



**Cheptalam v Kenya Power & Lighting Company Limited & 4 others (Civil Application 121 of 2020) [2021] KECA 179 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 179 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION 121 OF 2020  
MSA MAKHANDIA, JA  
NOVEMBER 5, 2021**

**BETWEEN**

**CHRISTOPHER CHEROP CHEPTALAM ..... APPLICANT**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR, UASIN GISHU ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND SURVEYOR, UASIN GISHU ..... 3<sup>RD</sup> RESPONDENT**

**COMMISSIONER OF LANDS ..... 4<sup>TH</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application for leave to file Notice of Appeal out of time, against the Judgment/Decree of the Environment and Land Court at Eldoret (Ombwayo, J.) dated 17th October, 2019) in ELC 350 of 2012 Formerly ELDORET HCCC No. 94 of 2007)*

**RULING**

1. Before me is a motion brought on notice under Rule 4, 59(1), 41, 42 and 43(i) of the [Court of Appeal Rules](#) and Article 159(2) (d) of the Constitution of Kenya
2. seeking that the applicant be granted leave to file and serve the notice of appeal dated 11<sup>th</sup> September 2020 out of time and that the said notice be deemed to be duly filed and served. The application is premised on the grounds inter alia; that the judgment was delivered at Eldoret on 17<sup>th</sup> October 2019 by S.M. Kibunja J. in the absence of the Applicant's Advocates. The Applicant's Advocates were not notified and or served with a notice of the delivery of judgment despite severally making inquiries about it. That his advocate became aware of the delivery of the judgment on 4<sup>th</sup> September 2020 when he received a letter from the Chief Registrar



of the Judiciary to that effect after seeking her intervention regarding the delayed judgment. That although there was a copy of judgment notice forwarded by the Chief Registrar to the parties, there was no evidence that there was service upon the parties of the said notice. That the applicant is nonetheless in the process of filing an appeal which appeal according to him is arguable.

- 3 The application is further supported by the affidavit of the applicant who save for what he reiterates from the grounds above adds that the matter was due for delivery of judgment on 25<sup>th</sup> March 2019 but the same was not delivered and the indication communicated thereafter to the parties was that the same would be delivered on notice. Later the Judge who heard the suit was transferred to another station. That his advocate was to learn later that the judgment was delivered on 17<sup>th</sup> October 2019. That the notice of appeal was filed and duly sealed by the Deputy Registrar on 17<sup>th</sup> September 2020 and served on the respondents on 23<sup>rd</sup> September 2020. The notice was thus filed 11 months late. That the applicant will suffer great and irreparable loss if the intended appeal is not filed, heard and determined on merit. That the intended appeal is arguable as can be gleaned from the draft memorandum of appeal annexed to the application.
- 4 The application was opposed by the 1<sup>st</sup> respondent through a replying affidavit sworn by its legal officer one, Emily Kirui. She deposed that the application was misconceived, inappropriate and bad in law as the delay is inordinate, having not been explained and thus inexcusable. The delay was over one year, the application having been filed on 15<sup>th</sup> October 2020 whilst the judgment was delivered on 17<sup>th</sup> October 2019. The applicant had not exercised due diligence in pursuit of the matter as there was notice of delivery of judgment served on the parties but he failed to attend. That the applicant had a duty to pursue the court file to establish the true position of the suit as the court file had always been available in court, a position that was confirmed by the Chief Registrar in her letter of 27<sup>th</sup> August 2020. That the reasons advanced by the applicant do not warrant the grant of the orders sought. The 1<sup>st</sup> respondent therefore prays that the application be dismissed with costs.
5. The 2<sup>nd</sup> to 5<sup>th</sup> Respondent's did not wish to participate in the application as per their letter dated 20<sup>th</sup> May 2021. They were however willing to abide by the outcome of the application.
6. The application was conversed by way of written submissions. The applicant in his written submissions dated 19<sup>th</sup> May 2021, merely reiterated and expounded on the grounds on the face of the motion and it is therefore not necessary to rehash here. Suffice to add that he has since lodged the appeal being Civil Appeal Number 43 of 2021 *Christopher Cherop Chetalam vs. Kenya Power & Lighting Company Limited & 4 Others*, and is ready to serve the record on the respondents within the stipulated time that the Court may direct. He submits further that being aggrieved by the decision of the trial court and having the intention to appeal against the said decision and being unable to do so as required by Rule 75 (2) of the Court of Appeal Rules, he approaches the court under Rule 4 of the Court Rules which gives the court unfettered discretion to extend time to enable a party to file and serve notice of appeal out of time. He relies on the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* (1999) 2 EA 231 where the court set out some of the factors to be considered in dealing with an application for extension of time. I was also urged to be guided by Article 159(2) (d) of the constitution and exercise my discretion to ensure the ends of justice are met by allowing the application.
7. The 1<sup>st</sup> Respondent through its submissions dated 21<sup>st</sup> May 2021 submitted that extension of time is discretionary and should only be exercised judicially and on sound factual and legal basis



