



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISCELLENOUS E1091 OF 2020

KULWANT DHARIWAL.....APPELLANT/APPLICANT

VERSUS

MADISON INSURANCE CO. (K) LIMITED....RESPONDENT

BEING AN APPEAL FROM THE AWARD DELIVERED BY MR. WAMBUA KILONZO, SOLE ARBITRATOR ON 25TH JUNE, 2020

IN THE MATTER OF AN ARBITRATION

AND

IN THE MATTER OF ARBITRATION ACT, 1995

BETWEEN

KULWANT DHARIWAL.....APPLICANT

VERSUS

MADISON INSURANCE CO. (K) LIMITED1ST RESPONDENT

RULING

1. The Appellant who is the present Applicant filed a Notice of Motion dated 9th September, 2020 brought under Section 39 of the Arbitration Act, 1995, Section IA, 3, 3A, 63 (e) of the Civil Procedure Act, and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

a. The main prayers sought in the application are:

b. THAT the Appellant/Applicant be granted leave to file and serve his Memorandum of Appeal out of time.

c. THAT as a consequence of grant of Order (1) above, the Memorandum of Appeal dated 9th September, 2020 be admitted out of time.

d. THAT this Honourable Court be pleased to make such further or other orders as it may deem fit and just to grant.

e. THAT the costs of this application be in the cause.

2. The application is based on the following grounds:

a. Vide the award dated 25th June, 2020 the arbitrator declined to award the Applicant herein interest for the sum of Kshs.

2,258,152/.

b. The Applicant herein was aggrieved by part of the decision of the arbitrator and consequently referred the matter back to the arbitrator for an additional award under Section 34(4) of the Arbitration Act, No. 4 of 1995.

c. Vide a letter dated 28th July, 2020, the arbitrator declined to award the Appellant the prayers sought.

d. The Appellant seeks to appeal part of the decision of Mr. Wambua Kilonzo, sole arbitrator that declined to award interest to the sum of Kshs. 2, 258,152/= sought by the Appellant.

e. Due to inadvertence, the file was filed away and subsequently the Memorandum of Appeal was not filed within the time frame required by law.

f. The time to file the Memorandum of Appeal has run out by 12 days.

g. The delay is regretted and is not so inordinate or so great to be inexcusable.

h. The Respondent will not suffer any prejudice if the orders sought are granted.

i. It is in the interest of justice that this application be allowed.

3. The application is further supported by the Affidavit of **Karen Muthee**, an advocate practicing in the law firm of LLP which is on record for the Applicant sworn on 9th September, 2020.

4. The Supporting Affidavit basically reiterates the grounds on which the application is premised, save to add that a Memorandum of Appeal was filed in court on 9th September, 2020 reflecting a delay of 12 days which was purely caused by the inadvertence on the part of the counsel for the Applicant, which mistake ought not to be visited upon the Appellant.

5. It is urged that the Applicant has a good chance of success in the Appeal and if the orders are not granted, the appeal is likely to be rendered nugatory.

6. In opposing the application, a Replying Affidavit was filed, the same sworn by one **Obara Nicolas Andrew**, advocate having the conduct of the matter on behalf of the Respondent on 2nd November, 2020.

7. It is deposed that the application is intended to foreshadow the intended appeal which implies that the court is being called upon to sieve the evidence adduced under the application and find merit in the appeal before the same is heard.

8. The Respondent puts a case that the Applicant has no chances of success in the appeal on the following grounds:

a. The intended appeal being based on Section 39 of the Arbitration Act, 1995 it is imperative to bring before to the attention of this Honourable court that the parties to arbitration did not at any single time agree to have matters arising as in Section 39 before the court.

b. In addition to the same, in as much as the appellant may hope so, there is no question of law brought forth in the intended appeal.

c. To allow an appeal contrary to the provisions as stated would be a direct affront to the sanctity of arbitration because as said, parties did not agree to the same, neither is there a question of law arising to be heard in appeal.

d. Parties to the arbitration agreed to be bound by the final award and knowing this full well, the appellant applied to the tribunal to have the same rectified and/or have an additional award put in place and was informed that the tribunal was functus officio, rightly so.

e. The appellant is now before this court with unclean hands and the same should not be entertained.

f. Section 32 A of the said Arbitration Act puts forth that an award is final and binding and no recourse lies from the same unless the same is varied or set aside in its entirety based on the provisions of Section 35.

g. This position is buttressed by Section 10 of the Arbitration Act that states that there shall be no Court's intervention unless parties agree to the same, of which there is no agreement of such nature.

h. Section 32 C (*the Act does not a section 35C*) of the Act brings us to the bone of contention which is interest awardable. (emphasis by the court).

i. As is trite law, the same is not mandatory, but rather award of the same is based on discretion of the tribunal.

