REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 467 OF 2013(OS)

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND CIVIL PROCEDURE RULES, (2010), CAP 21 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ARBITRATIN ACT, NO. 4 OF 1995 AND THE ARBITRATION (AMENDMENT) ACT NO. 11 OF 2009 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ARBITRAL AWARD

BETWEEN

JOSEPH ONDIEK TUMBO ……..….. APPLICANTVERSUS

SONY SUGAR CO. LTD…….. RESPONDENT

R U L I N G

By an originating summons dated 7th August 2013 filed in court on 8th November 2013 brought under the provisions of Section 1A and 3A of the Civil Procedure Act, Section 29 (b) (11) of the Arbitration (amendment) Act No. 11 of 2009. Section 4 (1) (c) and 34 (1) of the Limitation of Actions Act and *"any other enabling laws,"* the applicant Joseph Ondiek Tumbo seeks from this court against Sony Sugar Company Ltd orders that:

a. The applicant be granted leave to file an appeal against the decision of the Sugar Arbitration Tribunal out of time. The decision from which an appeal is sought was made on 7th February 2007 under the Arbitration act.

The applicant claims that the said decision which was based on an alleged consent in tribunal Case No. 00001 of 2005 was made without his consent.

He further avers that he sought to set aside the alleged consent judgment of the Sugar Arbitration Tribunal

but on 5th February 2009, the Tribunal dismissed the application for review/setting aside of the consent judgment on the ground that it was *functus officio*.

In his supporting affidavit sworn on 7th August 2013, the applicant further deposes that he approached the respondents with a hope of reaching an out of court settlement in vain and that he had a different understanding of the consent which gave rise to the judgment hence he wishes it to be set aside on appeal. He attached copy of ruling delivered on 5th February 2009.

At the hearing of this application, Mrs Omollo argued the application on behalf of the applicant, there was no representation on the part of the respondent. She reiterated the contents of the application and the applicant's supporting affidavit and urged the court to grant leave to appeal out of time as it was in the interest of justice to grant leave.

I have carefully perused and considered the applicant's application for leave to file an appeal against the Sugar Arbitration Tribunal's ruling dated 5th February 2009 rejecting the applicant's application seeking to set aside/review consent judgment wherein he was paid Sh. 230,000/=, two hundred and thirty thousand by the respondent, which sum was "all inclusive". The proceedings before the Sugar Arbitration Tribunal were not attached to this application. The ruling referred to above only refers to the parties as parties. It does not mention whether the said parties were represented by advocates.

The issue for this court's determination is whether the application herein satisfies the conditions for granting leave to appeal out of time.

It should be noted that this application was filed in court on 8th November 2013, 4½ years after the ruling sought to be challenged was delivered on 5th February 2009. In deciding whether or not to grant the orders sought herein, I am fortified by the decisions in various decisions. In **Leo Sila Mutiso – Vs – Rose Hellen Wangari Mwangi, CA NRB 255/1997 UR** that:

> ***"it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary, it is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are***
>
> 1. ***The length of the delay; the reason for the delay, the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted."***

The court further went ahead to find that the grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule or thumb, but in a principled manner in accordance with reason and justice.

> ***"The exercise of the discretion is a matter of weighty and balancing all the relevant factors which appear from material before the appeal tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses."***

(See **United Arab Emirates – Abdelghafar & Others 1995 IRLR 243** in **Costellour – Vs – Somerset CC 959**), **Sir Thomas Birgham MR** pointed out that

> ***"The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met.***
>
> ***The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate ... The approach is different, however, if***

the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. The leave may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings."

"Further, an extension of time is an indulgence from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default."

The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat – Vs – Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR** citing with approval the decision of the Supreme Court of Judicature Court of Appeal Civil Division in **Sayers – Vs – Clarke Walker (a firm) [2002] EWCA UR 645** derived the following as the underlying principles that a court should consider in the exercise of such discretion, upon agreeing that indeed, the discretion to extend time to appeal is unfettered and that it is upon the applicant to explain the reasons for delay in making the application for extension of time and whether there may be any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. The principles laid down by the Supreme Court of Kenya are:-

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.

The period provided for appeal from the decision of the Sugar Arbitration Tribunal to the High Court is 30 days. The applicant herein chose not to exercise his right of appeal and instead applied for review, setting aside of the consent judgment entered between the parties and adopted by the Tribunal on 7th February 2007. His application for review of the said consent judgment was dated 28th April 2008, one year and two months from the date of the consent judgment. The ground upon which he sought review was that the consent judgment was obtained through undue influence and duress.

