



**Makovu (Suing on behalf of the Estate of David Makovu Ndambo - Deceased) v Kenya Power & Lighting Company Ltd & 2 others (Civil Application E312 of 2024) [2025] KECA 1314 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1314 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E312 OF 2024**

**F TUIYOTT, JA**

**JULY 18, 2025**

**BETWEEN**

**MORRIS KYENGO MAKOVU (SUING ON BEHALF OF THE ESTATE OF DAVID MAKOVU NDAMBO - DECEASED) ..... APPLICANT**

**AND**

**KENYA POWER & LIGHTING COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**EDWARD WILLY MAKOVU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time to file an Appeal out of time from the judgment of Environment and Land Court at Machakos (A. Nyukuri, J.) Dated 9th December, 2021 in Petition Case No. 16A of 2019)*

**RULING**

1. The applicant, being aggrieved by the decision of A. Nyukuri, J. delivered on 9<sup>th</sup> December, 2021 in Machakos ELC Petition Case No. 16A of 2019 dismissing his petition, is desirous of challenging the said decision by way of appeal. He, however, failed to file a notice of appeal within the requisite timelines and now brings this application dated 20<sup>th</sup> June, 2024 seeking leave for extension of time within which to file a record of appeal and that the memorandum of appeal filed be deemed to be properly on record.
2. In support of the application is his affidavit sworn on even date.

At trial he was represented by J.W Wachira Advocates who informed him of the judgment of 9<sup>th</sup> December 2021 which aggrieved him. He instructed the said advocates to prefer an appeal against the said decision but they failed to do so within the time specified for filing an appeal, a matter he came to



learn long after. He attributes this failure to his former advocate's ignorance and failure to attend to his instructions and that the delay is neither deliberate nor inordinate. He asserts that his appeal has reasonable prospects of success.

3. The 1<sup>st</sup> respondent has opposed the application vide a replying affidavit of Dennis Maanzo, a Legal Officer practising under the 1<sup>st</sup> respondent, sworn on 30<sup>th</sup> September, 2024. He asserts that the application is an afterthought having been brought after an unreasonable delay of more than two and a half years since the impugned judgment was delivered. He contends that there are no tenable or credible reasons for the unreasonable delay and nor has the applicant proved his assertions that he gave instructions to his advocates to file an appeal. That save for the misleading information that he applied for copies of certified proceedings and upon delay the High Court issued him with a certificate of delay, the applicant has not demonstrated any effort to pursue the appeal and neither is the alleged letter requesting the certified proceedings provided.
4. Only the applicant filed submissions, which I have considered in the context of the material before me.
5. This Court's discretion under Rule 4 of the Rules of the Court to grant extension of time is exercised within the well settled principles rehashed in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR):-

“The period of delay, the reason for the delay, (possibly) 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 factors...”

6. Rule 77(2) requires that a notice of appeal is lodged within fourteen days of the decision intended to be appealed against.

The judgment intended to be appealed from by the applicant was delivered on 9<sup>th</sup> December, 2021. A notice of appeal was never filed within the prescribed timelines, a failure attributed to the applicant's advocates. The applicant contends that once he discovered this omission (the date whereof this Court is not told), he immediately applied for certified copies and filed this application seeking leave to file the appeal out of time. There is a delay of over two and a half years since the judgment was delivered.

7. When the blame for the failure to act on time has been placed upon counsel on record, then the nature, quality and circumstance of the failure as well as its overall implication must be interrogated. So as well is the conduct of the applicant. This Court in *Itute Ingu & another v Isumael Mwakavi Mwendwa* [1994] eKLR stated:

“What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court's rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court's discretion in his favour.

But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes.”



8. A period of two and a half years to discover that indeed no appeal was filed is a long time. This does not depict the applicant as a diligent and attentive litigant. If there was a lapse on the advocates so too on the applicant. As a result the long delay cannot be pardoned.
9. The application of 20<sup>th</sup> June, 2024 is dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY, 2025.**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

