



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: ONYANGO OTIENO, KARANJA & KOOME, JJ.A.**

**CIVIL APPEAL NO. 311 OF 2010**

**BETWEEN**

**THE KENYA POWER & LIGHTING CO LTD .....APPELLANT**

**AND**

**JOSEPH KINYANJUI MWAI T/A**

***SANDWORTH PRINTING & PACKAGING* .....RESPONDENT**

**(Appeal from an order of the High Court of Kenya at Nairobi (Khamoni, J) dated 2<sup>nd</sup> July, 2010**

**in**

**MISC CIVIL APPLN NO. 111 OF 2010)**

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**JUDGMENT OF THE COURT**

**1.** This is an appeal from the order of the High Court of Kenya at Nairobi (Khamoni, J) dated the 2<sup>nd</sup> July 2010 in **Misc. Civil Application No. 111 of 2010**. In the matter, **JOSEPH KINYANJUI MWAI T/A SANDWORTH PRINTING & PACKAGING** (respondent) filed a notice of motion dated 19<sup>th</sup> March, 2010, in which he sought for extension of time to file an appeal from the judgment of the **Energy Tribunal**. By the ruling delivered on 2<sup>nd</sup> July, 2010, the respondent was granted leave to file the appeal. That is the order which has now given rise to the present appeal.

**2.** Being dissatisfied with that order the appellant has appealed on the following grounds:

*“1. The learned judge misdirected himself in failing to hold that the Third Schedule of the Energy Act and in particular paragraph 11 set out the substantive law and procedure governing appeals from the Energy Tribunal to the High Court.*

*2. The learned judge erred in failing to hold that the provisions of the Third Schedule*

of the Energy Act constituted “a different procedure” under section 79 of the Civil Procedure Act.

3. *The learned judge erred in proceeding as if the Third Schedule of the Energy Act was not part of an Act of Parliament but was only subsidiary legislation.*
4. *The learned judge erred in holding that the provisions of the Energy Act could not “oust” the provisions of the Civil Procedure Act.*
5. *The learned judge erred in proceeding as if he had the power to override the express provisions in the Energy Act as passed by Parliament.*
6. *The learned judge misdirected himself in treating the Energy Tribunal as a subordinate court and holding that the Civil Procedure Act and Rules applied to an appeal from the Energy Tribunal to the High Court.*
7. *The learned judge erred in failing to hold that the Energy Tribunal does not fall within the definition of “subordinate court” in the Interpretation and General Provisions Act.*
8. *The learned judge erred in failing to adopt the procedure set out in the Court of Appeal Rules for appeals from the High Court and following the principals established by the Court of Appeal in considering applications for extension of time.*
9. *The learned judge erred in holding that the respondent had given a satisfactory explanation or excuse for the failure to file the intended appeal within time.*
10. *The learned judge misdirected himself in holding that a signed copy of the judgment of the Energy Tribunal was a prerequisite for the filing to the intended appeal.*
11. *The learned judge erred in failing to have regard to whether there was an arguable appeal.”*

3. In further arguments to support the above grounds, Mr Fraser, learned counsel for the appellant, relied on written skeleton submissions which were highlighted before us.

4. Briefly, the respondent lodged a complaint with the Energy Regulatory Commission on 8<sup>th</sup> April, 2008, claiming damages for loss suffered on account of interference with his electricity bills and irregular disconnection of power to the tune of about KShs.53 billion. The respondent claimed that he suffered loss because the appellant allegedly caused or connived with others who made illegal connections to his power meter and were supplied with electricity from the respondent’s premises which lead to low voltage and poor quality of supply of electricity.

5. This complaint was dismissed by the Energy Regulatory Commission on 5<sup>th</sup> March, 2009, and the respondent appealed to the Energy Tribunal. Similarly, the appeal was dismissed on 20<sup>th</sup> November, 2009, and the respondent had thirty days to file an appeal to the High Court by 20<sup>th</sup> December, 2009. The respondent did not appeal within the stipulated period and he applied for leave to appeal out of time. That application was granted. According to Mr Fraser the **Energy Act** provides the procedure on how an appeal should be filed. He further faulted the decision of the learned judge because it went against the well established principles on extension of time and secondly, the **Energy Act** clearly provides the procedure of appeal. The learned judge misconstrued **the Energy Act** especially by the suggestion in that ruling that the Act contravened the **Civil Procedure Rules**.

