



REPUBLIC OF KENYA



Vishnu Builders and Developers Limited v Maow Holding Limited (Civil Application E608 of 2021) [2023] KECA 1571 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KECA 1571 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E608 OF 2021
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
JUNE 22, 2023**

BETWEEN

VISHNU BUILDERS AND DEVELOPERS LIMITED APPLICANT

AND

MAOW HOLDING LIMITED RESPONDENT

(Being an application for leave to file an appeal against the entire Ruling delivered by the High Court at Nairobi (Njuguna, J.) on 15th October 2020 in Misc Civil Application No. 671 of 2019.)

RULING

1. Before this Court is a Notice of Motion dated 1st October 2021 brought by the applicant pursuant to the provisions of Article 164(3) (a) of the *Constitution*, section 35 of the *Arbitration Act*, rule 3(1) of the *Arbitration Rules*, 1997 and rules 39, 42 & 43 of the *Rules* of this Court. The applicant seeks leave to file an appeal against the entire ruling delivered by Njuguna, J on 15th October 2020 in High Court Misc Civil Application No. 671 of 2019.
2. A precis of the facts leading to the application is that a dispute emanated amongst the parties herein resulting in arbitration proceedings. Upon hearing the parties, the arbitrator, vide an arbitral award dated 2nd October 2019, awarded the applicant a sum of Kshs.28,831,562.50 plus interest at 14% p.a. from the date of filing the claim.
3. Aggrieved by the arbitrator's decision, the respondent moved the High Court by way of a Chamber Summons dated 17th October 2019 under the provisions of section 35 of the *Arbitration Act* essentially seeking to have the arbitral award set aside. Upon hearing the parties, the High Court (Njuguna, J), in a ruling delivered on 15th October 2020, allowed the application and consequently set aside the arbitral award.



4. The applicant herein contends that the learned judge, in setting aside the arbitral award, relied on grounds other than those set out under section 35 of the [Arbitration Act](#) and, as a result, delivered a ruling which was manifestly wrong and which, if left to stand, shall deny justice to the applicant.
5. It is further contended that the said ruling offends the provisions of section 32A of the [Arbitration Act](#), Article 159 of the [Constitution](#), and various decisions of the Supreme Court and of this Court.
6. The applicant had, vide a notice of motion application dated 28th October 2020, sought leave of the High Court to appeal against the ruling dated 15th October 2020. However, leave was not granted as Mbogholi Msagha, J (as he then was), vide a ruling dated 27th July 2021, held that, pursuant to the provisions of section 39(3)(b) of the [Arbitration Act](#), the jurisdiction to determine such an application was a preserve of this Court.
7. The applicant argues that the intended appeal raises cogent points of law, the determination whereof substantially affects the rights of the parties herein. The applicant further contends that the issue to be raised in the appeal is of general public importance as the principle followed by the court set a precedent which shall jeopardize the future of arbitration.
8. Lastly, it is contended that the application has been filed in good faith and should be allowed to avert a miscarriage of justice on the part of the applicant.
9. The application is opposed by the respondent through Grounds of Opposition dated 12th April 2023. However, pursuant to the provisions of rule 50 of the [Court of Appeal Rules](#), 2010 any response to a notice of motion is made by way of an affidavit in reply. It follows, therefore, that the respondent's Grounds of Opposition dated 12th April 2023 are incompetent and of no value and/or weight to the application herein.
10. At the hearing of this application, learned counsel Ms. Mayaka appeared for the applicant, while learned counsel Mr. Itemere was present for the respondent. Highlighting the applicant's written submissions dated 12th April 2023, counsel reiterated that the ruling of the High Court dated 15th October 2020 went beyond the grounds stipulated under section 35 of the [Arbitration Act](#). The learned judge went into the merits of the award, and as per the Supreme Court's pronouncements in [Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch \(Interested Party\)](#) [2019] eKLR and [Synergy Industrial Credit Limited v Cape Holdings Limited](#) [2019] eKLR which are binding on this Court, the applicant has demonstrated that the right of appeal to this Court can be invoked.
11. Although the respondent had not filed written submissions, Mr. Itemere made brief oral submissions. He argued that, although the ruling of Mbogholi Msagha, J through which the court declined jurisdiction to consider an application for leave to appeal to this Court was delivered on 27th July 2021, the instant application for leave was filed on 1st October 2021. According to counsel, pursuant to the provisions of rule 39(b) of the [Court of Appeal Rules](#), 2010, the applicant ought to have filed the application within 14 days from 27th July 2021. The argument by counsel, therefore, was that the application was filed out of time and is, therefore, bad in law.
12. In a brief rejoinder, Ms. Mugoya conceded that the application was filed out of time and attributed the delay to counsel's oversight. She urged this Court to be guided by the provisions of Article 159 of the [Constitution](#), which enjoins courts to administer justice without undue regard to procedural technicalities.



13. We have considered the application, the written and oral submissions by all the parties, as well as the applicable law. The application herein is premised on, inter alia, the provisions of rule 39 of the Rules of this Court. Rule 39(b) which is applicable to the circumstances herein provides as follows:

“Where an appeal lies with leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within 14 days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within 14 days of such refusal. [Emphasis added].

14. This Court in *Zeinab Khalifa & 4 others v Abdulrazak Khalifa & another* [2016] eKLR considered the intention of rule 39(b) and stated:

“The essence of that rule is that a party who has applied to the High Court for leave to appeal to this Court and whose application has been refused, is free to make another application in this Court for leave to appeal, within 14 days of the refusal by the High Court...The jurisdiction of the Court under Rule 39(b) is an original jurisdiction, much like the jurisdiction of the Court under Rule 5(2)(b) which allows the Court to hear applications for stay of execution, stay of proceedings or injunctions, notwithstanding that similar applications have been heard and denied by the High court. The application before the Court is therefore not an appeal, a reference or application for review of the decision of the High Court.”

15. The ruling by Mbogholi Msagha, J declining jurisdiction to consider the application for leave to appeal to this Court was delivered on 27th July 2021. As such, the computation of time, which is material to the motion before us, commenced on 27th July 2021. The application for leave was filed on 1st October 2021, way outside the 14 days contemplated under the provisions of rule 39 of the Rules of this Court. The application was therefore filed out of time. The jurisdiction of this Court as per the provisions of rule 39 is invoked where the applicant brings his application within 14 days of the refusal by the High Court of the application for leave to appeal to this Court. It follows, therefore, that the instant application is incompetent, bad in law, and this Court is without any jurisdiction to determine it on its merits.

16. The applicant has invoked the provisions of Article 159 of the *Constitution*. It has been held in a plethora of decisions that Article 159(2) (d) of the *Constitution* is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it. Rule 39(b) is, in our view, couched in mandatory terms and does not provide any wriggle room for extension of time or consideration of an application filed beyond the 14 days’ period. Failure to comply with the provisions of rule 39(b) is not a procedural technicality as opined by the applicant.

17. Consequently, the application having been filed outside the 14 days’ period as prescribed under rule 39 of the *Court of Appeal Rules*, 2010, this Court is bereft of jurisdiction to consider it on merit. Accordingly, we hereby strike out the applicant’s Notice of Motion dated 1st October 2021 with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY JUNE, 2023.

D. K. MUSINGA, (P.)

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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

