is the operative law in answering the question as to whether the prayer to enlarge time to file an appeal is merited. The section provides as follows:

“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.”

10. Our case law has further developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in the case of *Mwangi v Kenya Airways Ltd [2003] KLR* and they include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

11. The Applicants’ application for extension of time to file an appeal will be considered against these factors. Both the Applicant and the Respondent agree that the Ruling was delivered in their absence and that the Applicant only became aware of the same over a month after the Ruling had been delivered. From the date the ruling was delivered, the Appeal ought to have been filed by 31<sup>st</sup> October, 2018. However, the Applicant came to court with the instant Application on 5<sup>th</sup> September, 2018. Under the circumstances, I do not find this to be inordinate.

12. Looking at the Draft Memorandum of Appeal filed, I am unable to see any substantial adverse effects the granting of the order for filing an appeal out of time that would arise and what effect it will have on the Respondent other than permitting the Applicant to exercise a precious right of appeal.

13. The upshot therefore, is that this Court finds the Applicant’s Application dated 5<sup>th</sup> September, 2018 merited and the same be and is hereby allowed in terms of prayer 2 and 3 of the Motion.

14. The Deputy Registrar is directed to avail the original record of proceedings to enable the Appellant/Applicant file and serve the record of appeal within 60 days from today.

15. Costs shall abide the outcome of the Appeal.

Orders accordingly.

**Dated, Signed and Delivered in Nairobi this 4<sup>th</sup> Day of JUNE, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil

disputes.