



**RH Devani Company Limited v Kenya Power & Lighting Company Plc (Petition E391 of 2021)
[2025] KEHC 14597 (KLR) (Constitutional and Human Rights) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E391 OF 2021
LN MUGAMBI, J
OCTOBER 16, 2025**

BETWEEN

RH DEVANI COMPANY LIMITED PETITIONER

AND

KENYA POWER & LIGHTING COMPANY PLC RESPONDENT

RULING

Introduction

1. By a Notice of Motion Application dated 22nd November 2024, the Respondent seeks orders that:
 - i. Spent.
 - ii. This Court do set aside the Orders issued on 12th February 2024.
 - iii. This Court do re-open the matter and grant the Respondent leave to file a response to the main Petition.
 - iv. The Court be pleased to allow the Respondent to file submissions on their Application dated 4th April 2024 in terms of the directions issued on 20th April 2023 albeit out of time.
 - v. The costs of this application be provided for.

Respondent's Case

2. The Application is sustained by the Respondent's, Legal Officer, Lynn Nyangweso Owano's supporting affidavit of even date, a supplementary affidavit sworn on 10th March 2025 by Dennis Maanzo and the Grounds on the face of the Application.



3. She depones that on 8th July 2024, when this matter was being heard and submissions being highlighted for the Petition, she was attending a matter in Constitutional Petition No. E096 of 2023, in this Court, before Justice Mugambi. She informs that the Counsel who was in charge of this matter left the Company in May 2023 and due to insufficient information, there was no update or follow up on the same.
4. She notes that prior to Counsel's exit, he had filed an Application dated 4th March 2023 seeking leave to appeal the Ruling dated 10th March 2023 on its Notice of Preliminary Objection. This Application had been set for directions on 20th April 2023 where the Court directed that it be disposed by way of written submissions. The matter was to be mentioned on 12th June 2023, however at this time, Counsel had already left.
5. Following adjournment, of the mention set for 23rd October 2023, the matter was heard on 12th February 2024. On this day, the Petitioner took directions on the main Petition in the absence of the Respondent. This was despite the pending Application and Respondent not having filed a response to the Petition.
6. In view of this, she asserts that if this Court proceeds to hear the Petition, the Respondent will be condemned unheard, an injury that cannot be remedied otherwise.
7. Counsel maintained that the failure to file submissions on their Application dated 4th April 2023 and consequently the Petition, was inadvertently occasioned by Counsel's departure and failure of service upon the Respondent by the Petitioner.
8. Counsel, Dennis Maanzo states that the Petitioner's service to the Respondent's official email on 9th February 2024 was not duly affected as argued. He informs that the indicated email address receives and dispatches huge fleets of emails, as each matter is handled by a specific advocate. He maintains that since this matter had not been assigned to a new advocate upon the previous counsel's exit, the matter was not discovered and actioned.
9. He further adds that the Petitioner had already made a response to the Respondent's Application dated 4th April 2023, before the matter was mentioned in Court on 12th February 2024. As such, he states that the Petitioner was nifty in taking directions to the main petition fully aware of the pending proceedings. He equally insists that if the Application is not allowed, the Respondent's right to be heard will have been curtailed.

Petitioner's Case

10. In reaction, the Petitioner filed a Replying Affidavit sworn by its General Manager, Geoffrey Okora on 4th March 2025.
11. He asserts that for the Respondent's Application to be successful, they must demonstrate that they were not properly served with the mention date or failed to appear in Court at the hearing due to a sufficient cause. He notes that there is an affidavit of service indicating that the Respondent was served with the mention dated 12th February 2024 on 9th February 2024. He states that there is no sufficient cause as to why the Respondent failed to attend Court on the material day.
12. Disputing the previous Counsel's exit, he stresses that service was not personally effected on the Counsel but the Respondent's official address litigationprosecutionsection@kplc.co.ke.



13. Furthermore, he averred that an Application to set aside Court Orders must be brought at the earliest opportunity which was not done in this case. He states that once Counsel was apprised of the matter on 8th July 2023, there was no explanation why this Application was filed 5 months later.
14. The Respondent is accused of cunningly filing interlocutory applications with the aim of frustrating the expeditious disposal of this Petition. Moreover, Counsel submitted that if the Respondent was indeed acting in good faith, it could have filed its Replying Affidavit to the Petition. In his view, the Respondent's conduct is negligent in the manner it has prosecuted this suit and thus this Court should not entertain such indolence.
15. That said, he states that the key Application sought to be revived was for leave to appeal out of time. He asserts that the applicable law on extension of time for giving notice of intention to appeal from a judgement is Section 7 of the [Appellate Jurisdiction Act](#) and not Section 95 of the [Civil Procedure Act](#) relied on by the Respondent.
16. It is contended that the said Application was nonetheless a non-starter, incompetent and incurably defective as the Respondent filed a Notice of Appeal out of time on 3rd April 2023 and filed the Application thereafter on 6th April 2023. He argues that once the Notice of Appeal was filed, this Court became functus officio and its jurisdiction under Section 7 of this Act was divested.
17. Considering this, he contends that this Court does not have jurisdiction to hear that Application. In his view, the Respondent has not demonstrated the substantial loss it will suffer if this Court does not allow this Application.

