



Northern Water Works Development Agency (Formerly Known as Northern Water Service Board) v AA Bayusuf & Sons Limited (Civil Application E446 of 2025) [2025] KECA 1580 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KECA 1580 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E446 OF 2025
DK MUSINGA, JA
OCTOBER 3, 2025**

BETWEEN

NORTHERN WATER WORKS DEVELOPMENT AGENCY (FORMERLY KNOWN AS NORTHERN WATER SERVICE BOARD) APPLICANT

AND

AA BAYUSUF & SONS LIMITED RESPONDENT

(Being an application for extension of time to file and serve an application for leave to appeal against the Ruling of the High Court of Kenya at Nairobi (Mong'are, J.) delivered on 16th June 2025 in Misc. Civil Application No. E080 of 2024 As consolidated with Misc. Civil Application Nos. E098 & E1100 of 2024)

RULING

1. The applicant's notice of motion dated 23rd July 2025 seeks stay of execution of the ruling and order delivered on 16th June 2025 by the High Court in HCCOMMARB Miscellaneous Applications Nos. E080, E098 and E1100 of 2024 consolidated; and enlargement of time for the applicant to file and serve its application for leave to appeal from the said ruling. The prayer for stay of execution of the said ruling can only be heard by a full bench of this Court, and therefore, this ruling is in respect of the prayer for extension of time only.
2. The application is supported by an affidavit sworn by Andrew Rage Eysimkele, the Chief Executive Officer of the applicant. He states that the respondent initiated arbitration proceedings against the applicant on a dispute arising from a contract for rehabilitation and augmentation of the existing sewerage system that was awarded to the respondent by the applicant. On 30th September 2024 the sole arbitrator, Dr. S. M. Kasanga, made and published the arbitral award, ordering the applicant to pay the respondent Kshs.72,307,927.41 within 60 days and also bear the costs of the arbitration proceedings.



3. The applicant, being dissatisfied with the arbitral award, filed an application before the High Court, Misc. Application No. E080 of 2024, seeking to set aside the arbitral award on grounds that it was against public policy and that the arbitral procedure adopted in the arbitration was not in accordance with the agreement of the parties.
4. On the other hand, the respondent filed two applications before the High Court. In Misc. Application No. E098 of 2024, the respondent sought recognition of the arbitral award as binding and adopted as a judgment of the court; and vide Misc. Application No. E1100 of 2024, the respondent sought to have a part of the arbitral award set aside to the extent that it dismissed the respondent's two injunction applications involving substantial amounts of money.
5. In a ruling delivered on 16th June 2025, the High Court (Mongare, J.) dismissed the applicant's application and allowed the respondent's applications, with the effect that the arbitral award was recognised and adopted as a judgment of the court, and the award in so far as the rejection of the two injunction applications was set aside, and the court referred that part of the dispute to a different arbitrator.
6. The applicant, being dissatisfied with that ruling, intends to appeal against it and filed a notice of appeal dated 25th June 2025 and applied for certified copies of the proceedings and the court order. The proceedings and the order had not been supplied at the time of filing this application. The applicant alleged that at the material time the Judiciary e-filing system was experiencing technical downtime, preventing any online filing of pleadings.
7. The applicant, in an attempt to comply with the requirements of rule 41 of this Court's Rules, now seeks leave to appeal against the decision of the High Court. The applicant states that the delay has been occasioned by failure to obtain certified copies of the ruling and order of the High Court and the downtime experienced by the Judiciary e-filing system. The applicant further states that the delay has also been occasioned by the rigorous and bureaucratic internal approvals required before an appeal can be lodged.
8. The applicant believes that the intended appeal has high chances of success and the respondent shall not suffer any prejudice if the orders sought are granted.
9. The application is opposed. In his replying affidavit, Abdulkarim A. Bayusuf, the managing director of the respondent, challenges the explanations for the delay as advanced by the applicant. Regarding the e-filing downtime, the respondent states that although the Judiciary acknowledged the same via a letter dated 14th July 2025, that date falls after the 30th June 2025 deadline for filing the application for leave to appeal, therefore the e-filing downtime cannot reasonably explain the initial failure to file the application for leave. Further, the Judiciary advised parties on alternative emails of filing urgent and time-bound documents during the downtime.
10. In any event, the respondent continued, the applicant promptly filed a notice of appeal on 25th June 2025, which demonstrated that the applicant was capable of accessing the e-filing system. There was therefore no reason for not filing an application for leave within the stipulated period of time.
11. As regards alleged administrative delays in obtaining certified copies of the ruling and order, the respondent states that the said documents were not necessary for filing an application for leave under rules 41 and 45 of this Court's rules.
12. The respondent contends that the intended appeal does not have good chances of success and there are no compelling reasons to warrant grant of leave as sought.