9. It is averred that the grounds advanced as to why the appeal was filed out of time is inexcusable because only closed files are filed away.

This implies that the Applicant had no intention of filing an appeal. That again, there is no legal provision for what is sought in the appeal in that it is prayed that the award be varied, set aside wholly or remitted to the arbitral tribunal for reconsideration.

10. Furthermore, the award on interest is in the discretion of the Arbitrator who declined to award the same.

11. The Respondent states that the court should not be placed in the position that it is in now where the appeal is an exercise in futility and an academic exercise as in the present application.

12. It is thus prayed that the application be dismissed with costs.

Submissions

13. The application was canvassed by way of written submissions. The first date given for the delivery of the Ruling was 28th April, 2021 but the court was not able to deliver due to a tight schedule. Earlier, the matter was mentioned on 13th April, 2021 to confirm that parties had filed their submissions. Miss Njeri who was on record for the Applicant only informed the court that counsel for the Applicant had received the Respondent's Replying Affidavit but made no mention of submissions filed on behalf of the Applicant. The Ruling was deferred to 4th May, 2021.

14. The court has severally viewed the e-system portal and confirmed that the Applicant did not file submissions. Only counsel for the Respondent filed submissions dated 22nd April, 2021. The same in principle are intended to demonstrate that the intended appeal has no chances of success, a principle the court is not necessarily mandated at this level to consider before granting leave to appeal out of time. I thus underscore that submissions are intended to emphasize either the law or pleadings of a party but do not, *per se*, determine the final outcome of a decision.

15. On the part of the Respondent, it is submitted that the intended appeal seeks to have the court invoke powers which are not envisaged by the law. As to the finality of the Arbitral Award, it is submitted that Section 32A of the Arbitration Act puts in place that the effect of an arbitral award is that it shall be final and binding and no recourse is available against it, save in as provided for in Section 35 of the Act.

16. That on the other hand, Section 35 allows for recourse to the High Court against Arbitral Awards. However, only where proof is furnished that a party to the proceedings was under some incapacity, the arbitration agreement is invalid, a party was not notified of the appointment of arbitrator, or was not accorded an opportunity to present their case; the award dealt with an issue not contemplated by or not falling within the terms of reference to arbitration; the composition of the tribunal was not in accordance with agreement of the parties; or if the making of the award was induced or affected by fraud, bribery, undue influence or corruption.

17. In the view therefore, the Respondent submits that the Applicant has not advanced any of the above grounds in the draft Memorandum of Appeal to warrant a ruling in his favour.

18. The Respondent further submits that the Applicant has invoked Section 39 of the Arbitration Act. That the Section provides that where parties agree for an application to be made to court to determine any question of law arising in the course of an arbitration, or arising out of the award, then the same may be made to court. That furthermore, the law provides that this shall be made in the time prescribed, which hinges on the substance of this appeal.

19. On this, it is the Respondent's submission that, arbitration exists out of the will and agreement of the parties, and Section 39, rightly so prescribes that recourse to High Court on a matter of question of law shall only be permitted on express agreement of the parties. That in the present case, there exists no such agreement between the parties and as such attempt through this limb will fail.

20. It is also argued on a without prejudice basis to the foregoing that, there exists no question of law to be determined by a High Court. That a question of law is defined as an issue that the law itself has authoritatively answered and as such the court may not answer it as a matter of discretion.

21. The Respondent also argues that the alleged question of law which the Appellant purports to bring to the High Court is the issue of interest which is addressed by the Arbitration Act. It is submitted that Section 32C (*albeit not in the Act*) of the Act provides that an Arbitral Award may include provision for the payment of interest. That this makes it clear that the award of interest is discretionary and to ask the court to examine the reason why the same was not issued is to subject the parties to an additional litigation process where the monetary claim has already been settled by the Respondent.

22. The Respondent in summary thus submits that the above issues have been settled by the law and as such no Court can deviate from the bindings of statute. The Respondent likens the Applicant to a party who wants to have his cake and eat it at the same time. That in any case, the question of interests accruing from medical insurance policies are mainly exhibited in contractual agreements, more so where a creditor is notified beforehand.

23. The Respondent accordingly urges that the application be dismissed.

Analysis and Determination

24. I have accordingly considered the application and its annexures, the Reply to the Application and the submissions by the Respondent upon which I have deduced that the only issue arising for determination is whether the court should grant leave to the Applicant to file and serve his Memorandum of Appeal out of time and/or whether the Memorandum of appeal dated 9th September, 2020 should be admitted out

of time.