Respondent's Submissions

18. In support of its application, the Respondent through their Counsel, D. Maanzo filed submissions dated 10th March 2025 and underscored the salient issues as: whether the Respondent has demonstrated sufficient cause for review to set aside the Orders of 12th February 2024 and whether the Court should allow the Applicant prosecute the Application dated 4th April 2023.
19. Counsel on the onset relied in Rule 16 of [the Constitution](#) of Kenya (protection of rights and fundamental freedoms) Practice and Procedure Rules (Mutunga Rules), which provides that if the Respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the Petition in the Respondent's absence. However, the Court may set aside an order made under sub-rule (1) on its own motion or upon the application of the Respondent or a party affected by the order.
20. Counsel submitted thus that the law accords a party aggrieved by ex- parte orders recourse to have its case re-opened if it is demonstrated that there is sufficient reason to do so. He notes that this is in tandem with Article 159(2)(d) of [the Constitution](#). Equally reliance was placed in Government of Mombasa; Energy & Petroleum Regulatory Authority & 3 others (Interested Parties) [2024] KEHC 2976 (KLR) where it was held that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”
21. Like dependence was placed in KB v RJ & 4 others (Petition E010 of 2024) [2024] KEHC 7562 (KLR).
22. On the second issue, Counsel submitted that the Respondent despite not filing a response to the Petition, participated in the suit and prosecuted its Preliminary Objection. Counsel as such urges the Court to hear its Application to enlarge time for filing an appeal.



23. To buttress this point reliance was placed in Rule 23(1) of the Mutunga Rules and the case of In re Estate of Timotheo Gatheru (Deceased) [2021] KEHC 1406 (KLR) where it was held that”

“for an application that was still alive, it was for the Applicant to decide what to do about it.”

Petitioner’s Submissions

24. Odhiambo, Nyawade and Mwangi Company Advocates on the Petitioner’s behalf filed submissions dated 24th March 2025. Counsel stated that the instant Application is incurably defective for being an omnibus application as seeks several reliefs, lacks sufficient cause for review and that Court has no jurisdiction to entertain the Application dated 4th April 2024.

25. On the first issue, Counsel submitted that the Application seeks three different orders that do not flow from each other and governed by different legal rules and thus ought to be struck out. Reliance Ashana Raikundalia & 2 others v Arun C. Sharma [2017] eKLR where it was held that:

“...An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiffs application incurably defective, and a candidate for striking out...”

26. Comparable dependence was placed in Pyral Mhand Bheru Rajput vs. Barclays Bank of Kenya & Others HCCC No. 38 of 2004 and Santokhsingh t/a Trilok Construction vs Suchaminvestments Limited [2021] eKLR.

27. On the second point, Counsel submitted that there is no sufficient cause to review the Court Orders dated 12th February 2024 as the Respondent was served with the mention notice. Furthermore, Counsel argued that there was no explanation as to why the Respondent delayed in filing this Application thus terming it as inordinate delay.

28. On the third issue, Counsel submitted that this Court does not have jurisdiction to entertain the Respondent’s Application dated 4th April 2023 as the Respondent had already filed its Notice of Appeal.

29. Counsel submitted that the Respondent filed this Appeal out of time and without leave of the Court hence was not a legitimate appeal. Reliance was placed in Charles Karanja Kiiru Vs Charles Githinji Muigwa [2017] eKLR where it was held that:

“It is mandatory that an appeal can only be filed within 30 days of filing the Notice of Appeal... However, it cannot be grainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such 'an appeal', is tantamount to moving the court to remedy an illegality. This, court cannot do. To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. no appeal can be filed out of time without leave of the court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court.”



30. Secondly, Counsel submitted nonetheless that this Court became functus officio once the Respondent filed the Notice of Appeal. Reliance was placed in *Serah Wanjiru Kung'u v Peter Munyua Kimani* [2021] eKLR where it was held that:

“...It is therefore clear from the prevailing jurisprudence on the jurisdiction of this court under Section 7 of the *Appellate Jurisdiction Act* that once a notice of appeal has been lodged, served and subsists, this court is divested of the jurisdiction donated to it under Section 7 of the *Appellate Jurisdiction Act*. That is my finding on the second issue...”

31. Comparable dependence was placed in *Trimborn Agricultural Engineering Ltd Vs David Kabaiko & Anor* [2000] eKLR.

Analysis and Determination

32. Following a perusal of the pleadings and submissions of the parties, it is my view that the single issue raised for determination is:

Whether the Respondent’s Application should be allowed.