13. I have considered the application, the affidavits and submissions filed by both parties. Under rule 4 of this Court’s Rules, the Court is empowered to extend time for doing any act authorized or required by the Rules. However, the exercise of that discretion has to be done judiciously. In so doing, the Court has to consider several factors, among them, the length of the delay; the reason for the delay; whether the intended appeal is arguable; the degree of prejudice to the respondent if the application is granted; whether the applicant acted with diligence; and whether there is a public interest element in the matter. (See *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR).
14. It is not in dispute that the impugned ruling was delivered on 16th June 2025. The notice of appeal was filed on 25th June 2025, which was within the 14 days’ statutory period. Rule 41 (1)(a) of this Court’s Rules requires that where an appeal lies with leave of the superior court, an application for such leave may be made within 14 days of such decision, and where an appeal lies with the leave of this Court, an application for such leave has to be made within 14 days after the decision against which it is desired to appeal, or where the application for leave to appeal has been made to the trial and refused, within 14 days after such refusal.
15. The applicant’s explanations for delay are: the Judiciary’s e- filing downtime, administrative delays in obtaining certified copies of the ruling and order from the High Court and bureaucratic approvals on its part. However, as rightly pointed out by the respondent, the Judiciary’s notice of downtime of its e-filing system was issued on 14th July 2025, long after the statutory deadline of 30th June 2025. If the applicant was able to file a notice of appeal on 25th June 2025, that demonstrates that the e-filing system was accessible at the time and the alleged down-time could not have been a sufficient reason for the delay in seeking leave to appeal.
16. As regards the delay in obtaining certified copies of the proceedings and the ruling, the same were not necessary. Rule 45(3) of this Court’s Rules states that:

“ An application for leave to appeal shall, where practicable, be accompanied—

 - a. by a copy of the decision, including the reasons therefor (if any) against which leave to appeal is sought.”
17. Further Rule 45(4) further stipulates that:

“Where the documents referred to in subrule (3) have not been filed together with the application, the applicant shall file and serve the documents at least twenty-four hours before the application is heard.”
18. It was therefore not necessary for the applicant’s advocate to apply for and obtain certified copies of the ruling and order before filing an application for leave to appeal from the impugned decision. Only a copy of the ruling was required, and it was available on the Judiciary’s portal. In view of the foregoing, I find and hold that the delay in filing the application for leave has not been sufficiently explained.
19. Apart from the unexplained delay in filing the application for leave to appeal, it is also doubtful whether the application for leave meets the threshold set by the Supreme Court in, *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, where the Court held:

“...an appeal should be allowed to proceed to the Court of Appeal only in exceptional circumstances where the High Court has stepped outside the grounds set out in section 35



of the Arbitration Act, or where a determination has been made that is so grave, so manifestly wrong, that it has led to a miscarriage of justice.”

20. The Court went on to state that:

“...such jurisdiction must be exercised sparingly, and only where it is shown that the High Court’s decision is so grave, so manifestly wrong, as to close the door of justice to either party.”

21. The applicant has not demonstrated such exceptional circumstances to warrant grant of leave, and neither has the applicant shown that the learned judge in setting aside part of the arbitral award travelled outside the provisions of section 35(2) and (3) of the Arbitration Act.

22. For these reasons, I find the application for leave unmerited and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

