



**Collaoration Engineering Solutions and Products Limited v China
Zhongxing Construction Company Limited & another (Civil Application
E584 of 2024) [2025] KECA 1328 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1328 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E584 OF 2024
JM NGUGI, JA
JULY 18, 2025**

BETWEEN

**COLLAORATION ENGINEERING SOLUTIONS AND PRODUCTS
LIMITED APPLICANT**

AND

**CHINA ZHONGXING CONSTRUCTION COMPANY LIMITED 1ST
RESPONDENT**

KENYA CONFERENCE OF CATHOLIC BISHOPS 2ND RESPONDENT

*(Being an Application for enlargement of time to file leave to file an appeal
against the Ruling and Order of the High Court of Kenya at Nairobi,
(Mugambi, J.) dated 7th June, 2024 in HCCOMMARB No. E011 of 2022)*

RULING

1. This Court has recently witnessed a troubling rise in what may aptly be described as “omnibus applications” — applications that improperly bundle together prayers which, under our procedural rules, ought to be heard by a single judge, with others that can only be entertained by a full bench. The motion before us, dated 29th October 2024, is a textbook example of this procedural misadventure. It seeks the following prayers:

1. That this Honourable Court be pleased to enlarge time for the Appellant/Applicant to file the instant application seeking leave to file an appeal to the Court of Appeal.
2. That leave be granted to the Appellant/Applicant to file an appeal against the ruling of the High Court (Hon. Lady Justice F. Mugambi) given at Nairobi on 22nd September 2023 in Nairobi HCCOMMARB no. E011 of 2022.



3. That the Costs of the application be provided for.
2. The first prayer, for leave to extend time within which the applicant can seek leave to appeal against the ruling of the High Court, is one which should be sought under Rule 4 of the Court of Appeal Rules; and be heard by a single judge. The second prayer, for leave to bring an appeal against the High Court ruling for its decision to set aside an arbitral award, is one which is brought under section 39(3) of the *Arbitration Act*; and must be heard by a full bench.
3. In any event, out of an overwhelming desire to decide the application on its merits, I will overlook this improper procedural amalgam and determine whether the applicant is deserving of enlargement of time to approach a full bench of the Court for leave to appeal against the High Court ruling. I am aware that other applicants who have attempted similar misadventures recently have suffered more drastic consequences. See, for example, *SBM Bank (Kenya) Limited v Afrasia Bank Limited* [2025] KECA 1046 (KLR)(Ruling delivered on 16th June, 2025 holding that “this is an omnibus application which is irredeemably defective....which is struck out with costs to the respondent.”
4. A brief procedural history of the case is imperative. It was the appellant who first approached the High Court vide an application dated 27th January, 2022 seeking the enforcement of an arbitral award. The respondents, in turn, filed applications dated 8th February, 2022 and 2nd March, 2022 respectively seeking to set aside the arbitral award.
5. The respondents prevailed in a ruling dated 22nd September, 2023, the High Court ((Dr.) F. Mugambi, J.) where the learned Judge set aside the arbitral award.
6. The applicant was aggrieved by the decision of the High Court. The applicant processed its dissatisfaction in two ways. First, it filed a Notice of Appeal against the High Court ruling on 26th September, 2024. Second, it filed an application, at the High Court, dated 6th October, 2023 seeking leave to appeal against the High Court ruling.
7. Both efforts were ill-fated. The Notice of Appeal, as it became readily obvious to the applicant – perhaps too late – was of no avail; for no right of appeal lies against a decision of the High Court setting aside an arbitral award sans leave. It would seem that the applicant abandoned that Notice of Appeal. Instead, it pursued the leave sought vide the application dated 6th October, 2023. That pursuit was halted by the High Court in a ruling dated 7th June, 2024 dismissing the application. The reason was the obvious one: the High Court had no jurisdiction to grant the leave sought and the learned Judge so held.
8. To drive home the point, the learned Judge cited section 39(3) and (4) of the *Arbitration Act*. It provides as follows:

“(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2) —

- a. if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or
- b. the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).



(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.

9. Again, the applicant responded in two ways. First, it filed another Notice of Appeal against that ruling denying leave. The Notice of Appeal is dated 12th June, 2024. Second, it brought the present application. As aforesaid, this application is dated 29th October, 2024 and it seeks, among other prayers, for extension of time to seek the leave of the Court of Appeal to challenge the original High Court ruling.
10. The application is supported by the affidavit of Christopher Ng'ang'a Githini dated 29th October, 2024. It is opposed through the replying affidavit of Aurephena Nasimiyu Wanjala, the legal secretary of the 2nd respondent which was deposed on 11th July, 2025.
11. The application was canvassed by way of written submissions. The applicant's submissions are dated 14th July, 2025 and are accompanied by a Case Digest of even date. The respondent's submissions are equally dated 14th July, 2025 and also accompanied by a Case Digest of even date.
12. It is Rule 4 of the Court of Appeal Rules which governs extension of time of the kind requested by the applicant. The Rule provides as follows:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

13. While this Rule does not list the factors the Court ought to consider in an application for extension of time, the courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. A case in point is *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which laid down the parameters as follows:

“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 in to account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

14. The applicant has sought to explain the delay by relying on the now famous decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Ltd* [2024] KECA 523 (KLR). It is worth citing the application verbatim on this:

Given the ration [on] (sic) *Nyutu Agrovet Limited v Airtel Networks Kenya Ltd* [2024] KECA 523 (KLR), an application for leave to appeal should be accompanied by the Record of Appeal for the Court to consider whether there is an appealable (sic) appeal when considering the application for leave to appeal.

