



Kariuki v Kenya Power & Lighting Company Limited (Civil Application E117 of 2024) [2025] KECA 801 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 801 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E117 OF 2024**

SG KAIRU, JA

MAY 9, 2025

BETWEEN

EDWARD MBURU KARIUKI APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

(An application for leave to file an appeal out of time against the decision of the Environment and Land Court of Kenya at Mombasa (S. Kibunja, J.) dated 17th July 2024 in ELC Appeal No. 1 of 2024)

RULING

1. In his application dated 23rd October 2024 invoking Rule 4 of the Court of Appeal Rules among other provisions, the applicant, Edward Mburu Kariuki, seeks leave “to file an appeal out of time” against the judgment of the Environment and Land Court (ELC) at Mombasa (S. Kibunja, J.) delivered on 17th July 2024 in ELC Appeal No. 1 of 2024.
2. In that judgment, the ELC dismissed the applicant’s appeal from a decision of the Magistrate’s Court delivered on 25th February 2022 dismissing his suit for compensation against the respondent, Kenya Power and Lighting Company Limited (KPLC), on grounds that the court lacked jurisdiction to entertain the appellant’s claim; and that under the Energy Act, 2019 jurisdiction over the dispute lay with the Energy and Petroleum Tribunal established under that Act.
3. Based on the material before me, it would seem that KPLC constructed high voltage power transmission lines and pylons over the appellant’s property Title Number Mgumopatsa/Mazeras/540 which, according to the appellant, rendered a portion of his said property unusable. Consequently, the appellant filed suit against KPLC before the Magistrate’s Court at Mombasa being CMELCC No, 579 of 2020 seeking compensation. KPLC raised a preliminary objection contesting jurisdiction of the court to entertain the suit.



4. The learned trial magistrate upheld that objection in a judgment delivered on 25th February 2022 having found that the applicant's claim, being a compensation dispute between him as the land owner, and KPLC, as the licensee, the appropriate dispute resolution forum would be the Energy & Petroleum Tribunal under Section 25 of the *Energy Act*. Aggrieved, the appellant lodged an appeal before the ELRC, which in its judgment delivered on 17th July 2024 upheld the decision of the Magistrate's Court.
5. Still dissatisfied and intending to challenge that decision before this Court, the appellant filed a Notice of Appeal dated 14th October 2024. He followed that up with the present application dated 23rd October 2024 in which he seeks leave to file appeal out of time and for the Notice of Appeal dated 14th October 2024 be validated and be deemed duly filed.
6. As is evident from the parties' respective written submissions before me, counsel for both parties are alive to the legal principles applicable to applications of this nature. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time, that discretion should be exercised judicially. In *Fakir Mohamed vs. Joseph Mugambi & 2 Others* [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04)) the Court stated as follows:

“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”.
7. Subsequently in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014 the Supreme Court of Kenya pronounced 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; 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.
8. With those principles in mind, it is incumbent upon the applicant to provide a basis for the exercise of the Court's discretion in his favour. In that regard in his supporting affidavit and in his advocate's written submissions, it is the applicant's case that the impugned decision of ELRC was made without sufficient judicial authority; that in the case of *Nicholus vs. Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) the Supreme Court has pronounced itself on the specific limited powers of the Energy Tribunal; that the applicant has lodged a Notice of Appeal against the judgment of the ELRC albeit out of time; that certified proceedings as well as a certificate of delay have been applied for and that:

“...the delay and/or failure to comply with timelines and/or to accompany this application with a certificate of delay is beyond the applicant's control and it would be manifestly unfair to let that stand in the way of my quest for justice through the intended appeal...”



9. It is urged that the application has been filed without inordinate delay in the circumstances.
10. In opposition to the application, counsel for KPLC referred to a replying affidavit of Justus Ododa in submitting that there is no basis for the Court to exercise its discretion in favour of the applicant; that procedural timelines serve an important purpose in timely dispensation of justice meant for all parties; that the judgment of the ELC in this case was delivered on 17th July 2024 in the presence of counsel for both parties; that the present application was filed approximately five months after the lapse of the fourteen days permitted to file the appeal; that the delay involved is not explained and the application is an afterthought; that in any event the intended appeal is not arguable; and that granting the application would be prejudicial to KPLC.
11. Although counsel for the parties did not appear before me on 27th February 2025 when the application was scheduled for hearing, I have nonetheless considered the application, the affidavits and the submissions against the stated legal principles applicable in matters of this nature.
12. The judgment of the ELC the applicant intends to appeal was delivered on 17th July 2024. By dint of Rule 77(2) of the Court of Appeal Rules, the applicant had 14 days after the date of the judgment, to lodge the Notice of Appeal. It should have been lodged on or before 31st July 2024. It was not lodged until 14th October 2024 going by the date of the Notice of Appeal. The present application dated 23rd October 2024 was then filed. That is delay of 90 days or approximately three months. What is the applicant's explanation?
13. Beyond the contention that the intended appeal is arguable and has high chances of success on account of the Supreme Court decision in the case of *Nicholus v Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment)*, there is really no explanation regarding what hindered the applicant from filing the notice of appeal immediately after delivery of the judgment on 17th July 2024, and in any event within the prescribed timelines thereafter.
14. It bears repeating, that as stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others*, (above), 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. The applicant has not satisfactorily explained the delay involved and there is accordingly no basis on which I can exercise the Court's discretion in his favour.
15. The applicant's application dated 23rd October 2024 fails and is hereby dismissed. As counsel did not appear during the hearing of the application, I make no orders as to costs.

DATED AND DELIVERED AT MOMBASA THIS 9TH 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.

DEPUTY REGISTRAR

