Geothermal Development Company v Lantech Africa Limited (Civil Application E029 of 2021) [2024] KECA 269 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 269 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E029 OF 2021

MSA MAKHANDIA, M NGUGI & GWN MACHARIA, JJA

MARCH 8, 2024

BETWEEN

GEOTHERMAL DEVELOPMENT COMPANY .... APPLICANT

AND

LANTECH AFRICA LIMITED .... RESPONDENT

(In the Matter of the Reference of the Ruling and Order of a single Judge (Dr. K.I. Laibuta, JA.), dated 7th July 2021 in the application dated 29th January 2021) in Civil Application No. E029 of 2021)

RULING

1. After considering Geothermal Development Company's (the applicant) application dated 29th January 2021, on 7th July 2021, Laibuta JA. delivered a ruling and issued orders: enlarging the time for the applicant to file its application to seek leave to appeal against the ruling of W. Okwany, J. delivered on 16th December 2020; that the intended application for leave be deemed as duly filed and served; that the application for leave be listed for determination by a full bench on a priority basis; and that costs be in the cause.

2. Aggrieved, the respondent, Lantech Africa Limited preferred a reference through a letter dated 8th July 2021, against the decision of Dr. K. I. Laibuta, JA. The reference is hinged on rule 55 (1) (b) of the *Court of Appeal Rules* 2010 (now rule 57 (1)(b) of the *Court of Appeal Rules*, 2022).

3. A brief background leading up to the events before us is that a dispute arose between the parties on the performance of the contract dated 1st July 2013 for drilling consultancy services. Parties submitted themselves to an arbitral process before a sole arbitrator, FCI Arb. Mr. Kyalo Mbobu, and an award was delivered on 12th November 2019. The arbitrator informed the parties that the award was ready, and on 13th March 2020 parties collected the copies thereof.

4. Both parties took diametrical views on the award. Before the superior court, the respondent filed an application dated 3rd June 2020 for adoption of the award. The applicant on the other hand filed an application dated 12th June 2020 seeking to set aside the award. The respondent then counteracted the applicant's application by filing a preliminary objection dated 23rd June 2020 on grounds that the application to set aside the award was time barred, and that it was brought three months after delivery of the award. In a ruling dated 16th December 2020, the learned Judge of the superior court upheld the preliminary objection and allowed the respondent's application for enforcement of the award. It is that ruling which gave rise to these proceedings.

5. The grounds upon which the extension of time was sought are contained in the affidavit of Adrian Topoti, the applicant's legal counsel sworn on 29th January 2021. The applicant stated that on 16th December 2020, the superior court delivered an abridged version of its ruling upholding the respondent's preliminary objection. Due to the COVID-19 pandemic, the ruling was read in virtual court, but the learned Judge indicated that it would be available on the e-filing platform. In the meantime, the applicant lodged a notice of appeal on 28th December 2020, but it was not until 18th January 2021 that it discovered that the ruling had been uploaded on the Kenya Law Reports' platform after unsuccessfully following it up from the court.

6. The applicant stated that the superior court did not consider its application for setting aside the arbitral award on merit, but that it simply upheld the respondent's preliminary objection that the application had been filed outside three months contrary to the provisions of section 35 (3) of the *Arbitration Act* (hereafter the Act).

7. The applicant lamented that it would suffer prejudice in being deprived of the time allocated to it by statute, and being required to move the court in respect to an award it is yet to see. It deposed that the intended appeal raises important issues in regard to the interpretation of section 35 (3) of the *Act* especially in circumstances where a party files an application under section 34 of the *Act*. Hence, its prayer to be granted leave to appeal against the decision of the High Court ought to be granted.

8. The application was opposed. The respondent through its Director, Aquinas Wasike swore an affidavit on 30th April 2021.

   It was deposed that the applicant did not require to have the ruling for purposes of filing the application in light of the provisions of rule 43 (3) and (4) of this *Court's Rules*; that the applicant's Notice of Motion and its preliminary objection were heard together on merit, but it is the objection which was upheld on points of law; that in light of the provisions of section 32A of the *Act*, the arbitral award was final; and that the intended appeal is based on grounds meant to reopen the issues which have been adjudicated to their finality by the arbitral tribunal and the superior court.