In the circumstances, the applicant delayed in the filing (sic) instant application since it was waiting for copies of the certified proceedings, rulings and resultant orders in order to prepare the record of appeal which would accompany the instant application for leave.



The filing of the instant application for leave beyond the statutory timelines was not intentional but caused by circumstances beyond its control.

15. A reading of section 39(3) and (4) of the *Arbitration Act* and Rule 41 of the Court of Appeal Rules reveals that leave to appeal is to this Court not the High Court; and that such leave must be sought within fourteen days of the decision sought to be appealed against. Rule 41 is in the following terms:

41. Application for leave to appeal in civil matters

1. In a civil matter —

- a. where an appeal lies with the leave of the superior court, application for such leave may be made —
 - i. informally at the time when the decision against which it is desired to appeal is given; or
 - ii. by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;
- b. where an appeal lies with the leave of the Court, application for such leave shall be made —
 - i. in the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or
 - ii. where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal.

16. In short, the applicant should have filed an application for leave to appeal against the ruling of the High Court dated 22nd September, 2023 within fourteen (14) days of that ruling. Instead, after the procedural misadventures described above, it brought this application more than 13 months or 403 days later!

17. Does the excuse given by the applicant justify the deployment of discretion on its behalf? I think not for a number of reasons. First of all, granted the subject matter – arbitration and its policy justification for quick resolution of matters – an attempt to bring an appeal 403 days after a decision is inordinate. Arbitration is meant to be rapid, efficient, and reflective of the parties’ expectations — not delayed by needless procedural laxity. Indeed, the *Arbitration Act* was designed to ensure arbitration fulfills its advantages — most notably, speed and cost- efficiency—which reflect the parties’ original intention when agreeing to arbitrate their disputes. To be clear, the only decision of the High Court that is amenable to an appeal before us (after grant of leave) is the one dated 22nd September, 2023.

18. Second, the ostensible reason for the delay – that the applicant was waiting for a certified copy of the proceedings is demonstrably false for two reasons: One, there is no requirement that a party seeking leave to appeal over an arbitral matter must attach a certified copy of the proceedings as the applicant claims; and two, even though the certified copy of proceedings were, in fact, available as early as 16th August, 2024, the present application was not brought until more than two months later (though the applicant counts them as 40 days!). In fact, there are 74 days between 16th August, 2024 (when the certified copy of proceedings was available) and 29th October, 2024 (when the present application was filed). Yet, this delay is not explained at all. If the regulations require that an action be taken within fourteen (14) days, a delay of forty (40) days would surely need an explanation otherwise it would be condemned as inexcusable neglect. Such is the case here.



19. Finally, it is worth stating that the Supreme Court in Nyutu Agrovet Ltd Case did not say that an application for leave to appeal to the Court of Appeal must be accompanied by a record of appeal. The Supreme Court emphasized that the Court of Appeal must be satisfied that there is an arguable appeal, and it must exercise its jurisdiction restrictively and cautiously. The Supreme Court did not, however, impose a procedural requirement that a full record of appeal be filed at the leave stage. The applicant also claims that *GeoChem Middle East v Kenya Bureau of Standards* (Petition No. 47 of 2019)[2020] KESC 1(KLR) said the same. In fact, what the Supreme Court stated in that case is as follows:

“After our pronouncements in Nyutu and Synergy, it is not possible that the Court of Appeal can grant leave to appeal from a section 35 judgment of the High Court without interrogating the substance of the intended appeal to determine whether and on the basis of our pronouncements such an appeal lies. A general grant of leave to appeal would not suffice. Yet, this is exactly what happened in the instant case before us.”

20. While it is advisable, given the threshold – that the Court of Appeal’s jurisdiction to grant leave under section 35 of the *Arbitration Act* is narrow, sparingly exercised, and invoked only in the clearest cases – that an applicant includes as much material as possible when approaching the Court for leave, there is no rigid procedural requirement that the entire Record of Appeal must be included. If a party faces a trade-off between filing their application for leave more than 400 days later with the full record of appeal or filing the application timeously attaching only the impugned ruling of the High Court, prudence should dictate that the party takes the latter option. At the leave stage, the Court only takes a provisional view of the merits of the case in interrogating the substance of the intended appeal to determine if an arguable appeal lies.

21. I have said enough to demonstrate that it would be imprudent in the circumstances of this case to extend time to the applicant to prolong this tortorous litigation by applying for leave to this Court. I, therefore, dismiss the application dated 29th October, 2024 with costs to the 2nd respondent. As the 1st respondent did not participate in the proceedings, they shall not be entitled to costs.

22. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2025.

JOEL NGUGI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

