



**Green Power Generation Company Limited v Kenya Power and
Lighting Company Limited & another (Civil Appeal (Application)
E006 of 2024) [2025] KECA 760 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 760 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E006 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MAY 9, 2025**

BETWEEN

GREEN POWER GENERATION COMPANY LIMITED APPLICANT

AND

KENYA POWER AND LIGHTING COMPANY LIMITED 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(Application to strike out the appeal against the Judgment of the Environment and Land
Court at Malindi (Olola, J.) dated 6th May 2020 in Malindi ELC Case No. 179 of 2013)*

RULING

1. The Applicant, Green Power Generation Co. Ltd has brought this Notice of Motion dated 20th February 2024 pursuant to rules 3 and 86 of the Court of Appeal rules as read with sections 2, 68(2) (c), 79, 80 and 81 of the *Evidence Act* and Order 50 Rule 4 of the Civil Procedure Rules praying that the Memorandum and the entire Record of Appeal be struck out for failure to comply with the rules of this Court, the *Evidence Act*, and for failure to join and serve Mpeketoni Electricity Project (MEP), a party directly affected by the appeal, with the Notice and Record of Appeal; that, further, to save on time and costs, this application be heard alongside Malindi Court of Appeal Civil Application No. 48 of 2020 - Green Power Generation Company Limited and KPLC and Hon. Attorney General.
2. The Applicant's Motion is brought on several grounds, namely that: an uncertified copy of the decree of the lower court is attached, and which cannot be proved otherwise than as is prescribed under sections 2, 68, 79, 80, and 81 of the *Evidence Act*; that the proceedings were typed and certified on 2nd November 2023, but that the Memorandum and Record of Appeal were filed 72 days after 2nd November 2023, about 12 days out of time without leave or an order of the court extending time; that the Certificate of delay is incorrect, and untenable for the purpose of computing time under the



- Court's rules and under Order 50 rule 4 of the Civil Procedure rules; and that the typed and certified proceedings were ready for collection from 2nd November 2023.
3. It was further contended that MEP is directly affected by the appeal and ought to have been served with a Notice of Appeal as the sale of the subject property by MEP to the applicant is the subject of the appeal, and that a decision of this Court regarding the impugned sale will affect MEP as well as the applicant as the purchaser of the plot known as Lamu/Lake Kenyatta 1/3690 (the subject property); that the 1st respondent failed to file third party proceedings against MEP or the residents of Mpeketoni, yet it pleaded illegality of the sale of the subject property from the outset; that the 1st respondent had moved this Court on 19th June 2020 in Malindi Court of Appeal Civil Application No. 48 of 2020 on the same ground, but that the registry at Mombasa had not fixed the application for hearing; and that the doctrine of pre-emption does not apply as the pendency of the earlier application since 2020 rendered it necessary that this application be heard alongside the earlier application.
 4. The Motion is supported by the affidavit of Peter Njiiri Murachia, a director of the applicant, in which he reiterates the grounds of the application and further deposes that the Record of Appeal was not served on MEP, although the grounds of appeal concern the propriety or probity of its title, and whether through the impugned sale, it could pass on good title over the subject property to the applicant; that, consequently, MEP, as vendor of the subject property, is a party directly affected by the appeal, but has not been served with a notice or Record of Appeal; that the 1st respondent had not sought an order to dispense with service of the Notice of Appeal on MEP even though the issue was raised soon after the Notice of Appeal was lodged; and that the 1st respondent was aware right from the outset of the involvement of MEP in the sale of the subject property.
 5. It was further deposed that the decree cannot be proved before this Court as it contravenes the rules of evidence, as well as the Court of Appeal Rules; which issue goes to the jurisdiction of the appeal as it renders the Record of Appeal without attachment of a certified decree to be fatally defective; that the proceedings in the court below were typed and ready for collection from 2nd November 2023, but that the appellant did not file the Record of appeal until 7th February 2024; that the record was filed 72 days from the time of the certification of the proceedings in the trial court, and that the 1st respondent has not sought to extend time or explain the delay; and that it has instead proceeded to file the Record of Appeal outside the permitted timeline without an explanation, or an order of this Court extending time.
 6. In response, Mercy Lelu, counsel for the 1st respondent, filed a replying affidavit sworn on 18th April 2024, where it was deposed that the appeal was filed within the timeframe specified by the rules, and that MEP was not a party to the suit in the lower court and was therefore not an affected party in the appeal. It was further deposed that the decree which was signed, sealed and stamped by the Deputy Registrar is a true extract of the Judgment and is annexed to the Record of Appeal; that the applicant has not disclosed any discrepancy between the Judgment and the decree that would render the decree invalid.
 7. When the appeal came up for hearing, learned counsel Mr. E.M. Kimani appeared for the applicant while Mr. Andiyo appeared for the 1st respondent/appellant. There was no appearance for the Attorney General for the 2nd respondent despite having been served with the hearing notice.
 8. Both parties filed written submissions which were highlighted during the hearing. Counsel for the applicant begun by submitting that they would abandon all the grounds except grounds 1 and 10 concerning the question of the uncertified decree. It was submitted that the decree failed to satisfy the requirements of Sections 68(2) (c) and (f) and 79(1) (iii) of the Evidence Act, and that though the rules of this Court were amended to allow for inclusion of an uncertified decree in the appeal, the rules of



this Court were not capable of overriding to the stipulations of the *Evidence Act*. In support of this contention counsel cited the case of Ngige Ngugi vs Njenga Waweru [1979] KLR 254. On the basis of the submissions, counsel asserted that this Court should strike out the appeal.

