



Songa Ogoda & Associates v University of Nairobi (Civil Application E240 of 2022) [2023] KECA 57 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 57 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E240 OF 2022
K M'INOTI, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 3, 2023**

BETWEEN

SONGA OGODA & ASSOCIATES APPLICANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

(Being a reference under Rule 57 of the Court of Appeal Rules, 2022 in Civil Application No. E240 of 2022)

RULING

1. The applicant, M/s. Songa Ogoda and Associates, instituted arbitral proceedings against the respondent, the University of Nairobi, challenging termination on 23rd January 2013 of their appointment on 22nd November 2011 as quantity surveyors, and part of a consortium of professional consultants in the construction of the University of Nairobi Towers.
2. In determination of the arbitral proceedings, the Tribunal issued its award as notified in its letter dated 24th November 2017. In its award, the tribunal directed the respondent to pay to the applicant a sum of KShs. 193,867,327/22.
3. On 19th January 2019, the applicant filed a Motion in the High Court in HC Misc. Application No. E024 of 2019 seeking to enforce the award. In a bid to resist enforcement, the respondent applied vide its Notice of Motion filed on 9th April 2019 in HC Misc. Application No. E089 of 2019 seeking to have the award set aside in its entirety pursuant to section 35 of the *Arbitration Act* (Revised 2019), 1995.
4. In response to the respondent's application, the applicant raised a preliminary objection on the ground that the Motion, which ought to have been filed within 3 months, was time barred. In his ruling dated 20th July 2020, Tuiyott, J. upheld the applicant's preliminary objection and struck out the respondent's Motion.



5. Aggrieved by the decision of the learned Judge, the respondent belatedly moved to this Court by way of a Notice of Motion dated 8th October 2022 seeking: extension of time by 9 days to apply for leave to lodge an appeal; that the application filed on 12th August 2020 in which it sought leave to appeal be deemed as having been filed and served on time; and that the costs of its application be provided for.
6. The respondent's Motion for extension of time was supported by the affidavit of Prof. Kiama Stephen Gitahi sworn on 8th October 2022. The Motion was also anchored on the grounds that the respondent was only able to access the ruling delivered on 20th July 2020 on 3rd August 2020 due to the then prevailing COVID-19 restrictions, which slowed down the operations of the Judiciary; that it managed to obtain the impugned ruling on 3rd August 2020; that it experienced difficulties to submitting its application through the e-filing platform, and only succeeded 9 days later on 12th August 2020; that the 9 days' delay was excusable in the circumstances.
7. In his ruling delivered on 7th November 2022, L. Kimaru, JA. allowed the respondent's Motion, noting that it was unopposed. According to the learned Judge –

“... The explanation given by the applicant for the delay in lodging the motion in time is excusable. This Court takes judicial notice of the situation that prevailed at the time during the height of the Covid - 19 pandemic and the resultant interventions by the Government during lockdowns of certain localities to control the spread of the virus. The court also takes judicial notice of the fact that there were teething challenges when the Judiciary rolled out the online filing system which challenges have since been resolved. It is clear to this Court that the circumstances explained by the applicant are excusable and in the premises therefore, this Court will allow the application.”
8. Dissatisfied by the ruling of L. Kimaru, JA., the applicant comes to this Court on Reference under Rule 57 of the *Court of Appeal Rules* requesting that the Court do vary, discharge or reverse the impugned ruling, and disallow the respondent's application dated 8th October 2022. According to the applicant, it filed its submissions in opposition to the respondent's Motion on 7th November 2022 at 11.52 am, but that the same were not considered by the single judge.
9. It is noteworthy that the respondent's application was listed for hearing and determination on the basis of written submissions by counsel on 7th November 2022 at 9.00 am, hours before counsel for the applicant filed their submissions.
10. Before us, Learned counsel for the respondent, M/s.Ngatia and Associates, filed written submissions, list of authorities and case digest all dated 21st January 2023 citing 2 judicial authorities of *Mbugua and Mbugua Advocates vs. Kenindia Assurance Ltd* [2009] eKLR and *In Re Estate of Nazir Khan Mohamed* [2022] KEHC 14929 (KLR) to back their foundational submission that the applicant had failed to comply with the timelines set for written submissions; that the court considered the respondent's application on the basis of the material before it, and on merit; that the applicant has failed to establish that, had the learned Judge considered its alleged submissions, he would have arrived at a different conclusion. He asked us to dismiss the Reference and uphold the impugned decision of L. Kimaru, JA.
11. In response, learned counsel for the applicant, Mr. Kevin Wakwaya of Rachier and Amollo Advocates, made oral submissions citing rule 3 of this Court's Rules and section 57(b) of the *Interpretation and General Provisions Act* (Cap. 2), contending that the due date for his written submissions fell on an excluded day, being Sunday, the 6th day of November 2022; that he filed his submissions on 7th November 2022 at 11.52 am; and that the learned Judge ought to have considered them before



delivering his ruling. According to Mr. Wakwaya, the applicant was denied their constitutional right to fair hearing. He urged the Court to allow the Reference.

