



Kenya Power & Lighting Co. Limited v Mwahunga (Miscellaneous Application E139 of 2024) [2025] KEHC 5038 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E139 OF 2024**

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

BETWEEN

KENYA POWER & LIGHTING CO. LIMITED APPLICANT

AND

HAMISI TSUMA MWAHUNGA RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion erroneously dated 26.8.23 filed by the Applicant seeking orders that:
 1. Spent.
 2. That the Honorable Court be pleased to stay further proceedings in the respondent's Notice of Motion dated 06th February, 2024 pending the hearing and determination of this application.
 3. That the Honorable Court be pleased to enlarge the time within which the applicant was to offer security to 21st February, 2024.
 4. That this Honorable Court be pleased to issue an order staying execution against the Judgment and decree of Hon E.K USUI delivered on the 16TH June, 2023 in Malindi Chief Magistrates Court Case No 216 of 2018 Hamisi Tsuma Mwahunga v Kenya Power Lighting Co; Ltd and all consequential orders and/or proceedings be stayed pending inter-parties hearing and determination of this Application.
5. That this Honorable Court issues a stay of execution against the Judgment and decree of Hon E. K. USUI delivered on the 16th June, 2023 In Malindi -chief Magistrates Court Case Number 216 of 2018 Hamisi Tsuma Mwahunga v S Kenya Power Lighting Co; Ltd and all consequential orders and/or proceedings be stayed pending hearing and determination of the Intended Appeal



6. Any such further order(s) which this Honorable Court deems just and expedient in the circumstances be issued.
7. That costs of this Application be provided.
2. The grounds upon which the Application is premised are that judgment was delivered via email on the 16.6.23 and the applicant was accordingly advised. By the time CIC General Insurance Limited, the Applicant's insurers instructed the advocates to lodge an appeal against liability and quantum, the time within which an appeal ought to have been filed had already lapsed. The Applicant filed application dated 6.8.23 seeking for leave to appeal out of time, which was compromised by the consent order filed on 23.10.23. The terms were that the applicant was to deposit the sum of Kshs 3,601,155/- within 45 days from 23.10.23 in account number XXXXXXXXXXXX held at ABSA Bank Kenya between Messrs Michira Messah Company Advocates and Mogaka Omwenga Mabeya Advocates. The deposit was made 21.2.24, which remains in the said account despite being deposited outside the time stipulated in the consent order.
3. The Application seeks to stay the hearing of the Respondent's application dated 6.2.24, seeking to have the appeal struck out upon the ground that the security for the appeal had not been given. It is the Applicant's case that if the orders sought are not granted, the present Application will be rendered nugatory and the Applicant will suffer great legal prejudice and remain shut out from the seat of justice. The Applicant urged that in the circumstances, it is fair for the Court to exercise its unfettered discretion and enlarge the time for depositing the security to 21.2.24. Further that the Respondent herein shall not suffer any prejudice if the orders sought herein granted.
4. The Respondent opposed the Application vide a replying affidavit sworn on 4.9.24 and a notice of preliminary objection dated 13.9.24. The Respondent averred that there is no justification or reasonable ground for the application dated 6.2.24 to be stayed. It was averred that the Applicant fully participated in the said application by filing a replying affidavit and was allowed to file a further replying affidavit which has not been filed. The said application is slated for a mention on 15.10.24 for confirmation of filing off submissions.
5. The Respondent further averred that the Applicant has not explained why it misled the Court in its replying affidavit that the bank account was opened on 25.11.23 yet the same was opened on 19.4.24. Further that the Application before the Court seeks to review of the consent order through the back door. It was asserted that a consent order can only be altered by the Court if the same was fraudulently made or by consent of the parties and none of the said cardinal grounds exist. Additionally, the Applicant being CIC General Insurance Co. Ltd is not a party to the Appeal as the Appellant is Kenya Power & Lighting Co. Ltd. Further, that the Application ought to have been filed in HCCA No E004 of 2024 but not in HCCCMISC/E139/2024 as the same is closed file which led to the filing of the appeal. It is the Respondent's contention that the Applicant has not demonstrated why it failed to comply with a consent order and that the Application is intended to deny him the lawful enjoyment of the fruits of his judgment.
6. In objections raised in the preliminary objection are that the application as filed violates provision of section 81(1)(a) of the *Appellate Jurisdiction Act*; the memorandum of appeal was filed out of time against the consent order; the intended appeal has already been rendered nugatory for failure to comply with the consent order; the consent order recorded by the parties herein has never been set aside by the parties or by the Court.
7. 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.

8. In his application the stay of which is sought, the Respondent sought that the Applicant's memorandum of appeal filed in Civil Appeal No E004 of 2024 be struck out for failure to comply with the consent order.
9. The Court notes that the deposit of the decretal amount in the advocates' joint account, which was to be done within 45 days of the consent order of 26.10.23 i.e. by 11.12.23, was not done until 21.2.24. No explanation has been given for the 2 months' delay. Further, the memorandum of appeal which was to be filed on 23.10.23 was filed on 26.1.24. Again, 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. 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.
11. The Appellant seeks that the Court exercises its discretion by staying the Respondent's application seeking the striking out its memorandum of appeal filed out of time. It also seeks stay of execution of the Judgment and decree of Hon E. K. USUI delivered on the 16.6.23 in Malindi Chief Magistrates Court Case Number 216 of 2018 Hamisi Tsuma Mwachungu v Kenya Power Lighting Co. Ltd. The Applicant further seeks enlargement of time within which it was to offer security to 21.2.24.
12. 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.
13. The circumstances herein are that by consent of parties, the Applicant was allowed to file appeal out of time on terms. Even after being indulged by the Respondent, the Applicant failed to comply with the terms upon which leave to appeal out of time was granted. This is a party that has despised the grace extended to it by the Respondent and disobeyed a court order and now seeks to negotiate the manner of compliance with the same. The Applicant by its conduct is undeserving of the exercise of the Court's discretion in its favour.
14. Accordingly, the Application herein being devoid of merit is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED THIS 25TH DAY of APRIL 2025

M. THANDE

JUDGE