The tribunal after consideration of his application on merit, dismissed it on 5th February 2009. The tribunal in dismissing his application observed that the applicant was seeking to re-open the case for determination afresh by raising issue with the words *"all inclusive."*

They also dismissed his allegation that he was coerced into signing the consent yet on the other hand he stated that he was only receiving the Sh. 230,000/- as part payment as far as he was concerned. It further noted that both parties were present at the time of recording the consent judgment and that at the time of considering the application for review, the applicant was called upon to refund the Sh. 230,000/- before the respondent could concede to an application for review but he refused, contending that he expected an unconditional setting aside.

With utmost respect to the applicant, having spent all the monies subject to the consent judgment, he appears to be making attempts to have a second bite at the cherry by having his cake and eating it!

The applicant has not demonstrated to this court why there has been a delay of over 4½ years since the ruling was delivered against him and no application lodged. In my view, a deposition that he had approached the respondent to attempt to solve this matter out of court is no ground to explain the inordinate delay. The orders being sought being discretionary in nature, I decline to grant him the extension of time on account of inordinate, unexplained and inexcusable delay in bringing this application which I find an afterthought. Even if I was wrong in the exercise of my judicial discretion, I would still decline to grant the orders sought for reasons that prima facie, the applicant has not demonstrated in his application or affidavit that he has an arguable appeal.

The applicant seeks leave to file an appeal to challenge an order refusing to set aside consent judgment entered by the tribunal on account that he understood the consent *"all inclusive"* differently and that there was therefore duress or coercion. No particulars of duress were provided and neither has he demonstrated that indeed there was any duress by the respondent. As I have stated, the allegation of duress or coercion one year after the judgment in question and after he had utilized all the money paid to him is an afterthought. In my view, the attempts by the applicant to re-open the case, without showing sufficient reasons and to the satisfaction of the court, is prejudicial to the respondents whose legitimate expectation is that litigation must come to an end.

Furthermore, delay defeats equity which aids the vigilant and not the indolent.

For the applicant to cause the consent judgment to be set aside, he ought to have demonstrated that the consent was obtained by fraud or collusion or by an agreement contrary to the policy of the court or tribunal or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for reason which would enable the court to set aside an agreement. The application for review did not disclose any facts for setting aside a consent judgment as was considered in the case of **Brookebond Liebig (T) Ltd – Vs – Maliya (1975) EA 266**.

I note that pursuant to the said consent judgment of an *"all inclusive"* figure of Sh. 280,000/=, the applicant was paid the said sums of money and after he exhausted it is when he woke up a year later seeking to set the consent aside. A consent judgment has a contractual effect upon the parties. It is my view that the conduct of receiving money pursuant to the consent judgment operates as an estoppel against the applicant and prevents him from challenging the terms of the consent.

This issue of setting aside consent judgment was considered in the case of **Samwel Wambugu Mwangi – Vs – Othaya Boys High School [2014] eKLR** by the Court of Appeal delivered on 18th June 2014 vide **Nyeri CA No. 6 & 7 of 2014** that the appellant on the material before the court, was unable to prove fraud and therefore he was stopped from denying the terms of the consent judgment, having received money due and owing as per the consent filed.

Accordingly, for reasons that the applicant's application was filed 4½ years after the ruling and he has failed to satisfactorily explain to the court reasons for such inordinate delay, and as such delay is inexcusable, and prejudicial to the respondent, and that as the applicant's appeal is not arguable but an afterthought, I decline to grant him the prayers sought.

The applicant sought refuge in Sections 1A and 3A of the Civil Procedure Act to urge this court to apply the overriding objectives. However, his conduct is not consistent with pro-activeness. The policy of the court and any court of law for that matter, is and should be to exercise latitude in its interpretation of the rules so as to facilitate determination of the disputes and facilitate access to justice by ensuring that deserving litigants are not shut out. The overriding objective does not, however, facilitate the granting of orders where the applicant has not shown to the satisfaction of the court that the delay is not inordinate or has been explained to the satisfaction of the court. See **City Chemist (Nrb) & Another – Vs – Oriental Bank Ltd CC Appl 302/2008 UR** cited in **CA 98/2013 Aviation Cargo Support Ltd – Vs - St Mark Freight Services**. In the instant application, the applicant is guilty of inordinate delay and has failed to

explain it to the satisfaction of the court.

Consequently, I am unable to exercise my discretion in favour of the applicant and as his application lacks merit.

I therefore dismiss his originating summons dated 7th August 2013. I make no orders as to costs.

Dated, signed and delivered at Nairobi this 10th day of December, 2014

R.E. ABURILI

JUDGE