9. The respondent further stated that the award was published on 12th November 2019, and the applicant had 90 days under section 35 of the *Act* to apply to set it aside. Furthermore, on 26th March 2020, the respondent made a request for correction of the award under section 34, which application was opposed by the applicant; and that the Tribunal dismissed the application on ground that the relief sought was not available under section 34. The Tribunal only corrected typographical errors, but it did not issue an additional award as suggested by the applicant.

10. In light of the above, the respondent contended that the applicant is estopped from relying on the provisions of section 34 of the *Act* by taking a different position which it was now taking; and that the issues of law as to the timelines including those set out under section 35 (3) have already been settled by this Court. The respondent thus urged that the application being an abuse of the court process should be dismissed with costs.

11. The respondent further filed a supplementary affidavit dated 1st December 2023, vide which it annexed a ruling of this Court delivered on 16th December 2022 where a stay of execution application by the applicant was dismissed. The respondent also brought to our attention a pending application, being Civil Application No. E460 of 2023 which, as at the time of hearing this application was scheduled for ruling on 15th December 2023. It stated that the applicant had filed a fresh suit before the superior court, being Commercial Case No. E329 of 2023 challenging the final arbitral award; and that it had recovered a sum of USD 536,551.56 out of the final arbitral award which stood at USD 28,138,326.70.

12. We heard the parties via the Goto virtual platform on 4th December 2023. Learned counsel, Mr. John Ohaga SC appeared alongside Mr. John Masika for the respondent while learned counsel, Mr. Ombati Omwanza appeared alongside Mr. Ahmednasir SC who was not present in Court for the applicant. It was agreed and with our guidance, that the reference would be heard first and the application dated 29th January 2021 at a later date. Thus, this ruling is in respect to the reference.

13. In support of the reference, Mr. Ohaga SC and Mr. Masika relied on submissions dated 20th March 2023 whilst in opposition thereto Mr. Omwanza relied on submissions dated 21st March 2023. None of the counsel wished to highlight the submissions.

14. Mr. Ohaga, SC submitted that the intended appeal cannot be inferred to be an ordinary appeal as it emanates from arbitration proceedings which this Court has held several times are subject to minimal interference. It was his view that the single judge failed to exercise his unfettered discretion fairly and within the law. This was hinged on the explanation that the application as drafted was bad in law and it offends the provisions of rule 55 of this *Court's Rules*.

15. According to the counsel, the learned Judge should have adjourned the entire application for it to be heard by a full bench instead of granting orders in part. It contended that the application was omnibus in nature, and ought to have been struck out in limine as was held in the case of *Rajput vs. Barclays Bank of Kenya Limited & 3 others* (2004) 2 KLR.

16. He went on to state that the learned single Judge did not consider that the applicant was guilty of laches and material non-disclosure of facts by deliberately omitting page 2 of its letter dated 30th March 2020 for the Judge to appreciate its full meaning, effect and tenor; that the Judge wrongfully exercised his discretion by failing to give effect to rule 45 (3) and (4) of the *Court's Rules* which provide that the applicant does not require a ruling to timeously file the application since the same could be availed afterwards; that the reasons advanced by the applicant for the delay in filing the appeal against the ruling of W. Okwany, J. delivered on 16th December 2020 were not justifiable; and that therefore, the reference ought to be allowed with costs.

17. In response to the written submissions, Mr. Omwanza also filed a supplementary list of authorities dated evenly. Counsel submitted that, the learned single Judge in considering the application to enlarge time, properly exercised his unfettered discretion pursuant to rule 4 of this Court's Rules; that he considered the applicable principles for extension of time namely: length of delay, reason for delay, chances of the appeal succeeding and prejudice to be suffered by the respondent; and that the contention that the application was plagued with laches and material non-disclosure of facts is not accurate.

18. Counsel further submitted that the learned Judge considered the assertion that a ruling was a prerequisite to the filing the application as a consequent to which he arrived at the decision he did. We shall revert to this issue hereafter in this ruling. Counsel denied that there was non-disclosure of material facts in that it tried to conceal page 2 of its response letter to the respondent's request for correction of the award; and that instead, page 2 of the said letter was in fact erroneously included as

page 210. In that regard, it stated that the error was technical and not based on deliberate bad faith. In this regard, reliance was placed on this Court's decision of *Songa Ogoda & Assocaites vs. University of Nairobi* (2023) KECA 57 KLR.