6. The other issue that was argued before us by Mr Fraser was that the draft memorandum of appeal that the respondent exhibited did not disclose bona fide or arguable grounds of appeal on merit. There

was unreasonable delay of three months and the reason advanced for the delay that the respondent was not able to secure a signed copy of the judgment was not plausible because it is not necessary to have a signed copy of judgment to facilitate the filing of a memorandum of appeal. Mr Fraser urged us to allow the appeal and set aside the order of 2<sup>nd</sup> July, 2010.

7. On the part of the respondent; Mr **Boniface Njiru**, his learned counsel, relied on his written submissions which he also highlighted. In his view, this appeal is a veiled attempt to strike out an appeal without addressing its merits. According to Mr Njiru, the learned Judge correctly noted the glaring absurdities contained in some of the provisions of the **Energy Act**; he submitted that while interpreting an Act of Parliament, the court has a duty to give a purposeful meaning to its contents. Moreover, what was before the Judge was an application for extension of time. The Act does not make provisions as to whether or not time to appeal cannot be extended. Mr Njiru urged us to be guided by the provisions of **Article 169 of the Constitution** which gives the Tribunal the same hierarchy as the subordinate court, thus any tribunal is of the same status as a subordinate court. The Energy Tribunal is *ad hoc* and its decisions are appealable to the High Court.

8. In further arguments to support the above grounds, Mr Njiru cited the case of **DANIEL OLOO ONYANGO VS R, CA NO. 152 OF 1986**, especially the passage that referred to the holding by Lord Green MR in the case of **ASSOCIATED PROVINCIAL PRINTING HOUSE LTD. VS WEDNESDAY CORPORATION [1948] 2KB page 228:**

*“It is true discretion must be exercised reasonably now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often used the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general discretion of things that must call his own attention to the matters which he is bent to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.”*

9. We have considered this matter and to a large extent we agree with the submissions by Mr Fraser regarding the remarks made by the learned trial Judge on the provisions of the **Energy Act**. We have noted that perhaps the learned Judge went too far in condemning the **Energy Act**, however there is a thin line on whether the Judge was only persuaded by his own strong views of the **Energy Act** or the overriding objective to allow the respondent pursue substantive justice by pursuing the appeal and thereby overlooking the delay of three months. Our concern also is that the respondent has already filed an appeal before the High Court which is pending determination and we are of the view that having the appeal heard its merits notwithstanding will serve the larger interests of justice.

10. According to Mr Fraser there was an inordinate delay of three months which was not explained and furthermore the judge failed to consider whether there was no appeal on merit. He cited the case of **JONSON VS SAMWIRI [1972] EA page 318** and also the case of **NJAGI VS MUNYIRI, [1975] EA page 179**. Musoke, J.A. while dealing with a similar issue of extension of time posited that:

*“Under Rule 4 of the Rules, this court can extend the time for lodging a notice of appeal, if “sufficient reason” is shown. The question now is whether the grounds which have been advanced in support of the application show “sufficient reason” for the exercise of the court’s discretion.”*

11. The reasons advanced by the respondent was that it took time to obtain a signed copy of the judgment, and the learned judge accepted that as the cause for the respondent’s inability or failure to file the appeal within the stipulated time. We have also considered this matter within the context of the provisions of **Section 3A and 3B of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya** (there are similar provisions under the Civil Procedure Rules) as they deal with discretionary powers that is exercised to achieve the overriding objective of furthering substantive justice in civil litigation which provides:

*“3 (A) (1) The overriding objective of this Act and the rules made thereunder is to*

*facilitate just, expeditious, proportionate and affordable resolution of appeals governed by this Act.*

*(2) The court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1) ...*

*4 3 (B) (1) For the purpose of furthering the overriding objective specified in **Section 3A**, the court shall handle all matters presented before it for the purpose of attaining the following aims:*

*(a) The just determination of the procedures; and*

*(b) The efficient use of the available judicial and administrative resources.”*

**12.** Being mindful of the aforesaid overriding objectives and the fact that granting of leave was a discretionary exercise of the judges inherent power, we are of the view that it will be in the greater interest of justice to have the appeal that has already been filed determined on merit. For this reason, it will not be appropriate for us to look into whether there is an appeal on merit. That will be for the trial court; even the learned Judge did not address the merit of the appeal as to do so would naturally prejudice the appeal.

For the aforesaid reasons, we dismiss the appeal. Due to the nature of this case, we order that each party shall bear its own costs.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of May, 2012.**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR