



**Eswari Electricals Ltd v Empower Installations Ltd & another (Civil Application
E103 of 2022) [2022] KECA 1109 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1109 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E103 OF 2022
F SICHALE, JA
OCTOBER 7, 2022**

BETWEEN

ESWARI ELECTRICALS LTD APPLICANT

AND

EMPOWER INSTALLATIONS LTD 1ST RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY LTD 2ND RESPONDENT

(An Application for Extension of time to file Notice and Record of Appeal against the judgment of the High Court of Kenya at Nairobi, (Majanja, J dated 30th January 2020.) IN (High Court Commercial & Tax Division Civil Case No. 106 of 2013)

RULING

1. March 2022 brought pursuant to the provisions of rule 4 of the [Court of Appeal Rules 2010](#), in which Eswari Electricals (PVT) Limited (the applicant herein), seeks leave to appeal out of time against the judgment and decree of Majanja J dated January 30, 2020.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Rathnaraj Joenathan Ebenezer, the applicant's country manager who deposed *inter alia* that being aggrieved with the judgment ad decree in Nairobi High Court Commercial & Admiralty Division Civil Case No 106 of 2013, they had lodged a notice of appeal against the same on February 26, 2020, albeit mistakenly about 12 days out of time.
3. He further deposed that failure to file the notice of appeal within time was due to a true and honest belief that the said notice of appeal was to be filed within 30 days after judgment of the superior court and that for some time, they could not take any steps in the matter as it was difficult to access the court registries to access court documents or services owing to the Covid-19 pandemic.



4. The motion was opposed vide a replying affidavit sworn by Steven Gikera a director of the 1st respondent, on April 20, 2022, who deposed *inter alia* that the applicant's reliance on Covid-19 was a mere and convenient excuse as the applicant had filed the notice of appeal in February 2020, out of time and made no efforts thereafter to file the appeal or seek leave to appeal out of time until they were served with garnishee proceedings in August 2021.
5. There was no response on part of the 2nd respondent.
6. The applicant in its submissions basically reiterated the contents in the supporting affidavit and further submitted that it had an arguable appeal and that the 1st respondent had not demonstrated the prejudice it would suffer if the orders sought were not granted.
7. On the other hand, it was submitted for the 1st respondent that the judgment that the applicant seeks to appeal against had been partly executed as the applicant's money which was held by Bank of India had already been remitted to the 1st respondent's advocates in compliance with court orders given on September 10, 2021 and that as such, the 1st respondent would suffer great prejudice if the motion is allowed as part of the said money was utilized by the bank's advocates as their costs and therefore the same could not be recovered.
8. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the 1st respondent's replying affidavit, the rival submissions by the parties, the cited authorities and the law.
9. The principles upon which this Court exercises its discretion under rule 4 are firmly settled. The court has wide unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion the court should do so judiciously. See [*Fakir Mohamed v 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 the prejudice to be occasioned to the parties.
10. In the instant case, the impugned judgment was delivered on January 30, 2020, whereas the notice of appeal was filed on February 26, 2020, albeit 12 days out of time without leave of the court whereas the instant application was filed on March 2, 2022, a period of about 26 months from the date of the impugned judgment which period is no doubt inordinate.
11. As regards the reasons for the delay, it was contended that the same was due an honest mistake on part of the applicant's advocates in computing time within which the appeal ought to have been filed and that for some time, they could not take any steps in the matter as it was difficult to access the court registries to access court documents or services owing to the Covid-19 pandemic.
12. From the circumstances of this case, I am of the considered opinion that the reasons put forth for the delay are neither reasonable nor plausible for the following reasons; firstly, it is inconceivable that the applicant's advocates could make an honest mistake in a case of this magnitude well aware of the consequences and that can only smack of negligence on their part. Secondly, the contention by the applicant that they could not take any steps in the matter as it was difficult to access the court registries owing to Covid-19 pandemic, is in my view without basis as this court takes judicial notice of the fact that, whereas the first Covid-19 case struck Kenya in March 2020 and whereas indeed court operations had been scaled down during his period, there is nothing on record in this case to show that that indeed the applicant was having difficulties in accessing the court's registry or the efforts made towards this respect.
13. Consequently, I am of the opinion that this delay has not been explained to the satisfaction of this court.



14. With regard to the possibility of the appeal succeeding, I have looked at the annexed draft memorandum of appeal and I cannot make a definitive finding on this issue sitting as a single judge,
15. As regards prejudice, I am satisfied that the 1st respondent will stand prejudiced if the instant application is allowed as it has been contended by the 1st respondent that part of the decree herein has already been executed as the applicant's money which was held by Bank of India has already been remitted to the 1st respondent's advocates, in compliance with the court orders given on September 10, 2021, and the same has been utilized by the bank's advocates as their costs and therefore cannot be recovered, a fact that has not been controverted by the applicant.
16. Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to rule 4 of this Court to extend time to file an appeal out of time and I hereby decline the same.
17. Accordingly, the applicant's motion dated March 22, 2022, is without merit and the same is hereby dismissed with costs to the 1st respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