19. It was also submitted that there was no application to strike out the application; that the directions issued on 23rd April 2021 were for parties to file submissions in respect to the application for enlargement of time; that on 5th March 2023, further directions were issued confirming that a single Judge bench would consider the prayer for enlargement of time, and the remainder of the prayers would be heard by a full bench of three judges; and that none of those directions were challenged.

20. We have appraised ourselves with the respective submissions and the law. Rule 57 (1) (b) of the *Court of Appeal Rules*, 2022 provides that:

> Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge—
>
> (b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.

21. A reference for all its intent and purposes, is not an appeal per se. A reference to a full bench from the decision of a single judge requires the full bench to limit itself to consider whether the single judge properly exercised his unfettered and wide discretion under rule 4 of the *Court of Appeal Rules*, 2022. In the case of *Kimathi & Another vs. Muriuki & 12* [2023] KECA 666 (KLR) June 2023) (Ruling) this Court stated that:

> " At the outset, we underscore that a reference is not an appeal and, as a fully constituted bench, we may only interfere with the exercise of the wide discretion bestowed on a single judge under rule 4 of this Court's Rules on the basis of sound principles. The Court has to consider whether the single judge took into account an irrelevant factor which he ought not to have taken into account; whether he failed to take into account a relevant factor which he ought to have taken into account; whether he misapprehended or failed to appreciate some point of law or fact applicable to the issues at hand; or whether the decision on the available evidence and law is plainly wrong."

22. We have understood that the reference is on the basis that, since the applicant's application was "omnibus" in nature in that it sought diverse orders, some of which ought to be determined by a single judge and others which can only be determined by a full bench, it would have been prudent for the learned Judge to refer the whole application to a full bench or, in the alternative, strike out the whole application altogether.

23. We have read and appreciated the ruling of the learned Judge. It was not lost to him that indeed the application before him was omnibus in nature. He prudently and whilst exercising caution observed that:

> " I hasten to observe that the orders sought in the applicant's Notice of Motion pursuant to rule 39 (b) of the *Court of Appeal Rules* for leave to appeal from the Ruling and Order of Hon. Lady Justice W. Okwany dated and delivered on 16th December 2020 in Nairobi HCCC Miscellaneous Application No. 776 of 2020 is not within my jurisdiction to grant. With regard to those specific orders, I direct that the applicant's Notice of Motion dated

29th January 2021 be listed for hearing by a full bench of this Court on a priority basis. That leaves me with the application for the orders sought to extend time to file and serve the application for leave to appeal."

24. Indeed, rule 55 of the *Court of Appeal Rules* specifies the particular applications which can be heard by a single judge other than those under rule 55 (2) as follows:

    2. This rule shall not apply to-

        a. an application for leave to appeal;

        b. an application for a stay of execution, injunction, or stay of further proceedings;

        c. an application to strike out a notice of appeal or an appeal; or

        d. an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of a hearing.

25. We cannot agree more with the exercise of wisdom by the learned Judge, to properly restrict himself to considering the prayer for enlargement of time as that was only what was within the ambit of his jurisdiction. Indeed, had a full bench sat to hear the entire application, as procedure would have it, it would have had to refer the matter to a single judge to first dispose of the prayer under rule 4. Consequently, we cannot fault the learned Judge for doing what was required of him.

26. Furthermore, we have taken the view that the learned Judge properly addressed the principles that guide the Court in considering an application under rule 4, and accordingly properly exercised his discretion in arriving at the decision he did. In particular, he made reference to several decisions of this Court and the Supreme Court on what the Court ought to consider before granting orders of extension of time.

27. The learned Judge also considered the requirement that a party needs to file a copy of the ruling being appealed from. This accords with rule 45 (3) and (4) of the *Court of Appeal Rules*, 2022 which requires that an application seeking leave to appeal should be accompanied by a copy of the decision which a party wishes to appeal from. Having stated that the prayer seeking leave to appeal against the decision of the superior court can only be heard by a full bench and whether or not this Court's Rules make it mandatory that a copy of the decision should be availed, the learned Judge exercised caution and rightly stated that it is a matter to be determined by a full bench.

28. We are therefore unable to find fault with the ruling of Dr. K. I. Laibuta, JA. dated and delivered on 7th July 2021, and we find no merit in the reference dated 8th July 2021. We hereby dismiss it with costs to the applicant, Geothermal Development Company.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

....

JUDGE OF APPEAL

G.W. NGENYE- MACHARIA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR