



REPUBLIC OF KENYA



Kilimanjaro Oil Company Limited v Rubis Energy Kenya PLC (Miscellaneous Application E568 of 2024) [2025] KEHC 6763 (KLR) (Commercial and Tax) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E568 OF 2024**

PM MULWA, J

MAY 22, 2025

BETWEEN

KILIMANJARO OIL COMPANY LIMITED APPLICANT

AND

RUBIS ENERGY KENYA PLC RESPONDENT

RULING

1. The Applicant has approached this Court by way of a Notice of Motion dated 10th July 2024 brought under Section 3(2), 3(4) and 39 of the *Arbitration Act*, 1995, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The Applicant seeks leave to file an appeal out of time against the final arbitral award rendered by Mr. Njoroge Regeru, sole Arbitrator, on 30th November 2023 and released to the parties on 18th April 2024. It is proposed that upon grant of the orders, the Memorandum and Record of Appeal shall be filed within fourteen (14) days. The application is supported by the affidavits of Issa Abdallah Chundo, sworn on 10th July 2024, and further affidavit sworn on 30th November 2024.
2. The grounds relied upon are stated on the face of the application and expounded upon in the Applicant's submissions. It is the Applicant's case that he engaged new counsel to take up the matter post-award, and that counsel needed time to peruse the record, apply for proceedings, and prepare the intended appeal. The period for filing an appeal lapsed before these steps could be concluded. The Applicant further contends that the intended appeal raises arguable points of law and fact and that no prejudice will be occasioned to the Respondent.
3. The application is opposed. The Respondent filed a replying affidavit sworn on 30th July 2024 by John Githiomi. The Respondent contends that Section 39 of the *Arbitration Act* does not provide for enlargement of time within which to file an appeal, and that this Court is thereby divested of



jurisdiction to entertain the application. The Respondent further asserts that the application is a tactical manoeuvre designed to delay the enforcement of the award and allow interest to accrue. He contends that the intended appeal does not raise any bona fide question of law, but merely seeks to invite the Court to re-evaluate factual findings made by the Arbitrator, contrary to the strictures of arbitration law and jurisprudence limiting judicial intervention in arbitral matters.

4. The application was canvassed by way of written submissions. I have considered the application, affidavits in support and in opposition, annexures and rival submissions by counsel. In my view, the issues arising for determination are two-fold:

- i. Whether this Court has jurisdiction under Section 39 of the Arbitration Act to entertain the intended appeal;
- ii. Whether the Applicant has made out a case for extension of time.

5. Section 39(1) of the Arbitration Act, No. 4 of 1995, provides:

“Where in the case of a domestic arbitration, the parties have agreed that—

- a. An application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
- b. An appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

6. Section 39(2) further empowers the High Court, on such application or appeal, to determine the question of law and confirm, vary, or set aside the award or remit the matter to the arbitral tribunal.

7. From the above, it is evident that the jurisdiction of this Court to entertain an appeal under Section 39 is not automatic. It is conditional upon the parties having agreed, either in the arbitration agreement or subsequently during the proceedings, to reserve the right of appeal on questions of law. In the absence of such an agreement, no appeal lies.

8. The Court of Appeal in *Okeno & Sons Building Contractors v Bukura Agricultural College* (2018) eKLR aptly held:

“It is clear from Section 39 of the Act that an appeal to the High Court is allowed on questions of law arising from the award and only if the parties have agreed that such an appeal could be made.”

9. In the instant application, the record confirms that in the Arbitral Tribunal’s Order for Directions No. 9 dated 12th January 2023, the parties expressly reserved the right to appeal to the High Court on questions of law arising from the final award. Accordingly, I am satisfied that the application before the Court is properly anchored under Section 39(1)(b) of the Act, and that this Court is seized of jurisdiction to entertain the same.

10. Having so found, the next issue is whether the Applicant has demonstrated sufficient cause to warrant an extension of time. The law is settled that an order extending time is an equitable remedy granted at the discretion of the Court. In *Mwangi v Kenya Airways Ltd* [2003] KLR 486, the court of appeal laid down the factors to be considered in such applications as follows:

- i. the length of the delay;



- ii. the reason for the delay;
 - iii. the chances of the appeal succeeding if the application is granted; and
 - iv. the degree of prejudice to the Respondent if the application is granted.
11. In the instant case, the arbitral award was released to the parties on 18th April 2024. The Applicant filed the instant application on 10th July 2024. The delay therefore spans a period of approximately 83 days. While not inordinate in absolute terms, it is still significant and calls for a satisfactory explanation.
 12. The Applicant attributes the delay to the instruction of new counsel and the need for familiarization with the record. However, no supporting evidence has been tendered to demonstrate any steps taken during the intervening period, such as correspondence, applications for proceedings, or attempts to seek extension before expiry of the statutory timeline. The explanation remains general and unsubstantiated.
 13. Further, as held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Court must act fairly and balance competing interests when considering such discretionary relief. An indolent litigant cannot be rewarded where delay is unexplained and no sufficient cause is shown.
 14. As regards the merits of the intended appeal, I have perused the court file and the CTS record. There is no draft Memorandum of Appeal annexed to the application. While the Applicant maintains that the intended appeal raises arguable issues, this assertion is not supported by any documentary material. In the absence of a draft Memorandum, the Court is unable to meaningfully assess the nature and substance of the alleged legal questions.
 15. On the issue of prejudice, the Respondent asserts that the application is a dilatory tactic calculated to delay the satisfaction of the award and allow interest to accrue. While these concerns are not without merit, they have not been demonstrated with specificity. In any event, such prejudice may be mitigated through appropriate directions on costs and interest. The right to appeal, where expressly preserved by statute, ought not to be unduly curtailed on speculative assertions.
 16. In the result, I am not satisfied that the Applicant has demonstrated sufficient cause to warrant the extension of time sought. The delay of approximately eighty-three (83) days has not been satisfactorily explained, and there is no draft Memorandum of Appeal on record to enable the Court to assess the arguability of the intended appeal. While the Court is properly vested with jurisdiction under Section 39(1)(b) of the *Arbitration Act*, the equitable remedy of extension of time is discretionary and must be grounded in credible and persuasive justification, which is lacking in this case.
 17. Accordingly, the Notice of Motion dated 10th July 2024 is hereby dismissed with costs to the Respondent.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Wanja h/b for Mr. Issa for Applicant

Mr. Nyangweso h/b for Mr. Muthui for Respondent



Court Assistant: Carlos