25. Under this head, the Applicant has invoked Section 63 of the Civil Procedure Act which provides that;

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed-

(e) make such other interlocutory orders as may appear to the court to be just and convenient.”

27. The substratum of the entire Section 63 of the Act deals with Supplemental Proceedings which in effect means that it does not provide for dealing with filing of Memorandum of Appeal out of time. The same case applies to Section 1A,3 and 3A of the Act which essentially deal with the invocation of the objectives of the Act as well as the inherent powers of the Court.

28. Section 36 of the Arbitration Act, 1995 has also been invoked. The same provides for the recognition and enforcement of Arbitral Awards. This is not a prayer sought in this application and would not apply in the circumstances of the application which in principle is intended to preserve the substratum of the appeal.

29. A Tribunal is a quasi-judicial court and is therefore considered to be subordinate to the High Court. If therefore, any appeal lies from a Tribunal and a party seeks an extension of time to file a Memorandum of Appeal, the proper provision to invoke is Section 79G of the Civil Procedure Act. The same provides that:

“” Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the decree and order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filling the appeal in time.”

30. The section does not provide for parameters to be considered as sufficient to allow the filing of the Memorandum of Appeal on time. It is therefore left to the discretion of the court to determine what in its view is sufficient cause to warrant the filling of the appeal out of time. In my view therefore, an Applicant seeking the relief must show good cause why the relief should issue. In so finding, I am minded by the provisions of Order 50 Rule 6 of the Civil Procedure Rules which states:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

31. The Supreme Court further set out the guiding principles for the exercise of such discretion in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** as follows:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- 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."**

32. In the present case, the Applicant has advanced the reason that, by inadvertence on the part of his counsel, the file was filed away causing a delay of filing the appeal by twelve (12) days. A scrutiny of the chronology preceding the filing of the appeal demonstrates that the Applicant, since the delivery of the Award was not indolent. The Award was delivered on 25th June, 2020. On 24th June, 2020, the Applicant's counsel wrote to the Arbitrator, Mr. Wambua Kilonzo requesting that he makes a further award on the issue of interest on grounds enunciated in the letter.

33. By a letter dated 28th July, 2020 Mr. Wambua Kilonzo, sole Arbitrator declined the request stating that he had considered the issue of interest in the main award which he rejected and that at that point he was *functus officio* in the proceedings.

34. The instant application was subsequently filed alongside a draft copy of a Memorandum of Appeal on 9th September, 2020 whilst an appeal ought to have been filed on or about 28th August, 2020.

35. What this court ought to consider is whether the delay was inexcusable and whether there lies any prejudice to be occasioned to the Respondent if the application is allowed.

36. As regards the first ground, the fact that the file was filed away can be considered as an oversight. This in short is “***an unintentional failure to notice or do something.***” It is an act that can fall prey to anyone and happens so often that it cannot be defined by any other words than that “an oversight is an oversight”. This implies that it would be so punitive and unwarranted to punish a party for an act arising out of an oversight.

37. I find that the reason advanced by the Applicant for the failure to file the appeal out of time is excusable. It was not intentional. Furthermore, a delay of 12 days was also not inordinate to warrant a denial to ventilate the appeal. It ought to be forgiven.

38. As regards prejudice likely to be occasioned to the Respondent, the same is hinged on two facets; first is as regards the success of the appeal. This is an issue that the Respondent concentrated on in its submissions and the Replying Affidavit. The relevant law was indeed cited to buttress this assertion. However, it is not a factor to be considered at this point for doing so is likely to pre-empt the appeal. In any case, a look at the draft Memorandum of Appeal does not reflect that the appeal, on the face of it as so frivolous. The Appellant ought to be given an opportunity to front his case to which the Respondent will have an opportunity to respond to, anyway.

39. Two, is the cardinal principle that no party should be shut out from the doors of justice unless in extreme circumstances, however weak its case is. The circumstances of this case is that there is no order staying the execution of the Award and the appeal is intended to make provision for further orders. As such, it can only be in the interests of justice that the Appellant be allowed to ventilate his complaints in the appeal.

40. In the premises, I allow the Notice of Motion dated 9th September, 2020 on the following terms;

a. The Appellant is granted leave to file A Memorandum of Appeal out of time.

b. The Memorandum of Appeal should be filed and served within seven days from the date of this Ruling.

c. Costs of the application to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH MAY, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

No attendance by counsel for the parties.