as stated in the case of *Njuguna vs. Magichu & Anor* [2003] KLR 507. That the Principles set out in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* (supra) had not been met as the delay is inordinate being 243 days late. That the delay was inexcusable and that even after filing the notice of appeal out of time, the same was equally served after inordinate delay and no explanation has been given. Further, the reasons advanced for delay are not plausible as all the email correspondences between the applicant and the Chief Registrar of the judiciary began on 14<sup>th</sup> April 2020 which was 6 months after delivery of the judgment sought to be impugned. There was no evidence of physical visit to the court registry by the applicant to check on the fate of the judgment. That a casual glance at the draft memorandum of appeal does not show an appeal with probable chances of success as no error is attributable to the learned Judge in his judgment. Lastly on the degree of prejudice, the 1<sup>st</sup> respondent submits that it will be highly prejudiced if the application is allowed as litigation ought to come to an end considering that the matter has been in court since 2007. That the continued litigation causes it unnecessary costs and related expenses. The 1<sup>st</sup> respondent urges the court to rely on the case of *Law Society of Kenya vs. The Centre for Human Rights and Democracy and 12 Others*, Petition No. 14 of 2013 and find that Article 159 (2) is not a Panacea for all procedural shortfalls and that not all procedural deficiencies can be remedied by it. It was its prayer therefore that the motion be dismissed with costs.

8. I have considered the application, grounds and affidavit in support thereof, the 1<sup>st</sup> respondent's replying affidavit, respective written submissions by counsel and the law. Rule 4 of the Court of Appeal Rules does not provide the factors that the court ought to consider in an application for extension of time but courts have over time devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case.
- 9 The case of *Leo Sila Mutiso vs. Hellen Wangari Mwangi* (supra) which is the locus classicus, on the question laid down the parameters as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

- 10 The list of considerations are said to be non-exhaustive as was explained in the case of *Fakir Mohammed vs. Joseph Mugambi & 2 Others* [2005] eKLR where this court rendered itself thus:

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path..... 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, (possible) the chances of the appeal 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 factor."



11. Similarly there is no maximum or minimum period of delay set out under the law. However the reason or reasons for the delay must be explained, and must be reasonable and plausible. In *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR , this Court stated:

"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."
12. The delay in filing the instant application and notice of appeal was cumulatively about one year. The applicant blamed the delay on the fact that the judgment was delivered in his absence and without any notification whatsoever. That he only became aware of the delivery of the judgment following a complaint he lodged with Chief Registrar of the judiciary. The applicant has however not explained the steps and difficulties he encountered in his quest to obtain the said judgment before he started writing letters four month after the delivery of the judgment and several months later from the last date that the judgment was due for delivery in March 2019.
13. In *Hamendra Mansukhalal Shah vs. Alnoor Kara & Another* [2000] eKLR this Court stated as follows:

"I am inclined to agree with Mr. Mwangi that the explanation given for the 47 days delay has not been sufficiently explained to me. If indeed as claimed by the applicant the fault laid with the registry of the superior court there was nothing to stop the applicant from obtaining even a mere letter from the registry to the effect that the file was missing during the said period and therefore the notice could not be lodged."
14. The reason for delay in my view has not been convincingly, succinctly and sufficiently explained. Looking at the correspondences between the applicant and the court, the first email communication was authored and sent on 14<sup>th</sup> April 2020 yet the date for the judgment had been slated for 25<sup>th</sup> March 2019. Even when the same was later delivered as alleged by the applicant without notice to him on 17<sup>th</sup> October 2019, the intervening period following his first correspondence is not explained.
15. The applicant had in the intervening period a duty to establish what had befallen the judgment. A physical appearance in the registry would have done the trick. Besides the advocate, the applicant too also had the responsibility to follow up on his case even though represented by counsel which did not happen in the circumstances of this case.
16. On the chances of success of the intended appeal, without going into the merits of the intended appeal as this will be determined by the full bench which will be seized of the appeal, the possibility of such success are in my view doubtful. In the case of *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan*, CA No. 227 of 2015 (UR) this Court stated as follows:

"This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly."



17. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension of time, against the prejudice to the respondent in granting an extension. The applicant was aggrieved by the judgment of the trial court and is desirous of appealing against the said judgment albeit out of time hence the instant application. On the other hand, the respondent contends that the applicant has failed to clearly explain the reason for delay in filing the notice of appeal. The 1<sup>st</sup> respondent further contends and rightly so in my view that it continues to suffer loss, legal costs and incidental expenses due to the continued existence of this litigation in court since 2007, a period of almost fourteen years. It is also true that ideally litigation should at some point come to an end. It has been 14 years plus since this dispute entered the corridors of justice. This indeed is a long period for a party to be weighed down with litigation. Let it end now!
- 18 In the end I am satisfied that the applicant has failed to demonstrate why I should exercise my unfettered discretion in his favour and allow the application. Accordingly, I dismiss the application with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

