



**Kenya Power & Lighting Company Ltd v Baya (Miscellaneous Application  
E137 of 2023) [2025] KEHC 410 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 410 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E137 OF 2023  
M THANDE, J  
JANUARY 24, 2025**

**BETWEEN**

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

**AND**

**JIMMY SHOMI BAYA ..... RESPONDENT**

**RULING**

1. By an Application dated 9.11.23, the Applicant seeks the following orders:
  1. Spent.
  2. That the Honourable Court be pleased to grant the Applicant leave to appeal out of time against the judgment of the Honourable SRM HON ONALO J. K. delivered on 18<sup>th</sup> AUGUST, 2023 in Malindi- Chief Magistrate's Court Case No. 294 of 2019 Jimmy Shomi Bayavs Kenya Power & Lighting Ltd.
  3. Spent.
  4. Spent.
  5. Any such further order(s) which this Honourable Court deems just and expedient in the circumstances be issued.
  6. That costs of this Application be provided.
2. The Applicant's case is that the judgment arises as a result of a fire that occurred within the Respondent's premises on 28.11.14. Judgment in the suit in the court below was delivered on 18.8.23. However, CIC General Insurance Limited which has insured the Applicant only instructed its advocates on 9.11.23 to lodge an appeal against quantum. By that time the time to lodge the appeal had long lapsed. The Applicant contends that the proposed memorandum of appeal raises strong grounds



and that the delay is excusable and not inordinate. The Applicant added that the given that security will be offered, the Respondent will not suffer any prejudice if the orders are granted.

3. Amongst the prayers sought in the Application are stay of execution of the judgment and decree of the lower court. On 16.11.23, the Court allowed the prayer for stay on condition that the entire decretal time would be deposited in Court by 8.12.23. In default the stay so granted would lapse.
4. The Application is opposed by the Respondent vide grounds of opposition dated 26.4.24. The grounds are that the Application was never served and that the Applicant has on several occasions attended court without notice to the Respondent. Further that the Applicant failed to comply with the orders of 17.11.23 and has abused the court process.
5. In a replying affidavit sworn on 15.5.24, the Respondent contended that the Applicant failed to deposit the decretal amount within the time stipulated by the Court. He added that the Applicant's advocates appeared before Court without informing his advocates. Further that the Applicant's advocates misled the Court that the parties wanted to record a settlement by depositing the decretal amount in a joint advocate of the Advocates, which the Court declined. He asserted that the decretal amount was only deposited when auctioneers proclaimed the Applicant's items. Further that when directions were given for the filing of submissions, the Applicant's advocates mischievously sent a consent to his advocates. The Respondent urged that the Application be dismissed for want of merit.
6. Parties filed their written submissions which I have duly considered together with the authorities cited.
7. For the Applicant, it was submitted that the delay in lodging the appeal was not inordinate. Further that the same was inadvertent and attributable to the delay in the insurance company instruction advocates to do so. Further that their files were misplaced during the end of years status reports and as a result the Applicant was unable to issue instructions.
8. The Respondent submitted that the Applicant was not deserving of the prayer for stay of execution having failed to deposit the decretal amount within the time stipulated by the Court. Further that the conditional orders for stay ceased to exist on account of the default and in the absence of an application for an extension. Additionally, that failure to comply with the said orders, there can be no competent appeal for consideration by the Court.
9. The issue of delay in deposit of decretal amount in Court was dealt with by the Court on 8.4.24. The Court noted that the decretal amount had been deposited though late, and in the wider interests of justice directed parties to file and serve their written submissions. Stay of execution having been granted, the only issue for determination by the Court is the prayer for leave to file appeal out of time.
10. The Court notes that the Respondent has also submitted on his application dated 3.4.24. With respect, no directions were given in respect of this application. The ruling is confined to the Application dated 9.11.23.
11. The statutory period for filing an appeal in this Court from a subordinate Court is 30 days. This is stipulated in Section 79G of the [Civil Procedure Act](#) which provides:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.



12. The proviso to Section 79G of the Act allows a party who gets caught up and is unable to file an appeal within the stipulated period, to seek extension of time. Such party must however satisfy the Court that there is good and sufficient reason for not filing the appeal on time.
13. An order for extension of the time to file an appeal is discretionary. It is an equitable remedy and not a right of a party. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court listed the following as the under-lying principles that a Court should consider in exercise of its discretion in an application for extension of time:
  1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
14. The impugned decision was made on 18.8.23. By dint of Section 79G of the *Civil Procedure Act*, the appeal ought to have been filed by 18.9.23. The Application was filed on 15.11.23 a delay of just under 2 months.
15. Applying the principles set out in the *Nicholas Kiptoo Arap Korir Salat* case (supra), the Court finds that while there was some delay in filing the Application and draft memorandum of appeal, the same is not inordinate.
16. As regards, the lost files, this issue has only been raised in submissions. It is well settled that submissions are not evidence. In *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, the Court of Appeal held:
 

Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.
17. Duly guided, the Applicant's claim that the delay in filing the appeal was occasioned by the loss of their files during preparations of end year status reports is rejected.
18. On the reason that the delay was occasioned by the Applicant's advocates being instructed late to file an appeal, the Court can do no better than cite *Apaloo, JA.* in the case of *Philip Keipto Chemwolo &*



another v Augustine Kubende [1986] eKLR who when considering a delay in filing of a memorandum of appearance stated:

But counsel seems to think the defendants are deserving of punishment and must be shut out for their negligence.

I think a distinguished equity judge has said:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs.

19. I have considered that delays do occur especially where insurance companies are the instructing clients on behalf of parties, as in the case herein. I have also considered that it has not been demonstrated to the Court that any prejudice will be suffered by the Respondent if leave sought to file the appeal out of time is granted. Further, the Applicant has deposited the decretal amount in Court. In light of the foregoing, I am persuaded that the broad equity approach requires that the Applicant be allowed to have its appeal heard and determined on its merits.
20. Having said that, I am also mindful of the fact that the decision in question was delivered on 18.8.23 and the Applicant has had more than ample time to obtain the proceedings. It is therefore imperative that the matter is disposed of expeditiously.
21. Accordingly, the Application dated 9.11.23 is allowed on the following terms:
  - a. Leave is hereby granted to the Applicant to file appeal out of time on terms that the memorandum and record of appeal shall be filed by 7.2.25. In default, the leave so granted shall automatically lapse.
  - b. The Respondent shall have costs.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 24<sup>TH</sup> DAY OF JANUARY 2025.**

**M. THANDE**

**JUDGE**

