



Kenya Power and Lighting Company PLC v Mt Kenya Abattoirs (Civil Appeal E013 of 2021) [2025] KEHC 7530 (KLR) (28 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E013 OF 2021
AK NDUNG’U, J
MAY 28, 2025**

BETWEEN

KENYA POWER AND LIGHTING COMPANY PLC APPELLANT

AND

MT KENYA ABATTOIRS RESPONDENT

RULING

1. The Application before court is dated 13/06/2024. It is premised on Article 50, 159(2)(d) of *the Constitution* of Kenya, Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 12 Rule 7 and seeks orders that;
 - i. Spent
 - ii. This honourable court be pleased to review, vary, and/or set aside the orders made on 13/05/2024 dismissing the memorandum of appeal dated 23/08/2021 together with all other consequential orders.
 - iii. The Honourable court be pleased to reinstate the Appellant’s/Applicant’s appeal.
 - iv. The Honourable court do stay the proceedings in Nanyuki CMCC No.91 of 2020, Mt. Kenya Abattoirs vs Kenya Power and Lighting Company PLC pending hearing and determination of the appeal.
 - v. The annexed record of appeal be deemed duly filed and served upon payment of requisite fees.
 - vi. Costs be provided for.
2. The application is based on the grounds on the face thereof and is supported by an affidavit of Anne Munene, the Appellant’s advocate. She deposed that the Appellant filed a memorandum of appeal dated 23/08/2021 seeking to appeal a ruling by the lower court dated 06/08/2021 but on



23/02/2024, the Respondent filed an application seeking for dismissal of the appeal which was allowed on 13/05/2024. That the Appellant issued the Advocates with instructions on the eve of hearing of the application for dismissal of the appeal and the delay in issuing the instructions was due to lengthy internal policies and procedures governing issuance of instructions to external counsels.

3. It is deposed that the appeal is arguable and raises triable issues as it is challenging the ruling on a preliminary objection raised on jurisdiction of the lower court to handle the matter and the appeal will be rendered nugatory if the proceedings in the lower court is not stayed. That the Appellant moved this court without undue delay and counsel is now properly seized of instructions to prosecute the appeal. Further, the Respondent will not be prejudiced by reinstatement of the appeal as they will have an opportunity to respond thereto.
4. The application is opposed and in a replying affidavit dated 16/08/2024 sworn by Julius Wachira Wang'ombe, the Respondent's director, deponed that the application has been overtaken by events on account that the lower court matter proceeded for hearing on 04/07/2024 where one witness testified in court. That the application for dismissal of the appeal was served upon the Appellant's advocate and on the hearing of the said application, there was no representation by the Appellant's advocate. That he has been advised that the Appellant have not demonstrated sufficient cause for failure to attend court on the said date hence there is no inadvertence, excusable mistake or error upon which this court can exercise its jurisdiction. That the instant application is a delaying tactic meant to frustrates his operations and that the maxim of justice delayed is justice denied applies in this case since the Appellant filed the appeal 3 years ago, in the year 2021 and have never taken steps to prosecute the same.
5. The application was canvassed by way of written submissions. The Appellant's counsel maintained that the delay in prosecuting the appeal was due to lengthy process and internal polices occasioned by the Appellant in issuing its instructions to its counsels. That the Respondent has not demonstrated the prejudice it stands to suffer if the appeal is reinstated and will not be prejudiced if the appeal is heard on merit since the hearing of the substantive suit is still pending in the lower court. She maintained that the appeal raises vital arguable point of law on the lower court jurisdiction to handle the matter and placed reliance on the case of Director General National Intelligence Service & Another v Vincent Konga Chelimo (2019) eKLR where court affirmed that a single arguable issue is a sufficient ground to satisfy the limb on whether the appeal is arguable.
6. In rejoinder, the Respondent's counsel maintained that the application has been overtaken by events as the lower court matter proceeded for hearing on 04/07/2024 where one witness, Respondent's director, testified and the matter was scheduled for further hearing on 30/01/2025. Further, the Appellant has been indolent in prosecuting the appeal which was filed on 24/08/2021 and the same has never been before court which shows that its goal is to frustrate the Respondent. He submitted that judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercise as was held in Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR and in Orion East Africa v Mugama Farmers' Co-Operative Union Limited & another (2015) eKLR where the court held that the discretion of the court was not intended to assist an indolent party who has sought to delay the course of justice.
7. It is submitted that the delay was inordinate and inexcusable and the Appellant's conduct is an abuse of this court and reinstating the appeal will prejudice the Respondent. That the reasons given by the Appellant's counsel is illogical, tenuous and not a legal basis for reinstatement of the appeal. The Appellant has been indolent since the filing of the appeal hence this court should frown upon granting the orders sought. She submitted that the Respondent stands to suffer irreparable loss that cannot be compensated by an award of damages since the suit emanates from a contractual obligation which is yet to be fulfilled.



8. I have considered the application, the response, the rival submissions, the applicable law and the case law cited. The issue for determination is whether the applicant has laid a proper basis for the exercise of discretion in its favour for the setting aside of the dismissal order and the reinstatement of the Appeal.
9. A decision on whether or not to reinstate a suit is discretionary. The Court of Appeal in *Tabuche v Tinga & 2 others* (Civil Appeal E003 of 2022) [2024] KECA 551 (KLR) (24 May 2024) stated that;

“Reinstatement of a suit dismissed for want of prosecution is a discretionary remedy and not as of right. In any event, each case depends on its own circumstances.”
10. In *Kenya Pipeline Co. Ltd v Maguta Production Ltd* [2014] eKLR, the court held that;

“... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”
11. And in *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, the court stated thus;

“A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.”
12. Has the Appellant sufficiently explained whether its application is merited? The explanation given by the Appellant’s counsel for failure to prosecute the appeal is that the delay was due to lengthy process and internal policies occasioned by the Appellant in issuing its instructions to its counsel. Counsel further stated that they received instructions on the eve of hearing of the application dated 23/02/2024 by the Respondent seeking to dismiss the appeal. Apparently, no correspondences have been attached to show that indeed the instructions were issued on the said date.
13. The delay in prosecuting the appeal is more than three years since the memorandum of appeal was filed on 24/08/2021. No explanation was adduced by the Appellant as to the steps, if any, it took to prosecute the appeal within the said period. The explanation that there was a lengthy procedure in issuing instructions to counsel is in my view untenable. It is the business of a litigant to ensure that instructions are given on time and the pace of court proceedings cannot be based on the intricacies of procedures in entities. Opening such a window would be a sure recipe for delayed justice. It flies on the face of Article 50, 159(2)(d) of *the Constitution* of Kenya and Section 1A, 1B, 3A of the *Civil Procedure Act*, ironically on which this application is premised.
14. The delay in the prosecution of the appeal is inordinate. Despite that, the Applicant was not even at hand to defend the application for dismissal for want of prosecution. The applicant’s situation is irredeemable and the application is one for failure.
15. With the result that the application lacks merit and is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY ,2025.

A.K. NDUNG’U

JUDGE

