



**Exclusive Estates Limited v Telkom Kenya Limited & another;  
Afraco Limited (Interested Party) (Civil Suit 1158 of 2001)  
[2022] KEHC 295 (KLR) (Commercial and Tax) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 295 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 1158 OF 2001**

**A MSHILA, J  
APRIL 21, 2022**

**BETWEEN**

**EXCLUSIVE ESTATES LIMITED ..... PLAINTIFF**

**AND**

**TELKOM KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**POSTAL HOUSING CO-OPERATIVE SOCIETY LTD ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**AFTRACO LIMITED ..... INTERESTED PARTY**

**RULING**

**Background**

1. A Notice of Motion dated 9<sup>th</sup> November 2021 was filed by the Applicant under Sections IA, 1B, 3A and Section 95 of the *Civil Procedure Act*, Order 43 Rules (2) & (3), Order 50 Rule 5 of the Civil Procedure Rules and Section 7 of the *Appellate Jurisdiction Act*. The Application was supported by the grounds on the face of it and the sworn Affidavit of Francis Mburu who sought for orders that;
  - a. The Plaintiff be granted leave to appeal from the Ruling of the Hon. Lady Justice Ngenye dated 22<sup>nd</sup> April 2021.
  - b. The Notice of Appeal dated 28<sup>th</sup> April 2021 be deemed as filed in time.
  - c. The time for filing the appeal to the Court of Appeal be extended by 30 days from the date of the Ruling.



2. The Plaintiff was ready to file the appeal within 30 days of leave being granted by the court as the proceedings and certified order are ready and the Notice of Appeal was filed within 14 days of the decision.
3. Extreme prejudice will be suffered by the Plaintiff and the 2<sup>nd</sup> Defendant who have waited for more than 26 years since the suit was filed and determined by way of arbitration only for the same to be set aside. Justice delayed is justice denied.
4. The suit property has been compulsorily acquired by the government and the intended appeal will determine who can claim compensation from the government.
5. The intended appeal raises issues of public importance to determine if a court can use extraneous circumstances outside agreed issues and pleadings to sustain setting aside an arbitral award.
6. The Interested Party opposed the Application and filed Grounds of Opposition dated 23<sup>rd</sup> November 2021 and stated that the Plaintiff/Applicant does not explain/justify the basis as to why the Court should grant it leave. Moreover, the Application for leave is made almost 8 months after the Court delivered its Ruling on 22<sup>nd</sup> April 2021 and no reasonable explanation has been offered by the Plaintiff/Applicant herein.
7. The 1<sup>st</sup> Respondent filed a Replying Affidavit dated 9<sup>th</sup> November 2021.
8. The parties were directed to canvass the application by filing and exchanging written submissions and to highlight the same. Hereunder are the parties rival submissions;

#### **Applicant's Case**

9. It was the Applicant's case that the delay in obtaining leave to appeal was on the erroneous assumption that leave to appeal was automatic as the award had it been adopted would have been equivalent to a final decree of the court. It was a genuine mistake by counsel to assume that leave to appeal was automatic. The Applicant relied on the case of *Savings & Loan Kenya Ltd versus Onyancha Bwomote [2014] eKLR* where the Court of Appeal exonerated a counsel who made a genuine mistake and reinstated the appeal.
10. The intended appeal raises arguable grounds and the Respondents have not controverted the substantial facts set out in the Supporting Affidavit. The Applicant argued that in *Euro Bank Limited (in liquidation) versus Shab Munge & Partners Ltd [2012] eKLR* the court allowed the application for leave to appeal under Order 43(2) of the CPR as the proposed appeal raised fundamental issues.

#### **Respondents' Case**

11. The Plaintiff had the option of applying for leave to appeal either orally at the time the decision was made or within fourteen (14) days of the decision. The Plaintiff did neither.
12. Although the Plaintiff filed a Notice of Appeal dated 28<sup>th</sup> April 2021 it did not file the application for leave to appeal until 9<sup>th</sup> November 2021, a period of over six (6) months.
13. The delay in filing this Application is inordinate and no reasonable and justifiable explanation has been granted to warrant the extension sought.
14. The Plaintiff ought not to be rewarded for its indolence in failing to file the present application on time. Had the same been filed on time, the extension of time to file the appeal would not be necessary as the timelines allowed by the law would have been sufficient to file the Plaintiff's appeal.



15. No prejudice will be occasioned to the Plaintiff and no failure of justice will result if leave to appeal and extension of time is denied. On the contrary, the Plaintiff will have a chance to ventilate its issues before the trial Court as the matter is set for a fresh hearing.
16. The 1<sup>st</sup> Defendant will be gravely prejudiced as the orders will hinder the expeditious determination and disposal of Civil Suit No. 1158 of 2001, which has been hanging over the 1<sup>st</sup> Defendant head for over 20 years over a transaction which occurred over 28 years ago. It is desirable that the fresh hearing of the suit commences to allow for a conclusive determination of the issues therein on merit forthwith.

