



Kenya Power & Lighting Company Limited v Ngunjiri & 4 others (Duly Registered Trustees of Kenya African National Union, Nakuru Branch) (Civil Appeal (Application) 149 of 2018) [2023] KECA 415 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KECA 415 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 149 OF 2018
DK MUSINGA, KI LAIBUTA & JM MATIVO, JJA
APRIL 14, 2023**

BETWEEN

THE KENYA POWER & LIGHTING COMPANY LIMITED APPLICANT

AND

JOHN MUTHEE NGUNJIRI 1ST RESPONDENT

PETER OTIENO OKETCH 2ND RESPONDENT

CHARLES MAINA WANDAKA 3RD RESPONDENT

EVANS EKALICHE ATTANASI 4TH RESPONDENT

SILAS RICHARD MUKOLWE 5TH RESPONDENT

**DULY REGISTERED TRUSTEES OF KENYA AFRICAN NATIONAL UNION,
NAKURU BRANCH**

(Being an application to strike out the appeal from the Judgment of the High Court of Kenya at Nairobi (Tuiyott, J.) delivered on 17th November 2016 in H.C. Civil Case No. 14 of 2004.)

RULING

1. The applicant's notice of motion dated June 8, 2018 was brought under rule 84 of the repealed *Court of Appeal Rules*, 2010. The applicant seeks an order for striking out of the appeal filed by the respondents from the judgment of Tuiyott, J. (as he then was), in the above matter on grounds that the record of appeal was filed out of time. The applicant also seeks costs of the appeal as well as costs of, and incidental to, the application.
2. The application is supported by an affidavit sworn by Mellap Wataka, an Advocate employed by Hamilton Harrison & Mathews, who are on record for the respondents. He depones that: the record



of appeal was filed on May 8, 2018 and received by his firm on the following day; that the judgment appealed from was delivered on November 17, 2016; that the notice of appeal was filed on November 22, 2016; and that the respondents are relying on a certificate of delay dated April 12, 2018 issued in accordance with the proviso to rule 82 of this *Court's Rules*, 2010 (now repealed). The advocate further states that the request for a copy of the proceedings dated November 18, 2016 and filed in court on November 21, 2016 was not served upon the applicant's advocates in accordance with the proviso to rule 82 until October 13, 2017. Evidence to that effect can be seen from the applicant's advocates' office rubber stamp.

3. On March 8, 2017, the applicant's advocates wrote to the respondents' advocates, Lawrence Mwangi & Mwangi, pointing out that the application for the proceedings had not been served, and that the intended appeal was instituted out of time. A copy of the said letter was annexed to Mr. Wataka's affidavit. The respondents' advocates responded to that letter on March 11, 2017 stating, inter alia, that they were pursuing the speedy filing of the appeal.
4. The applicant's advocates wrote back to the respondents' advocates on March 16, 2017 and stated as follows:

“Order 42 rule 6(4) of the Civil Procedure Rules 2012 provides that for the purposes of that rule an appeal to the Court of Appeal is deemed to have been filed when the notice of appeal is filed. We emphasize that it is only for the purposes of a stay that an appeal is deemed to have been filed on the filing of a notice of appeal.

The judge has given you a stay of 90 days. The judge has not extended the time for filing an appeal. Once more, we draw your attention to rule 82 of the *Court of Appeal Rules* which provides that the record of appeal should be lodged within 60 days of the date of which the notice of appeal was lodged. The proviso gives an extension of time on the 60 days provided a written request for the proceedings in the High Court is lodged and served on the parties within 30 days of the date of the decision appealed from.

These are different requirements that we have tried to bring to your attention. In our opinion, in the absence of the written request for the proceedings or a copy served on this firm, your appeal is out of time.”

5. When the matter came up for hearing on January 31, 2023, Mr. Fraser, Senior Counsel, was in attendance for the applicant. There was no appearance for the respondent despite service of a hearing notice on January 16, 2023 by way of email.
6. The applicant's advocate filed submissions dated January 17, 2023 and served the same upon the respondents' advocates via email on January 19, 2023. The respondents' advocate did not, however, file any submissions in response.
7. We have considered the application and the affidavit sworn by the applicant's advocates. The proviso to rule 82(1) of the 2010 Rules of this court is as follows:

“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 of 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.



(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”

8. From the chronology of events as recounted by Mr. Wataka in his affidavit, it is evident that the High Court delivered its judgment that gave rise to this appeal on November 17, 2016. The respondents filed a notice of appeal on November 22, 2016. On November 18, 2016, they requested for a copy of the proceedings, but that letter was not copied to the applicant’s advocates. It follows, therefore, that the respondent’s advocate cannot rely on the proviso to rule 82 (2) of this Court’s Rules of 2010, now repealed.

9. In view of the foregoing, we find and hold that the appeal, having been filed on May 7, 2018, was filed out of time. Consequently, we allow the applicant’s application dated June 8, 2018 and hereby strike out the appeal with costs to the applicant. The respondents shall also bear the applicant’s costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