12. The main question before us is, do the circumstances of this case justify interference with the impugned decision of L. Kimaru, JA.? We do not think so. The applicant’s submission that they were denied the constitutional right to fair hearing flies in the face of the belated filing of their written submissions. The contention by counsel that the due date fell on a Sunday, and that 7th November 2022 was the due date does not hold. Rule 3 of the Court of Appeal Rules, 2022 provides how time set by the rules or by a decision of the Court for doing any act is to be computed. Rules 3(b) and (c) provide as follows:

“(b) If the last day of the period is a Sunday or a public holiday (in this rule referred to as “excluded days”), the period shall include the next following day, not being an excluded day;

(c) when an act or proceeding is directed or allowed to be done or taken on a certain day, then if the day happens to be a excluded day, the act or proceeding shall be considered as done or taken in time if it is done or taken in the next day afterwards, not being an excluded day.”

13. However, by dint of rule 3(d), the concept of “excluded” days has no application where the period in question does not exceed six days. That rule states thus:

“Where any act or proceeding is directed or allowed to be done or taken any time not exceeding six days, excluded days shall not be reckoned in the computation of time.”

(Emphasis added).

14. Rule 3(d) is clear enough and cannot be interpreted to mean that excluded days are applicable in a period not exceeding six days, as Mr Wakwaya argued. It appears to us that the rationale behind rule 3(d) is that, ordinarily, in matters where the period set does not exceed six days, the matter is deemed so urgent that it must not be delayed even by the automatic extension inherent in the concept of “excluded days”. In this case, on 1st November 2022 the Court directed the respondent to file its submissions within three days, namely by 3rd November 2022, which the respondent duly did. The applicant was equally directed to file its submissions in reply within three days, by 6th November 2022, which it did not do. To the extent that the period in question did not exceed six days, by dint of rule 3(d) the applicant was not entitled to reckon time by relying on excluded days.

15. Counsel was well aware of the date set for determination of the Motion in issue on written submissions. The respondent’s Motion was determined and the impugned ruling delivered shortly before the applicant filed their submissions. In the circumstances, we find nothing to fault the learned Judge’s decision.

16. In *Kenya Co-operative Creameries Ltd vs. Fims Ltd* [2006] eKLR, the Court of Appeal held:

“In hearing matters brought under rule 4 of this Court’s Rules, the single Judge exercises unfettered discretionary powers which in law must be exercised upon reason and not capriciously. Once the single Judge has so exercised the same discretion, and made a decision on the matter, the full bench will be very slow in interfering with the same exercise of discretion by a single Judge unless it is demonstrated that the single Judge, in the exercise of the same discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly



wrong in the exercise of his discretion and that as a result there has been misjustice (see the case of *Mbogo vs. Shab*(1968) EA 93 at page 96).”

17. We find nothing on the record as put to us to suggest that the learned Judge misdirected himself in any of the matters falling to be considered; or that he arrived at a wrong decision; or that he was wrong in exercise of his unfettered discretion. In our considered view, the learned Judge correctly exercised his discretion, and his decision was by no means a misjustice.

18. In *Simeon Okingo & 4 others vs. Benta Juma Nyakako* [2021] eKLR, this Court set out the considerations to be made by the full bench in the following words:

“ 12. In an application under Rule 4 of this Court’s Rules, as was the one before the learned single Judge of this Court, the single Judge is exercising unfettered discretion, on behalf of the whole Court; such discretion ought to be exercised based on proper principles of law. Therefore, the full bench would only interfere with the exercise of such discretion if it is apparent that the single Judge took into account an irrelevant matter which he/she ought not to have taken into account or failed to take into account a relevant matter which he/she ought to have taken into account or that he/she misapprehended the law applicable and evidence before him or that his decision was plainly wrong.”

19. Having carefully considered the applicant’s reference, the rival written and oral submissions of learned counsel for the parties, the cited authorities in the backdrop of this Court’s Rules, we reach the inescapable conclusion that the applicant’s reference fails and is hereby dismissed. Accordingly, the ruling of L. Kimaru, JA. dated 7th November 2022 is hereby upheld. The costs of this reference shall be borne by the applicant. Orders accordingly

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

K. M’INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

