Isaac Gachagua, Hussein Godana & Peter B.N. Njiru (Suing as OFficials of Jada "B" Jua Kali Association) & another v Kenya Power & Lighting Company Limited & another (Civil Application E007 of 2025) [2025] KECA 878 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 878 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E007 OF 2025

SG KAIRU, JA

MAY 23, 2025

BETWEEN

ISAAC GACHAGUA, HUSSEIN GODANA & PETER B.N. NJIRU (SUING AS OFFICIALS OF JADA "B" JUA KALI ASSOCIATION) ..... 1ST APPLICANT

PANEL GRACE ..... 2ND APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED ..... 1ST RESPONDENT

NAIROBI CITY COUNTY ..... 2ND RESPONDENT

(An application for extension of time to file and serve the Notice of Appeal, Memorandum and Record of Appeal against the Judgment of the Environment and Land Court of Kenya at Nairobi (L. Mbugua, J.) on 26th September 2024 in ELC Case No. 1453 of 2007)

RULING

1. In their application dated 2nd January 2025 the applicants seek, among other prayers, an order for the firm of Kadenge Associates Advocates to come on record on their behald and for leave of the Court to lodge an appeal out of time against the judgement delivered on 26th September 2024 by the Environment and Land Court (ELC) (L. Mbugua, J.) in ELC Case No. 1453 of 2007. In that judgment, the ELC allowed the 1st respondent's claim against the applicants and ordered the applicants to remove their structures on and vacate the suit property known as LR No. 113044/9.

2. The application is supported by an affidavit sworn by Anthony Mwangi Mbuthia, the Chairman of JADA "B" Jua Kali Association as well as the applicants' written submissions. The application is opposed through a replying affidavit sworn by Dennis Maanzo, a Legal Officer of 1st respondent's as well as the 1st respondent's written submissions. I heard the application on 19th May 2025 when

Mr. Maanzo appeared for the 1st respondent. There was no appearance for the applicants or the 2nd respondent despite notice of hearing having been served. I have nonetheless considered the application, the affidavits and the submissions.

3. In this matter, there is no indication that the applicants have before this Court hitherto been represented by a firm of advocates other than Kadenge Associates Advocates and the prayer for that firm to come on record for the applicants seems unnecessary.

4. Regarding the prayer for extension of time, although the Court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time, that discretion should be exercised judicially. As pronounced by the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014 extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations include whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay. Public interest is also a relevant consideration.

5. Earlier in Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04)) this Court had stated that:

> " The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor."

6. I bear those principles in mind in considering the present application.

7. The backdrop is a dispute over the suit property which the applicants claim was allocated to them by the 2nd respondent. The 1st respondent on the other hand asserts ownership and have constructed a power substation on the property and maintained that the applicants had encroached on the same. Consequently the 1st respondent filed suit seeking the applicants' eviction and demolition of their structures on the property.

8. In the judgment delivered on 26th September 2024, the subject of the intended appeal, the ELC allowed the 1st respondent's claim, after finding that none of the parties had title to the suit land, but that the 1st respondent had rights and interests to the suit property that are superior to those of the applicants. The ELC observed that the applicants' presence on the property would be unsafe, considering the high voltage power lines on the property.

9. Following delivery of that judgment, the applicants filed an application dated 22nd October 2024 before the ELC seeking review/setting aside of the judgment and orders of stay of execution of the judgment. That application was upon hearing by the ELC dismissed in a ruling rendered on 17th December 2024. The present application was then filed before this Court.

10. The applicants in support of the present application assert that their former advocate did not inform them of the court's judgment and that they only discovered that the judgment had been delivered

through the press. The newspaper extract exhibited to the affidavit does not bear a date of its publication and neither do the applicants state nor give a date when they say they became aware. What is somewhat confounding is that although the applicants claim not to have been aware of delivery of the judgment by the ELC, they nonetheless applied before the same court to review and set it aside before moving this Court.

11. Judgment having been delivered on 26th September 2024, the applicants had, by dint of Rule 77(2) of the Court of Appeal Rules, 14 days after the date of the judgment, to lodge the Notice of Appeal. Therefore, the notice of appeal should have been lodged on or before 11th October 2024. It was not lodged. The present application is dated 2nd January 2025 was filed. That is a delay of approximately 3 months. What is the applicant's explanation? It is that the applicants' erstwhile advocate did not inform them of the judgement. However, and as already indicated, the applicants moved the ELC to set aside/review that judgment. Counsel for the 1st respondent has in that regard urged that the applicants cannot pursue an appeal having applied for review. In the case of Gerald Kithu Muchanje vs. Catherine Muthoni Ngare & Another [2020] eKLR, to which counsel referred, the Court stated as follows:

> "Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review."

12. I respectfully agree. Nonetheless, the applicants only decided to pursue an appeal after their review application was dismissed. There appears to be lack of candor on the part of the applicants when they seek to blame the former advocates for the delay to inform them of the judgment, yet they opted to apply for review of the judgment only to change tact after that failed.

13. It bears repeating, that as stated by the Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others, (above), that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court and the party seeking extension of time has the burden to lay a basis to the satisfaction of the court. I am not persuaded that the applicants have in this case discharged that burden.

14. The application fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR