



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Power & Lighting Co Limited v Mwanthi (Civil Appeal (Application)
E674 of 2021) [2022] KECA 907 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 907 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E674 OF 2021
KI LAIBUTA, JA
APRIL 28, 2022**

BETWEEN

KENYA POWER & LIGHTING CO LIMITED APPELLANT

AND

JOSEPH NZIOKI MWANTHI RESPONDENT

(Being an application for extension of time to file an application to strike out the Record of Appeal and the Appeal out of time, from the Judgment of the High Court of Kenya at Nairobi (Anne C. Ong'injo, J.) delivered on 21st January 2020 in H.C.C.A No. 257 of 2011)

RULING

1. The applicant (Joseph Nzyoki Mwanthi) has filed a Notice of Motion dated 25th January 2022 under Rules 4 and 84 of the *Court of Appeal Rules* in which he seeks extension of time pursuant to Rule 4 to file an application under Rule 84 to strike out the respondent's appeal from the judgment of the High Court of Kenya at Nairobi (Anne C. Ong'injo) delivered on 21st January 2020 in Nairobi HCCA No. 257 of 2011.
2. The Notice of Motion is made on 21 grounds most of which narrate the sequence of events beginning with the impugned judgment, the preferred appeal herein and the reasons on which this application is made. The substantive grounds on which the applicant's Motion is anchored are that the impugned judgment was delivered on 21st January 2020; that the respondent lodged its Notice of Appeal on 27th January 2020; that the respondent had been notified that certified copies of the proceedings were ready for collection on 2nd July 2020; that it served the record of appeal on the applicant on 25th November 2021 without endorsement on its face with the appeal case number, the date of filing or certification by the Deputy Registrar of the Court of Appeal with the date on which the appeal was lodged; that this made it difficult for the applicant to ascertain the date on which the appeal was lodged, or whether the respondent had obtained orders extending time to lodge the appeal out of time.



3. The applicant's Motion is supported by his annexed affidavit sworn on 25th January 2022. His case is that, on being served with the record of appeal on 25th November 2021, his advocates (M/s. Kang'ethe Waitere) wrote to the respondent on 20th December 2021 inquiring on the appeal case number and the date on which it was filed. The respondent's reply came on 17th January 2022 after which the applicant was able to establish that the respondent had filed its appeal out of time without leave of the Court; that the applicant's counsel promptly requested the Court Registry to map the appeal to its E-filing portal or profile to facilitate access and further action; that his advocates' request was granted on 24th January 2022, which made it possible for the applicant to immediately file the present application. He asks the Court to allow his application with costs.
4. The respondent opposes the applicant's Motion in terms of the affidavit of Irene Walala Adhiambo (the respondent's legal officer) sworn on 4th April 2022. In summary, the respondent admits serving the record of appeal on the applicant on 25th November 2021 and contends that the applicant took no steps to apply to strike out the appeal within the statutory period of 30 days; that it took the applicant three months to request that its appeal be mapped on its E-portal; that the respondent's counsel's delay in responding to the applicant's counsel's email of 20th December 2021 seeking particulars of the appeal was attributed to the Christmas break of which the Court should take judicial notice; and that the applicant took no steps to ascertain from the Registry the appeal case number and date of filing. They ask that the applicant's Motion be dismissed to allow the parties to canvass the main appeal.
5. In support of the applicant's Motion, his learned counsel filed written submissions dated 5th April 2022. On their part, learned counsel for the respondent also filed written submissions dated 6th April 2022 in support of the respondent's case.
6. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to

“... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act ...,”

on such terms as it thinks just.

7. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that the decision whether or not to extend time is discretionary. The Court, in deciding whether to grant an extension of time, takes into account the following among other matters: first, the length of the delay; second, the reason for the delay; and thirdly, the degree of prejudice to the respondent if the application is granted. I must also add that, in addition to the foregoing, it is equally important to consider whether the intended application merits exercise of the Court's discretion to grant.
8. The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. The discretion is unfettered. In its decision, the Court observed:

“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, the chances of the appeal [or application, as is the case here] 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.”

9. In considering these factors, I am guided by the decision in *Pothiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* [2005] eKLR where the Court, at p.733, called to mind the criteria applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR p591 where this Court stated:

“As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

- (a) that there is merit in his appeal [or intended application];
- [b] that the extension of time to institute and file the appeal [or application as is the case here] will not cause undue prejudice to the respondent; and
- [c] that the delay has not been inordinate.”

10. With regard to the merit of the intended application to strike out the respondent’s appeal pursuant to Rule 84, it is sufficient for the Applicant to demonstrate that the grounds on which the intended application is anchored merit consideration, and that the application is not an abuse of the Court’s process.

11. Having carefully considered the applicant’s Notice of Motion, the grounds on which it is made, the supporting and replying affidavits, and the respective submissions of learned counsel for the applicant and learned counsel for the respondent, I am satisfied that the grounds set out on the face of the applicant’s Motion and his supporting affidavit point to a reasonable conclusion that the intended application merits consideration by this Court (see *Joseph Wanjohi Njau v Benson Maina Kabau*, Civil Application No. 97 of 2012 (Unreported). To hold otherwise would be tantamount to standing in the applicant’s way in pursuit of justice, weighed against the respondent’s right of appeal. Indeed, the merits of the two corresponding rights stand to be tested when time comes for determination of the intended application, particularly in relation to the issue raised by the applicant – whether the respondent’s appeal was filed in contravention of Rule 82(1) of this Court’s *Rules*.

12. While so holding, I am nonetheless mindful of this courts considerable latitude in the exercise of its discretion under Rule 4 among other Rules of the Court. In particular, I call to mind the overriding objective as enunciated in the case of *Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR where the Court observed:

“On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under ... The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of *Kariuki Network Limited Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009*); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the case of *Kariuki (Supra)*); that in applying or interpreting the law or rules made there under, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate



and affordable resolution of appeals (See the case of Deepakc Manlal Kamami and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009)”

13. As regards the issue as to whether extension of time to file the intended application will cause undue prejudice to the respondent, I find that no such prejudice would be suffered. Moreover, the Respondent has not alluded to any undue prejudice in that regard.
14. With regard to the period of delay, the Court of Appeal in [Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet](#) [2018] eKLR observed that “... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.”
15. In my considered view, the applicant has given a plausible and satisfactory explanation for the delay in filing his application. Such delay is by no means inordinate. Accordingly, I find that the Respondent would not suffer undue prejudice by extension of time for the Applicant to file his intended application. In my considered judgment, the Applicant’s Notice of Motion dated 25th January 2022 merits the orders sought for extension of time to file his intended application to strike out the respondent’s appeal pursuant to Rule 84 of this Court’s [Rules](#). Accordingly, I hereby order and direct that –
 - (a) time be and is hereby extended for the Applicant to file his intended application within fourteen (14) days from the date hereof; and
 - (b) the costs of this application be costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

