



REPUBLIC OF KENYA



KENYA LAW
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Kenya Power and Lighting Company v Biashara Masters Saw Mills Ltd (Commercial Appeal E001 of 2024) [2025] KEHC 13580 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
COMMERCIAL APPEAL E001 OF 2024
HI ONG'UDI, J
SEPTEMBER 30, 2025**

BETWEEN

KENYA POWER AND LIGHTING COMPANY APPELLANT

AND

BIASHARA MASTERS SAW MILLS LTD RESPONDENT

RULING

1. The Notice of motion dated 14th April 2025 by the applicant herein prays for the following orders;
 - i. **ii**
- Spent.
 - iii. That the honourable court be pleased to enlarge time for filing an appeal for the applicant and thus deem the memorandum of appeal and record of appeal as duly filed.
 - iv. That upon granting of the prayed leave, the honourable court be pleased to admit the record of appeal and further order that the same be served within fourteen (14) days thereof.
 - v. That there be stay of execution in EPT case no. E028 of 2022 pending the hearing and determination of the appeal.
 - vi. That the costs of this application be provided for.
2. The application is supported by the grounds on its face and the affidavit of Joseph Muchai the appellant's legal officer sworn on even date. He deponed that the appellant aggrieved by the judgment delivered on 1st February 2024 in the said matter sought to appeal against the whole of the decision and indeed lodged a memorandum of appeal dated 8th March 2024. He stated that the significant delay in receiving the copy of the typed proceedings adversely affected the appellant's ability to ensure the filing of its appeal within reasonable time.



3. He further stated that the appellant's appeal against the judgment of the honorable Tribunal was merited and raises several arguable grounds of appeal with good chances of success. Thus, if the appellant is not allowed to file the appeal out of time it shall be prejudiced as it shall not have a chance to challenge the judgment of the Tribunal and the appeal would be rendered nugatory. He added that the respondent would not suffer any prejudice which could not be compensated by way of costs. Further, that the appellant's application had been made without delay and in the interest of justice the same ought to be granted to enable the appellant pursue its appeal.
4. In response to the said application the respondent filed an undated replying affidavit sworn by its director. He averred that judgment was duly entered in favour of the respondent on 1st February 2024 directing that the appellant refunds to the respondent the sum of Kshs. 3,980,000/= and a decree was subsequently extracted and issued by the court. He stated that since judgment was entered, the appellant had refused to comply with the simple order of revising their electricity bill despite several complaints from the respondent. He added that the appellant had approached this court with undue delay having taken over 2 months since service of the decree before making its application.
5. He further averred that the appellant had failed to offer any extenuating circumstances why it failed to file the appeal and application on time. He stated that there was no sufficient or reasonable cause demonstrated by the applicant to warrant a stay of execution. He further stated that the appellant stood to suffer no substantial loss that could not be compensated since the respondent consistently met its financial obligations, including the payment of electricity bills. He added that the appellant had not offered any security for the due performance of the decree, which was a mandatory requirement under the law for grant of stay of execution pending appeal. He urged the court to dismiss the appellant's application with costs.
6. The application was canvassed by way of written submissions.

Appellant/Applicant's submissions

7. These were filed by Ann Mulela Advocates and are dated 4th June, 2025. Counsel identified one main issue for determination which is whether leave may be granted to enlarge time for the applicant to file its appeal. She placed reliance on section 79G of the *Civil Procedure Act* and the decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the Supreme Court of Kenya set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated as follows:
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondent(s) if the extension is granted, Whether the application has been brought without undue delay; and
 - vi. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.



8. See also; *Paul M. Wambua v Attorney General & 2 others* [2015] eKLR as cited in the case of *Mwangangi v Mugi* (Civil Appeal 1 of 2023) [2024] eKLR.
9. Counsel submitted that the appellant/applicant in its supporting affidavit had shown sufficient cause for the delay in lodging the appeal. Further, that the *Constitution* guaranteed a party who sought to be heard an opportunity in court despite procedural technicalities as a reprieve for the applicant. She placed reliance on the decisions in *Berber Alibhai Mawji v Sultan Hasham Lalji & 2 Others* [1990-1994] EA 337, *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR and *Mwaniki Murangiri v Ndwiga Murangiri Muruambuci & Another* [2019] eKLR.
10. She urged the court to afford the appellant/applicant an opportunity to be heard, on merit.

Respondent's submissions

11. These were filed by John Mburu & Company Advocates and are dated 18th June, 2025. Counsel gave a brief background of the appeal and identified two issues for determination.
12. The first issue for determination is whether the application dated 14th April 2025 has merit. Counsel submitted that the appellant/applicant had admitted that the memorandum of appeal was lodged five (5) days outside the statutory 30- day period. Further, that the jurisdiction for this court's discretion to grant extension was guided by clear and well settled principles of law. She equally placed reliance on section 79G of the *Civil Procedure Act* and the decision in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* (*supra*).
13. She referred to the decision in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR where the Court of Appeal, while referring to various authorities, held as follows;

“The discretion under Rule 4 (on extension of time)-own emphasis is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
14. See also; *Henry Mukora Mwangi v Charles Gichana Mwangi* Nairobi Civil Application No. 26 of 2004 and *United Arab Emirates v Abdelghafar & others* 1995 IRLR 243.
15. Counsel urged the court to be guided by several decisions where no explanation was given for delay, among them being the decision in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR where the court stated as follows;

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
16. On the second issue, as to whether the costs of the application should be provided for, counsel submitted that costs of the application should be provided for and follow the event. She referred to



section 27 (1) of the Civil Procedure Act and the decision in Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR where the court stated as follows:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during and subsequent to the actual process of litigation.”