### **Interested Party's Case**

17. The Interested Party submitted that the Plaintiff/Applicant does not explain/justify the basis as to why this Honorable Court should grant it leave in light of the principles enunciated by the Supreme Court in the following cases: *Synergy Industrial Credit Limited v Cape Holdings Limited, Petition No. 2 of 2017*; *Nyutu Agrovet Limited v Airtel Networks Kenya Limited & another, Petition No. 12 of 2016*; and *Geo Chem Middle East v Kenya Bureau of Standards, Petition No. 47 of 2019*.
18. The Application for leave is made almost 8 months after the Court delivered its Ruling on 22<sup>nd</sup> April 2021 and no reasonable explanation has been offered by the Plaintiff/Applicant herein. The Plaintiff/Applicant is pursuing the most frivolous and vexatious cause of action well aware of the fact that it has no legal claim at all.
19. The Plaintiff/Applicant failed to establish exceptional circumstances to show that the Court arrived at an unfair and unjust decision when it set aside the arbitral award in its entirety vide its Ruling delivered on 22<sup>nd</sup> April 2021. The Plaintiff/Applicant also failed to identify any circumstances that would warrant the Court to exercise its discretion to consider whether leave to appeal should be granted or not.
20. The Application is wholly defective, incompetent, not hinged on any provision of the law, an abuse of the court process and ought to be struck out in limine.

### **Issues For Determination**

21. After considering the Application, response and the written submissions of the respective parties; the following issues are for determination;
  - a. Whether the instant application was brought without undue delay; and whether the explanation given is satisfactory;

### **Analysis**

#### **Whether the instant application was brought without undue delay; and whether the explanation given is satisfactory;**

22. The Applicant's request to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal within time. The Supreme Court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu vs County Government of Kisumu & others [2017] eKLR* while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 [2014] eKLR* the Hon. Judges reiterated the considerations to be made in such a case to be as follows:
  - a) 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;



- b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - e) Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - f) Whether the application has been brought without undue delay; and
  - g) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
23. The impugned ruling was delivered on 22<sup>nd</sup> April 2021 while the present Application is dated 9<sup>th</sup> November 2021. The Application has been filed over seven months after the ruling was delivered. This without a doubt amounts to inordinate delay.
24. The Court of Appeal in *Union Insurance Co. of Kenya Ltd vs Ramzan Abdul Dhanji Civil Application No.179 of 1998* held:
- “The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it”.
25. The Applicant explained that the reason for delay was that when the Ruling was delivered, the advocate mistakenly assumed that leave to appeal was automatic. That in the course of preparing the record of appeal the advocate found out that leave to appeal was required hence the present application. It is the Court’s view that this does not amount to sufficient cause to warrant the extension of time. Further, the explanation given by the Applicant is unsatisfactory in explaining the reason for delay.
26. Further, the Applicant argued that the suit property has been compulsorily acquired by the government and the intended appeal will determine who can claim compensation from the government. Thus, the intended appeal raises issues of public importance to determine if a court can use extraneous circumstances outside agreed issues and pleadings to sustain setting aside an arbitral award.
27. On whether the Respondents will suffer any prejudice if the extension is granted; the 1<sup>st</sup> Defendant stated that it will be gravely prejudiced as the orders will hinder the expeditious determination and disposal of this suit which has been hanging over the 1<sup>st</sup> Defendant’s head for over 20 years over a transaction which occurred over 28 years ago.
28. It goes without saying that this is an old suit which has taken over 20 years and the Respondent will be indeed prejudiced as justice ought to be administered without undue delay.
29. In light of the above, the court does not find the reason given for the delay to be satisfactory and the application for the enlargement/extension of time to file the Notice of Appeal out of time is hereby disallowed.

### **Findings and Determination**



30. In the light of the foregoing this court makes the following findings and determinations;

- (i) This court finds the reason given for the inordinate delay to be unsatisfactory
- (ii) This court finds the application to be devoid of merit and it is hereby disallowed.
- (iii) The applicant shall bear the costs of the application.

Orders Accordingly

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF APRIL, 2022.**

**HON. A. MSHILA**

**JUDGE**

In the presence of;

Allen Gichuhi for the Applicant

Allen Gichuhi holding brief for Mr. Anzala for the 2<sup>nd</sup> Respondent

Miss Musyoka for the 1<sup>st</sup> Respondent

Kere for Arbitrator

Hanan holding brief for Kemboi for the Interested Party

Lucy -----Court Assistant

