



**Gachoka & another (Suing as the legal representative of the Estate of Ann Muthoni (Deceased)) v Kenya Power & Lighting Company Ltd (Civil Application E054 of 2021) [2022] KECA 1192 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1192 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E054 OF 2021  
F SICHALE, JA  
OCTOBER 26, 2022**

**BETWEEN**

**NATHAN GACHOKA ..... 1<sup>ST</sup> APPLICANT**

**CHARLES NG'ANG'A MWAURA ..... 2<sup>ND</sup> APPLICANT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANN MUTHONI (DECEASED)**

**AND**

**KENYA POWER & LIGHTING COMPANY LTD ..... RESPONDENT**

*(An Application for extension of time to file and serve the Record of Appeal against the judgment of the High Court of Kenya at Nakuru (Mulwa, J dated 17th November 2016.) IN (Nakuru High Court Civil Appeal No. 110 of 2013)*

**RULING**

1. Nathan Gachoka & Charles Ng'ang'a Mwaura (suing as the legal representatives of the estate of Ann Muthoni- deceased (the applicants herein), have vide a motion dated September 15, 2021, brought pursuant to the provisions of rules 4, 82 and 47 of the Court of Appeal Rules, sections 3A & 3B of the Appellate Jurisdiction Act, cap 9 of the laws of Kenya sought the following orders:

- "1. Spent.
2. That this honourable court be pleased to enlarge time for the applicant to file and serve a record of appeal out of time.
3. That costs of this application do abide the outcome of the appeal."



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Benard Ochieng' Akang'o, counsel who has the conduct of this matter on behalf of the applicant, who deposed *inter alia* that the applicant herein, being dissatisfied with the judgment of Mulwa J dated November 17, 2016, had lodged a notice of appeal against the same on November 25, 2016 and further requested for certified copies of proceedings and judgment and that it was not until December 7, 2019 that he was notified that proceedings were ready for collection.
3. He further deposed that immediately after the record of appeal was prepared, it was transmitted to court for assessment of the requisite filing fees and that due to inadvertence on part of his staff, there was no immediate follow up with the court registry, which situation was later compounded by outbreak of Covid-19 and that it was not until September 9, 2021, that he discovered that the record of appeal was not filed within the stipulated timeline.
4. The application was opposed vide a replying affidavit of Evans Juma Matunda sworn on May 12, 2022, counsel who has the conduct of this matter on behalf of the respondent who deposed *inter alia* that the applicants counsel was informed on December 7, 2019 that proceedings were ready yet he did not take any steps to file the record of appeal within 60 days after the proceedings were ready and that further counsel had two clear months to file the record of appeal before the courts were shut down due to Covid-19.
5. It was submitted for the applicants that the delay herein had been thoroughly explained; reasons being inadvertence on part of counsel, which was further compounded by Covid-19 and that the mistake herein was wholly on part of counsel for which an innocent litigant should not be punished.
6. On the other hand, it was submitted for the respondent that the notice of appeal was lodged on November 25, 2016, whereas the instant application was lodged on September 23, 2021 and that as such, there was a delay of 5 years which inordinate and unjustifiable.
7. Regarding reasons for the delay, it was submitted that one of the reasons given for the delay namely; lack of immediate follow up with the registry due to inadvertence on part of counsel's staff was vague and unverified as the staff being blamed did not swear an affidavit to confirm this allegation and that further Covid-19 could not have caused the delay since the same started in the year 2020 and by this time, the delay was already more than 3 years.
8. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law. The principles upon which this court exercises its discretion under rule 4 are firmly settled. The court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion, the court should do so judiciously.
9. See *Fakir Mohamed -vs- Joseph Mugambi & 2 others* CA No Nai 332 of 2004 where the court laid out some of the considerations to be taken into account by court in deciding applications of these nature as follows; the length of the delay, the causes of the delay, the possibility of the appeal succeeding and prejudice to be occasioned to the parties.
10. In the instant case, the impugned judgment was delivered on November 17, 2016. The applicants subsequently lodged a notice of appeal on November 25, 2016, which was well within the stipulated timelines whereas the instant motion was lodged in court on September 23, 2021. There has therefore been a delay of 5 years which delay is certainly inordinate and unjustifiable for reasons which I will enumerate hereunder.



11. Regarding the reasons for the delay, counsel blames inadvertence on his part for failing to prepare and lodge the record of appeal within the stipulated period. The applicant's counsel at paragraph 8 of the supporting affidavit deposed that he was notified that the proceedings were ready for collection on December 7, 2019. Despite the proceedings being available and ready for collection on December 7, 2019, this application was not filed until September 15, 2021, 2 years down the line and no reasonable explanation has been forthcoming from the applicants to explain this delay.
12. Similarly, it has not been stated when the record of appeal was allegedly prepared and the staff who is alleged to have been "inadvertent" has not even been stated. Neither has it been stated when the same was transmitted to court for assessment of fees.
13. Additionally, save for a letter dated November 22, 2016, which appears to be handwritten requesting for proceedings, there is no other document evidencing that indeed the applicants made any follow up on the proceedings. Moreover, the applicants cannot be heard to blame covid 19 since the proceedings were ready as early as December 7, 2019, way before the outbreak of covid 19 in March 2020.
14. From the circumstances of this case, and for the above reasons, I am not satisfied with the reasons given for the delay and the same are not plausible as the delay herein has not been explained to the satisfaction of this court.
15. As to whether the intended appeal has possible chances of succeeding, I am mindful of the fact that I cannot make a definitive finding on this issue sitting as a single judge. In any event, the applicants have not even attached a draft memorandum of appeal for the benefit of this court's perusal.
16. Regarding prejudice, I am satisfied that the respondent will be greatly prejudiced if the instant application is allowed since the entire decretal amount has already been settled.
17. The upshot of the foregoing is that the applicants motion dated September 15, 2021 is devoid of merit and the same is hereby dismissed in its entirety.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

**F. SICHALE**

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**JUDGE OF APPEAL**