9. In response, counsel for the 1st respondent submitted that grounds 1 and 10 have been overtaken by events, and that the application was frivolous. Referring to pages 217 and 218 of the Record of Appeal, counsel stated that the decree was duly signed, sealed and dated by the lower court, and that no variance between the Judgment and the decree had been pointed out. Counsel further submitted that the only basis for seeking to strike out the appeal was on the technicality of certification of the decree. As concerns the cited authority, counsel asserted that the 1979 decision had long since been overtaken by the dictates of *the Constitution* and, in particular, Article 159(2) (d) which requires courts to render substantive justice without undue regard to procedural technicalities. Counsel went on to assert that the lack of certification notwithstanding, no prejudice would be suffered by the applicant.
10. The facts of the dispute are that the applicant instituted a suit against the respondents contending that it was the owner of the subject property. It sought the removal by the 1st respondent of its electric power generating plant and machinery located on the land. The 1st respondent failed to vacate or remove its machinery prompting the applicant to seek a declaration that the 1st respondent's continued occupation and use of the subject property from 2nd July 2010 was wrongful and actionable trespass. It further sought a declaration that the 1st respondent's continued occupation and use occasioned environmental degradation and diminution in the value of the subject property and that, as a result, the applicant had suffered loss and damage.
11. Upon weighing the evidence and arguments, in a Judgment delivered in favour of the applicant on 6th May 2020, the Environment and Land Court, (Olola, J.) issued a declaration that the continued occupation and use of the subject property by the 1st and 2nd respondents from 2nd July 2010 was wrongful and actionable trespass, and that it occasioned environmental degradation and diminution of the value of the subject property. The court awarded the applicant general damages in the sum of Kshs. 10,000,000 with interest at court rates from the date of the Judgment until payment in full, and costs of the suit. Aggrieved, the respondents have appealed against the decision of the trial court, which appeal the applicant seeks to strike out.
12. We have considered the Motion and the parties' oral and written submissions. What is before us is an application seeking to strike out the 1st respondent's appeal for the reason that the decree being uncertified rendered the appeal a nullity. The other grounds are on service of the Notice of Appeal on the applicant outside the prescribed time, and whether or not MEP ought to have been joined as an affected party to the appeal were abandoned by the applicant.
13. On the question of whether the appeal ought to be struck out for want of certification of the decree, counsel for the 1st respondent drew the court's attention to the Record of Appeal wherein a decree was attached. The decree issued on 29th January 2024 showed that it was given on 6th May 2020, and was signed and endorsed with the seal of the Environment and Land Court. The applicant's complaint is that the appeal should be struck out because the decree was not certified; that, being a copy of a public document, it could not be relied upon by the Court as the basis upon which to found the appeal. Besides the lack of certification, no question was raised that pointed to the existence of a variance between the Judgment and the decree.
14. This Court has variously stated that the rules for procedure are handmaidens of justice but, in appropriate cases, they ought not to obstruct the dispensation of substantial justice. Article 159(2) (d) of *the Constitution*, prescribes that "...justice shall be administered without undue regard to procedural technicalities." Under Rule 86 of this Court's rules, the Court has discretion to strike out a Notice of



Appeal or appeal where an essential step has been omitted during filing, or has not been taken within the time prescribed. This discretion should nevertheless be exercised judiciously in each case.

15. In the case of Peter Obwogo O vs H O (suing as next friend PO (minor) [2017] KECA 496 (KLR), this Court observed:

It is not contended that the copy of the decree incorporated in the record of the appeal does not conform with the judgment or that it is difficult to decipher the decision of the High Court from the copy of the decree or that the appellate court will be handicapped in effectually determining the appeal. In the premises, the fact that the copy of the decree is not certified as a true copy is a procedural technicality which does not in any way impede the efficacious determination of the appeal”.

16. Such are the circumstances that have arisen in the instant case. It is not disputed that the decree which was properly signed and sealed by the Deputy Registrar was not certified. A consideration of the decree and the Judgment did not disclose any discrepancies that would render it impossible for the Court to arrive at a determination of the appeal. Notwithstanding that the decree was not certified as a true copy of the original, the complaint of want of certification is a procedural technicality that ought not to come in the way of determination of the substantive appeal.

17. Accordingly, the Notice of Motion dated 20th February 2024 is without merit and is hereby dismissed with costs to the 1st respondent.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

