



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
MISC. CIVIL APPLICATION NO. 25 OF 2017

JOSEPH M.N MUGOTHIPLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD RESPONDENT

RULING

1. Joseph M. N. Mugothi (the Applicant) sued the Kenya Power and Lightning Company (the Respondent) sometime in the last decade in a suit sounding in damages to property. He lost the suit and a judgment was delivered by the then Hon. L.D. Ogembe on 12/08/2013.
2. The Applicant did not appeal against that judgment at that time.
3. Instead, he has now approached this Court, *vide* a Notice of Motion dated 20/02/2017 and filed in Court on 21/02/2017 seeking for leave to lodge an appeal out of time. For the record, the time to lodge the appeal lapsed on 12/09/2013. To put it differently, the time for lodging the appeal lapsed four and a half years ago. By the time the Applicant was lodging this Application for extension of time, the time for lodging his appeal had lapsed by **one thousand, two hundred and eighty eight days (1,288)**.
4. What reasons does the Applicant give for this lengthy delay? He says he fell sick and that, therefore, he spent all his resources for treatment “such that he could not even afford to lodge an appeal within the stipulated time.” To demonstrate his earnestness, the Applicant has annexed a letter from a Nairobi City Council Clinic in Kangemi (notwithstanding that Nairobi City Council ceased to exist in 2013) indicating that the Applicant has been a patient at the geriatric clinic for four years suffering traumatic arthritis and an onset of diabetes. That letter is signed by a Senior Clerical Officer. No matter. It is dated 28/11/2016. The affidavit supporting the Application is sworn, not by the Applicant, but by the Applicant’s advocates. However, when this was pointed out by the Respondent, the Applicant swore a Supplementary Affidavit verifying the same.
5. The Application is, naturally, opposed. The main ground, as expected is laches. They complain that the length of time it took to bring the present application betrays the fact that it is an afterthought and it is in bad faith.
6. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the 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.

7. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

8. Our case law has 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 *Mwangi v Kenya Airways Ltd [2003] KLR*. 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.

9. Consequently, these are the factors upon which I will construct the crucible against which the Applicants’ prayer for extension of time will be measured.

10. In this case, the Applicant waited for more than four years to bring the Application. Even accepting that the Applicant was ill, it stretches credulity to intimate that the illness caused a delay of 1288 days in lodging the Application or appeal. In any event, the Applicant has demonstrated no other efforts whatsoever he did to show a desire to appeal: there is, for example, no letter requesting for proceedings. He has not even indicated how much he would have been required to pay for appeal and why he would have been unable to pay them. In any event, though the affidavit of his advocate indicates that he channelled all his monies to pay for his medical expenses, there is no indication at all in the letter he has attached that any payments were required to the clinic he was attending.

11. Aside from the inordinate delay in lodging this Application, the Applicant has hardly shown that the appeal is arguable. The surest way to do this is to include a Draft Memorandum of Appeal enumerating grounds of appeal. None was attached. The Court is left to guess what the arguable points on appeal would be.

12. Finally, it is my opinion that it would be highly prejudicial to the Respondent to grant the orders for extension at this point in time given the extreme passage of time. Given that the nature of the claim was damage to property, it would be difficult to imagine that an organization as complex and as large as the Respondent would keep records and evidence of this kind of claim for that duration of time especially after a case against it has been dismissed.

13. There is therefore no doubt in my mind that the justice and equities of the case militate against the granting of the orders sought. Consequently, the Application dated 20/02/2017 is hereby dismissed with costs.

14. Orders accordingly.

Dated and delivered at Kiambu this 1st day of February, 2018.

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JOEL NGUGI

JUDGE