33. The principles for review are explicitly provided for under Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules. These provisions provide as follows:

Section 80 - Review

Any person who considers himself aggrieved—

by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

Any person considering himself aggrieved—

by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

34. The Court in *Jimi Wanjigi & another v Inspector General of Police & 3 others* [2021] eKLR while discussing the principle of review cited a number of authorities on this issue and observed:

“37. Courts have severally dealt with the issue of review. The Supreme Court in *Application No. 8 of 2017, Parliamentary Service Commission -vs- Martin Nyaga Wambora & others* [2018] eKLR, quoted with approval the findings of



the East Africa Court of Appeal in *Mbogo and Another -vs- Shah* [1968] EA, upon establishing the following principles: -

(31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- a. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- b. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- c. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- d. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- e. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- f. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

as a result, a wrong decision was arrived at; or

it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

38. The Court of Appeal in Civil Appeal No. 2111 of 1996, *National Bank of Kenya vs. Ndungu Njau* observed as follows in respect of reviews applications:

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A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law.”



35. Furthermore, the Court in *Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad* [2019] KEHC 12003 (KLR) observed as follows:

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“30. A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Signh and Another*[19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure[20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[21]

31. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga*[22] where they held as follows:-

In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

36. Concerning extension of time to appeal, the Court in *Diamond Trust Bank Kenya Limited v Invesco Assurance Company Limited & another* [2021] eKLR guided as follows:

“I have considered Section 7 of the [Appellate Jurisdiction Act](#), Cap 9 and it provides as follows:

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“S. 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

10. In view of the above provisions, it is explicitly clear that the High Court may extend time for giving notice of intention to appeal from a judgment of the High Court and in my view the said Section 7 does not need any more than a literal interpretation. Therefore, Section 7 of the [Appellate Jurisdiction Act](#) clearly confers to the High Court jurisdiction to extend time for the filing of a Notice of Appeal and to decide otherwise is akin to completely disregarding a clear provision in the law.



11. Similar finding is expressed in the decision of Odunga, J in the case of Nyamodi Ochieng Nyamogo v Telkom Kenya Limited, Nairobi H.C.C.C. No. 1736 of 1993. His observation therein was that:

“It is clear that the High Court’s powers under Section 7 aforesaid is limited to three instances and these are giving notice of intention to appeal from a judgment of the High Court and for making an application for leave to appeal or for a certificate that the case is fit for appeal.”

37. The Supreme Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KECA 782 (KLR) expressing itself on the issue of extension of time stated:

“The underlying principles a court should consider in exercise of such discretion should include:

- i. 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;
- 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 by 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 if the extension is granted;
- vi. Whether the application has been brought without undue delay.”

Review of this Court’s Orders dated 12th February 2024

38. The Respondent in bringing this Application submitted that it had been disadvantaged by the exit of the Counsel who had been handling this Petition. The Respondent indicated that the email address utilized to serve contains multiple communications that were dispatched to various persons in the Company. As a result, the Respondent was not able to be alerted of the mention date, as there was no one specifically handling the matter. For this reason, it urged the Court to set aside the cited order and allow it to file its response to the Petition.

39. In my humble view, such oversights do occur to that and this might have genuinely prevented the Respondent from taking action within the prescribed period and to attend Court. While the Petitioner insisted that service was effected, the Respondent maintained that even so, the Counsel handling the matter at that moment had left and there was no one else who used the matter.

40. In any case, the Petitioner has not demonstrated the prejudice that he would suffer if the application is allowed. Indeed, it is denying the Respondent an opportunity to prosecute the Petition and make its response that in my view that would cause injustice as it would bar the Respondent from exercising its constitutional right under Article 48 and 50(1) of *the Constitution*.

41. Consequently, I would consider that there is sufficient reason to review this Court’s orders of 12th February, 2024.



Application dated 4th April 2023

42. The Petitioner asserted that this Court does not have jurisdiction to entertain Prayer ‘4’ in the Application as the Respondent had already filed its Notice of Appeal before filing the Application. On this basis, the Petitioner argued that this Court was divested of jurisdiction to entertain this question any further. The Respondent was silent on this allegation save for maintaining that the Court should allow the Application as its right to be heard will be curtailed.
43. Ordinarily, this Court’s discretionary jurisdiction to extend time to file an appeal out of time is provided for under Section 7 of the *Appellate Jurisdiction Act*. In this matter however, as per the adduced evidence, the Respondent lodged the Notice of Appeal before the Application seeking leave to extend time was filed, albeit without the leave of the Court. I deduce so because the receipt of a notice of appeal dated 3rd April 2023 serves as confirmation that the intended appeal had been lodged and registered by the time the Application was filed.
44. In my humble view, Section 7 of the *Appellate Jurisdiction Act* empowers this Court to extend the time but once the Notice of Appeal has been filed, the matter cannot be entertained before this Court as it takes it outside its jurisdiction. The attempt to regularize the Notice of Appeal that has already been filed by Application dated 4th April 2023 is misconceived.
45. This Court lacks jurisdiction to entertain Prayer ‘4’. The instant Application cannot stand. It is hereby dismissed.
46. The respondent is only granted leave to file a response to the petition within next 14 days.
47. Mention on 17th February, 2026 to confirm compliance and further directions.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF OCTOBER, 2025.

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L N MUGAMBI

JUDGE