17. In conclusion, she submitted that allowing the appellant /applicant’s application would not only undermine the authority of the impugned judgment but also reward procedural indolence to the detriment of the respondent. She urged the court to dismiss the said application with costs.

Analysis and determination

18. I have considered the application together with the affidavit sworn in support, the replying affidavit and the submissions by the respective parties. The issue I find falling for determination by this court is whether the application dated 14th April 2025 is merited.

19. I will first deal with prayer 3 and 4 which seek for enlargement of time for filing appeal, thereafter the record of appeal be admitted and the same be served within fourteen (14) days.

20. Section 79G of the Civil Procedure Act is the statutory imperative calling upon an aggrieved party to lodge an appeal from the subordinate court within 30 days of a decision. It 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.”

21. Regarding extension of time to lodge the appeal, the Supreme Court in County Executive of Kisumu vs. County Government of Kisumu & 8 Others [2017] eKLR, where expressed itself therein as follows:

“It is trite law that in an application for extension, the whole period of delay should be declared and explained satisfactory to the court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time. The court delineated the following as:

1. Extension of time is not a right of a 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 on a case to case basis;



4. Whether there is 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 of the extension is granted;
 6. Whether the application has been brought without undue delay...”
22. In view of the above exposition, it is clear that the factors to be taken into consideration when determining an application of this nature are namely; the length of the delay, reasons for the delay, possibility of the arguability of the intended appeal, prejudice to be suffered by the opposite party if the reliefs sought were granted, any public policy issues that may be involved and the right of access to appellate justice. The current jurisprudential trend crystalizing this position states explicitly that being constitutionally entrenched, it can only be denied in exceptional circumstances
23. Looking at the first principle as stated above; the length of the delay, the application under consideration was presented approximately one year and two months from the date of the delivery of the impugned judgment. The appellant/applicant stated that the main reason for failure to timeously comply with the timelines set in the rules is the delay in receiving a copy of the judgment and proceedings.
24. In *Nick Salat v Independent Electoral and Boundaries Commission & 7 others* (supra), the Apex Judges therein remarked the significance of time in the following manner: -
- “Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants’ legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined.
25. Therefore, for time to be extended, a court must strike a fair balance between expeditious disposal of cases and an aggrieved party’s right of appeal. I take judicial notice that at times there can be such delays occasioned to a party especially the release of proceedings due to heavy workload. The appellant/applicant annexed in its application a letter dated 6th February 2024 addressed to the Chair of the Energy and Petroleum Tribunal, requesting for certified copies of the typed proceedings for EPA No. E28 of 2022.
26. However, I note that there is no evidence that the said letter was ever served upon the Tribunal as it bears no stamp or signature confirming receipt. Additionally, the appellant /applicant failed to point out the time when it received the judgment and proceedings as to aid this court in computing the delay that may not be attributed to it.
27. In *Nick Salat v Independent Electoral and Boundaries Commission & 7 others* the Supreme Court observed as follows;
- “... In those circumstances, it is incumbent on the Applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”



28. Despite all the above, this court finds that the appellant has a right to appeal against the decision of the tribunal. In *Muchemi v Roy Trans motors Limited* (Employment and Labour Relations Appeal E147 of 2024) [2025] KEELRC 650 (KLR) (28 February 2025) (Ruling) the court held as follows;

“.....The exercise of jurisdiction of the court in appeal is guided to be to sustain appeals. (*Butt -vs Rent Restriction Tribunal* (1982) KLR 417). Any prejudice caused by the delay can be cured by throw-away costs as submitted by the applicant. The court exercised its judicial discretion under Rule 18 of *Court (Procedure) Rules* in favour of the applicant by allowing an enlargement of time to file the appeal.”

29. In order not to deny it that right, the limited time to file appeal is hereby extended by 14 days from today’s date within which the appellant/applicant is to file and serve the memorandum of appeal and file the record within 30 days.

30. Regarding stay of execution pending appeal, the guiding principles are well settled. The same are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

No order for stay of execution shall be made under sub rule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

31. In *RWW vs. EKW* [2019] eKLR, the court addressed the purpose of a stay of execution order pending appeal as follows;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the appellant with those of the respondent.”

32. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. Furthermore, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of the case. This court has the duty to balance these rights to ensure that justice is served.

33. The above being the position, I allow the prayer for stay of execution of the judgment delivered on 1st February, 2024 on condition that the appellant/applicant deposits in court kshs. 2,000,000/= within 30 days failure to which the stay orders shall lapse.



34. The upshot is that the application dated 14th April 2025 is allowed as set out above.
35. The appellant/applicant shall bear the respondent's costs in this application.
36. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

