



REPUBLIC OF KENYA



Kenya Power & Lighting Co. Limited v Mwahunga (Civil Appeal E004 of 2024) [2025] KEHC 5022 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E004 OF 2024**

**M THANDE, J
APRIL 25, 2025**

BETWEEN

KENYA POWER & LIGHTING CO. LIMITED APPELLANT

AND

HAMISI TSUMA MWAHUNGA RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 6.2.24 filed by the Respondent/Applicant seeking orders that:
 1. The Hon. Court be pleased to issue an order striking out the Appellant's Memorandum of Appeal filed on 26th January, 2024.
 2. The Hon. Court be pleased to issue an order that execution of the decree issued in the Chief Magistrate Court Case No. 216 of 2018 do proceed.
 3. The Hon. Court do grant any other further relief it deems fit.
2. The grounds upon which the Application is premised are that the Respondent/Applicant's stated that case is that the parties compromised the Appellant's application for leave to file appeal out of time by a consent order of 26.10.23. The terms of the consent are inter alia that the Appellant was to deposit the decretal sum of Kshs. 3,601,155/= in the joint account of the parties' respective advocates within 45 days; file the memorandum of appeal upon the filing of the consent and the record of appeal within 30 days of receiving the certified copies of proceedings and judgment from the lower court registry. The Respondent/Applicant contends that the Appellant has not complied with the consent order in that it has failed to deposit the decretal sum and to file the memorandum of appeal as per the consent order.
3. The Appellant opposed the Application by vide a replying affidavit sworn by its counsel, Peter Omwenga on 9.4.24. It was averred that on 24.10.23, its advocates sent a memorandum of appeal



through the Court's email malindicourt@gmail.com which was never assessed for reasons that the Court had not yet endorsed the consent. Eventually the memorandum of appeal was filed on the 26.1.24. It was further averred that all along parties were liaising to open a joint interest earning account with ABSA Bank which was eventually opened on 19.2.24 and the money deposited on 21.2.24. Further that efforts to get typed proceedings from court have been futile despite several reminders hence the delay in filing the record of Appeal. The Appellant thus asserts that the delay in prosecuting the appeal is not deliberate but occasioned by the long time it has taken to obtain proceedings. Further that the appeal has an overwhelming chance of success and ought to be heard on its merit rather than dismissing it on a technicality.

4. In a rejoinder vide a supplementary affidavit sworn on 24.4.24, the Respondent/Applicant stated that the joint account was opened on 25.11.23 but that the decretal amount was not deposited until the Appellant was served with a proclamation notice. He further contended that the Appellant is not entitled to any equitable remedy as it has all along misled the court and that the replying affidavit is improperly before the Court.
5. Parties filed their written submissions which I have duly considered.
6. The Respondent/Applicant's contention is that there has been non-compliance with the consent order on the part of the Appellant and that the memorandum of appeal should be struck out. Further that execution of the decree issued in the Chief Magistrate Court Case No. 216 of 2018 should be allowed to proceed.
7. The Appellant submitted that there was no timeline set for the filing of the memorandum of appeal and asserted that the same was to be filed after the filing of the consent. Further that it requested assessment of the memorandum of appeal on 24.10.23 a day after the consent was filed and did a reminder on 27.10.23. The Appellant submitted that due to factors beyond its control, the memorandum was filed on 26.1.24.
8. The consent order which was adopted as an order of the court on 26.10.23 indicated that the memorandum of appeal was to be filed upon filing of the consent. Order 4 of the consent order states as follows:

That the memorandum of appeal to be filed upon the filing of this consent.

9. The Appellant has said that it sent a memorandum of appeal through the Court's email malindicourt@gmail.com on 24.10.23, the day the consent was filed. This is indicative of the fact that the Appellant was aware that the memorandum of appeal was to be filed upon filing of the consent. The Court has seen the email dated 24.10.23 requesting assessment of the memorandum of appeal. However, payment of filing fees was done on 25.1.24 and the memorandum of appeal filed on 26.1.24. No explanation has been given as to why the memorandum of appeal was filed 3 months after the date it was due to be filed and no effort to have the same filed within time has been demonstrated.
10. I now turn to the record of appeal which was to be filed 30 days after receiving the typed proceedings. This is yet to be done to date. The Appellant has stated that efforts to get typed proceedings from court have been futile despite several reminders hence the delay in filing the record of appeal. In a bid to demonstrate its efforts to obtain the typed proceedings, the Appellant has exhibited only one letter dated 13.2.24 to the executive officer of the court, requesting typed proceedings. It is not lost on the Court that this was written after the present Application was filed. Additionally, there is no evidence of the reminders that the Appellant speaks of.



11. On the deposit of the decretal amount in the advocates' joint account, this was to be done within 45 days of the consent order of 26.10.23. The deposit was thus to be done by 11.12.23. The Appellant has however told the Court that deposit was made on 21.2.24. The Court notes that this was more than 2 months after the deposit was to be made. No explanation has been given for the delay.
12. It is trite law that a consent order and an order made in the presence and consent of counsel is binding on parties. Such order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or generally for a reason which would enable the court to set aside an agreement. (see *Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd* [1980] eKLR and *Hirani v Kassam* (1952) 19 EACA 131). In the present case, the consent order in question has not been varied or discharged nor is there sufficient cause to set the same aside.
13. The Appellant seeks that the Court exercises its discretion by not striking out its memorandum of appeal as sought by the Respondent/Applicant.
14. In any matter where the jurisdiction of the Court to exercise its discretionary powers is invoked, the conduct of a party is key. In *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others* [2014] eKLR, Gikonyo, J. stated and I concur:

We should not only look at the delay of six months since the direction of 8th November, 2012, we should look also at the entire conduct of the Plaintiff; it is negligent and tainted with a don't-care attitude towards court orders. This is not unfair indictment of the Plaintiff; it is simply an atonement of serious disobedience of court orders which no serious court of law should countenance.

15. The circumstances herein are that the Appellant seeks to appeal against an order made on 16.6.23. The Appellant did not file an appeal within the stipulated period and filed an application for leave to appeal out of time. It is this application that gave rise to the consent order. Parties agreed that the Appellant files the appeal out of time but on terms. The Appellant has failed to comply with the terms of the consent. Its conduct is demonstrative of a party that has disregarded or treated the consent order casually.
16. Court orders are compulsive, peremptory and expressly binding and are to be complied with by all regardless of status. This was stated by the Court of Appeal in *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR. The Court went on to prescribe how courts must deal with parties who disobey court orders or decide the manner of compliance as follows:

When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.

17. The Appellant clearly chose not to comply with the consent order and now seeks to negotiate the manner of compliance. After considering the conduct of the Appellant, the Court finds that it would be a travesty of justice to exercise its discretion in favour of such a litigant.



18. In the end, I do allow the Application and make the following orders:

- i. The memorandum of appeal filed on 26.1.24 is hereby struck out.
- ii. Execution of the decree issued in the Chief Magistrate Court Case No. 216 of 2018 may proceed.
- iii. The Respondent/Applicant have costs.

DATED SIGNED AND DELIVERED THIS 25TH DAY OF APRIL 2025

M. THANDE

JUDGE

