



**Shreeji Wholesalers & Hardware Limited v Prasun Construction Co. Limited
(Civil Application E004 of 2024) [2024] KECA 651 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 651 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E004 OF 2024
HA OMONDI, JA
JUNE 7, 2024**

BETWEEN

SHREEJI WHOLESALERS & HARDWARE LIMITED APPLICANT

AND

PRASUN CONSTRUCTION CO. LIMITED RESPONDENT

(Being an application for extension of time to appeal against the judgment and decree of the High Court of Kenya at Migori (T. A. Odera, J.) dated 4th May 2023 in HCCA No. E025 of 2021)

RULING

1. The application dated 16th January 2024 brought pursuant to rule 5(2) (b) and rule 47 of the Court of Appeal Rules, 2010 seeks that leave be granted to the applicant to file an appeal against the decision in Migori HCCA No. E025 of 2021 delivered on 4th May 2023; as well as costs. The application is supported by a supporting affidavit of even date sworn by the applicant, Dipen Hasmukhlal Faldu, a director of the applicant.
2. The applicant had filed an appeal in Migori HCCA E025 of 2021, against the ruling in Migori PMCC No. 419 of 2018 by Hon. Munguti (Principal Magistrate). Judgment was delivered on 4th May 2023, (T. A. Odera, J.), dismissing the applicant's appeal with costs; and the applicant being dissatisfied with the judgment wishes to appeal against the whole judgment. The applicant points out that the intended appeal does not lie as of right being a decision made pursuant to Order 46 of the Civil Procedure Rules as it arises from an Arbitration matter. In the High Court the applicant had filed an application dated 17th May 2023, for leave to appeal, but it was dismissed on 20th December 2023; this has resulted in the present application.
3. It is the applicant's contention that it has an arguable appeal which is not frivolous; and no prejudice will be occasioned to the respondent if the prayer is granted.



4. In the replying affidavit dated 2nd February 2024 by Maulik Patel, the respondent describes the application as incompetent and lacking merit; contending that applicant had filed an application seeking to stop the reading and adoption of the award on the basis that the award was filed out of time and further that the arbitral tribunal dealt with issues beyond its mandate; yet, both applications were heard and a ruling was delivered dismissing the applicant's application and allowing the respondent's application, and the award was read and adopted as a judgment of the court; that the applicant, being aggrieved by the ruling appealed to the High Court which appeal was dismissed on grounds of no jurisdiction, provoking the instant application for leave.
5. The respondent further states that this Court can only be moved for leave to appeal from a determination on matters touching on arbitration only. The respondent also argues that the instant application has been brought under Rule 5(2)(b) and Rule 47 do not clothe this Court with the jurisdiction to grant the orders sought; as such is fatally incompetent; that the application for leave has been brought seven months from the date of delivery of judgment; the application is time barred by dint of the provisions of rule 39 of the *Court of Appeal Rules*, 2010 (now rule 41 (1) of the [Court of Appeal Rules](#) 2022); and does not fall within the parameters of section 39(3) of the [Arbitration Act](#); and the applicant has failed to disclose that the parties had no prior agreement that an appeal would lie.
6. In response, the applicant pointing out that the reference to arbitration was made under Order 46 of the Civil Procedure Rules; and not under the [Arbitration Act](#); and the two regimes do not operate interchangeably, thus the respondent cannot seek to invoke section 39 of the [Arbitration Act](#). The applicant also argues that Rule 39 [Now 41 (1)] of this Court's Rules provides that:
 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. ... 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.
7. From the onset, it is clear, and I concur with the respondent's counsel, that Rule 5(2)(b) is certainly not the provision to be invoked in an application of this nature. The relevant provision under the 2022 [Court of Appeal Rules](#), is Rule 41. But even if it was to be argued that on the strength of Article 159(2) (b), this Court ought to defer to substance over procedure, as the content of the application clearly communicates what the applicant is seeking, the next issue to consider, is whether this application was brought in a timely manner. Judgment was delivered on 4th May 2023; this application was made on 16th January 2024; the respondent says seven (7) months had lapsed before this application was filed, the applicant explains that in the intervening period it had before the High Court, by an application dated 17th May 2023, sought leave to appeal, the outcome of that application was made on 20th December 2023; and since the Christmas court vacation period is not reckoned in the computation of time, pursuant to rule 3 and 39 (b) of the [Court's Rules](#) the time would only begin to run after the vacation.



8. Indeed, as relates to computation of time, the applicant has demonstrated that he acted with nigh religious zeal in pursuing this matter; as a matter of fact, in less than 14 days he took the first stab at seeking leave to appeal as contemplated under Rule 39 (ii). The applicant has acquitted himself very well as to what happened in the intervening period, leading to the filing of the application on 16th January 2024. The Christmas Vacation in the Court of Appeal begun on 22nd December 2023, and ended on 15th January 2024. Rule 3(b) of the Court’s Rules provides as follows as regards computation of time:

3. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be computed in accordance with the following provisions-

(b) unless the Court otherwise directs, the period of the Christmas recess shall not be reckoned in the computation of time.

I need not say more, in my view, the writing is clearly on the wall, and the applicant has satisfied me that the order sought is merited, and is allowed. The leave sought to file appeal is granted as prayed. Costs shall abide the appeal.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

