



**Kiboi v Kenya Power & Lighting Co Limited & another (Civil Application
E246 of 2024) [2024] KECA 983 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 983 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E246 OF 2024
S OLE KANTAI, JA
JULY 26, 2024**

BETWEEN

JOHN SENTEU KIBOI APPLICANT

AND

KENYA POWER & LIGHTING CO LIMITED 1ST RESPONDENT

SHADES HORTICULTURE LIMITED 2ND RESPONDENT

(An application for extension of time to file and serve the Appeal and Record of Appeal against the Judgment and Order of the High Court of Kenya at Nairobi (Gregory Mutai, J.) delivered on 24th April, 2023 in H.C.C.A No. 7 of 2017)

RULING

1. I am asked in the Motion brought when rule 4, *Court of Appeal Rules*, 2010 to be pleased to extend the time within which to file and serve Memorandum of Appeal and Record of Appeal; that the applicant be granted leave to file his appeal and record of appeal out of time. It is said in grounds in support of the application and in a supporting affidavit of the applicant John Senteu Kiboi that the applicant learned of the judgment on 9th October, 2023, judgment having been delivered on 24th April, 2023 in the absence of the parties on the online platform; that the Judge dismissed the applicant's appeal and upheld the lower court judgment; that no notice of delivery of judgment was given by the court to the parties and the applicant had no opportunity to instruct his lawyers on filing an appeal; that the applicant's claim is one of trespass/way leave against the 1st respondent and that the intended appeal is arguable with high chances of success. Further, that the applicant applied for copies of proceedings, judgment and decree on 6th November, 2023, decree was issued on 16th May, 2024 upon which the application before me was filed; that grant of leave to extend time would not prejudice the respondents.
2. Attached to the application is a copy of the impugned judgment where the applicant's appeal was dismissed with costs of Kshs.120,000 awarded to the 1st respondent.



3. There is a Notice of Appeal dated 6th November, 2023 where the applicant intends to appeal against the whole decision of the High Court of Kenya sitting at Kajiado and there is a letter of the same date where the Registrar of that Court is requested to issue certified copies of proceedings. There is also a Memorandum of Appeal where 5 grounds of appeal are set out.
4. I have not seen any replying affidavit by the respondents who were served with a hearing notice on 2nd July, 2024 at 11.41 a.m. at Musyokawambua Co Info info@musyokawambua.co.ke where parties were required to do certain things within limited time and space. Neither party filed written submissions despite the said notification in the hearing notice.
5. The principles that govern a consideration of an application like this one are well known and were well summarized in the case of *Fakir Mohamed vs. Joseph Mugambi & 2 Others* [2005] eKLR as follows:

"The exercise of this Court's discretion under Rule 4 has been guided by a consideration of the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is granted."
6. The applicant here says that judgment was delivered on 24th April 2023 in the absence of the parties who were not notified in any way that judgment was to be delivered. He says that it was not until 9th October, 2023 that he or his lawyers got to know that judgment had been delivered. That upon finding out that judgment was delivered copies of proceedings were applied for on 6th November, 2023 and a notice of Appeal filed dated that same day 6th November, 2023. That is to say that the applicant took action to correct the situation where time for appealing had lapsed less than a month after learning that judgment had been delivered. I note that the application is dated 17th May, 2024, 1 day after decree was issued on 16th May, 2023. There is no inordinate delay.
7. I accept as reasonable the explanation given that judgment was delivered in the absence of parties who were not notified that judgment was to be delivered. I have looked at draft Memorandum of Appeal and I think the grounds set out are arguable.
8. The respondents who were served with a hearing notice did not respond to it. I cannot see that they would be unduly prejudiced if an appeal is heard and determined and rights of parties to the dispute determined with finality.
9. I allow the motion. Let a Notice of Appeal be lodged within SEVEN (7) days of today. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

S. OLE KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

