



**Waitiki v Kenya Power & Lighting Co. Ltd (Civil Application  
E107 of 2023) [2025] KECA 874 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 874 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E107 OF 2023  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
MAY 23, 2025**

**BETWEEN**

**EVANSON JIDRAPH KAMAU WAITIKI ..... APPLICANT**

**AND**

**KENYA POWER & LIGHTING CO. LTD ..... RESPONDENT**

*(Being an application to deem as withdrawn the Notice of Appeal from the  
Judgment and Decree of the Environment and Land Court of Kenya at Mombasa  
(L. L. Naikuni, J.) delivered on 12th October 2022 in E.L.C No. 87 of 2012)*

**RULING**

1. From the scanty record as put to us, we gather that, by a plaint dated 14<sup>th</sup> May 2016 and filed in the Environment and Land Court at Mombasa in ELC Case No. 87 of 2012, the applicant, Evanson Jidraph Kamau Waitiki, sued the respondent, Kenya Power and Lighting Company Limited, for general damages on account of alleged continuing trespass on his 4 parcels of land therein described as LR Nos. Mombasa/Mainland/South/Block 1/363 and 1/1031, Mombasa/Mainland South/Block V/109 and V/110; and costs of the suit.
2. The applicant's suit was defended and, by a judgment and decree dated 12<sup>th</sup> October 2022, the ELC (L. L. Naikuni, J.) allowed the applicant's claim and entered judgment against the respondent for Kshs. 21,000,000/=, costs of the suit and interest.
3. Dissatisfied by the learned Judge's decision, the respondent promptly gave notice of its intention to appeal to this Court vide its notice of appeal dated 14<sup>th</sup> October 2022 and requested for typed copies of the judgment and proceedings on 12<sup>th</sup> October 2022. However, the record of appeal is yet to be filed.
4. Before us is the applicant's Notice of Motion dated 30<sup>th</sup> November 2023 pursuant to rules 84 and 85 of the Court of Appeal Rules, 2022 seeking orders that: the respondent's notice of appeal filed on 14<sup>th</sup>



October 2022 be deemed as having been withdrawn or struck out; the order for stay of execution of the judgment made by the superior court on 12<sup>th</sup> October 2023 be set aside; and that the respondent bears the costs of the Motion.

5. The applicant's Motion was supported by the applicant's annexed affidavit sworn on 28<sup>th</sup> November 2023 essentially deposing to the grounds on which his application was anchored, namely: that the respondent has not lodged the record of appeal for a period exceeding sixty (60) days since the notice of appeal was lodged; that the respondent has failed to institute the intended appeal within the appointed time, and that it is deemed to have withdrawn the notice of appeal by dint of rule 85 of the Rules of this Court; that delay for a period exceeding one year is inordinate; that the applicant is an elderly citizen who is entitled to enjoy the fruits of his judgment; that the bulk of the proceedings had been typed in 2016, and that it could not take more than a year to have the remainder of the proceedings typed and certified; and that it is only fair, just and in the interest of justice that this Court grants the orders sought. In further support of the applicant's Motion, learned counsel M/s. Gacheru Ng'ang'a & Company, filed written submissions, a list and bundle of authorities dated 8<sup>th</sup> October 2024 citing 3 judicial authorities, which we have considered.
6. Opposing the Motion, the respondent filed its replying affidavit sworn by its Legal Officer, Justus Ododa, on 20<sup>th</sup> December 2023 stating, inter alia, that the parties have been engaged in numerous interlocutory applications in the superior court even as they waited for the certified copies of the proceedings; that the respondent should not be punished for waiting on a legitimate process of typing the proceedings to be completed; that the matter was highly litigated, which explains why the typing of proceedings was still ongoing; and that the respondent was ready and willing to prosecute its appeal.
7. In addition to the reply, learned counsel for the respondent, M/s. Munyiya, Mutugi, Umara & Muzna, filed written submissions and list of authorities dated 16<sup>th</sup> October 2024 citing 3 judicial authorities, of which we have taken note. Counsel submitted on the proviso to rule 84 of this Court's Rules, and that rule 85 should not be considered as a stand-alone provision, but conjunctively with rule 84.
8. Rule 84(1) of the Court of Appeal Rules, 2022 reads as follows:  
  
84.  
  
(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—  
  
.....  
  
Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
9. To our mind, the proviso to rule 84(1) cannot be used as a general excuse by a party who appears to have lodged a notice of appeal and sat back doing nothing to pursue expeditious institution of the intended appeal. It is clear that more than two years have passed since the respondent gave notice of its intended appeal. Yet, the record as put to us does not contain any correspondent to demonstrate diligence on the part of the respondent to pursue its application for certified copies of the proceedings. In any event, the proviso sought to be relied upon takes effect only after a certificate of delay has been issued to aid



in computation of the time appointed for institution of an appeal pursuant to rule 84(1). Before then, a party intending to appeal is bound to give satisfactory explanation for the delay.

10. In view of the foregoing, we form the view that this is a proper case for exercise of the Court's discretion pursuant to rule 85(1), which reads:

84.

(1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.

11. In MAE Properties Limited vs. Joseph Kibe & Another [2017] eKLR, this Court had this to say on the timelines prescribed under the Rules:

“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience ... Failure to comply with the timelines set invites sure consequences.”

12. We have carefully examined the record, the applicant's Motion, the affidavits in support and in reply, the rival submissions of learned counsel, the cited authorities and the law, and come to the conclusion that the applicant's Motion dated 30<sup>th</sup> November 2023 has merit and is hereby allowed in part on the following terms, namely:

- a. that the respondent's notice of appeal dated 14<sup>th</sup> October 2022 be and is hereby deemed as having been withdrawn by dint of rule 85(1) of the Court of Appeal Rules, 2022; and
- b. that the cost of the Motion be borne by the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF MAY, 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

