



Villa Care Management Limited v Kengen Retirement Benefits Scheme (Civil Application E165 of 2022) [2023] KECA 1216 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1216 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E165 OF 2022
DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA
OCTOBER 6, 2023**

BETWEEN

VILLA CARE MANAGEMENT LIMITED APPLICANT

AND

KENGEN RETIREMENT BENEFITS SCHEME RESPONDENT

(Being an application for extension of time for lodging of a notice of appeal and stay of proceedings against the Ruling of the High Court of Kenya at Nairobi (W. A. Okwany, J.) delivered on 29th July 2021 in H.C. Misc. Appl. No. 260 of 2019))

RULING

1. On September 23, 2022, Omondi, JA dismissed the applicant’s motion dated May 16, 2022 that sought extension of time to lodge a notice of appeal as well as an appeal against the ruling of the High Court (Okwany, J) dated July 29, 2021 in High Court Misc Application No 260 of 2019.
2. Earlier on, the applicant had made the very same application for extension of time before Laibuta, JA; who, by a ruling dated April 1, 2022, held that the Court had no jurisdiction to determine the application since the applicant had not filed a notice of appeal at all. The learned judge cited rule 75 (4) of this court’s [Rules](#) which states:

“When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”

3. Dismissing the applicant’s subsequent application, Omondi, JA held:

“6. I have considered the submissions made by both counsels, if one only focuses on the ultimate when this application found its way to finally being heard, then



the computation of time would be most skewed. The critical dates are award - May 20, 2019; application to set aside - August 14, 2019; was dismissed on July 29, 2021; resulting in application dated September 4, 2021; to extend time to file the application (extension application) was then filed.

7. That application was filed less than a month after the impugned decision, but an odd assortment of events which translated into obstacles slowed its pathway. I take note that the respondent does not dispute the bereavement faced by the initial advocate, and the only reasonable inference I can draw is that counsel for the respondent was aware of that. Then when it finally came to court in April, 2022; heard and a determination made rendering it dead on arrival due to want of Notice of Appeal. A fresh breath of air dated May 16, 2022; wafted and it then found its way back to this Court on July 13, 2022. If the court had simply rejected the application and given directions that no orders would issue for want of the notice of appeal that would have given the applicant a lease of life. However, in this instance this Court heard the matter and made a finding, and any attempt to now ameliorate the situation, is in my view tantamount to patching up the lapse that had informed the Judge's decision.
 8. The situation thus does not predispose me to exercise my discretion favourably, and the application is dismissed with costs to the respondent.”
4. Subsequent to delivery of the said ruling, the applicant's advocates wrote to this Court's Registrar on October 7, 2022 seeking a reference to the full court pursuant to the provisions of rule 57. That rule expressly states that such an application may be made

“informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.”
 5. The reference was made fourteen days after delivery of the impugned ruling. The applicant's advocate stated in his letter to the Registrar that the delay was due to “technological challenges in our emailing system”, such that he saw the ruling on October 4, 2022.
 6. The applicant faults Omondi, JA for taking the view that Laibuta, JA heard the earlier application on merit; and for holding that she could not deal with the application of May 16, 2022 in light of the findings by Laibuta, JA in his ruling of April 1, 2022, whereas a notice of appeal had subsequently been filed. For those reasons, the applicant's learned counsel urged us to vary the ruling of the single judge.
 7. The respondent opposed the reference. The respondent argued that the reference is incompetent as it was filed out of time for no apparent reason; that the learned judge exercised her discretion properly; and that it is now over four years since the arbitral award that gave rise to the application was published and the respondent had not been paid the sum awarded to it, Kshs 166,102,388/= together with interest and costs of Kshs 5,806,533/=. For those reasons we were urged to dismiss the reference.
 8. We have considered the application, the parties' written and oral submissions and the case digests that are on record. It is not in dispute that the reference was filed out of the stipulated time without leave of the court. No good reason was advanced for the delay. The applicant's counsel simply stated, without any explanation, that due to “technological challenges” he did not see the impugned ruling until after eleven days from the date it was emailed to his office. We find that reason unconvincing.



9. But even assuming that for whatever reason the reference could not be filed within seven (7) days from the date of the impugned ruling, the applicant ought to have sought leave to file it out of time, instead the applicant's counsel acted presumptuously.

10. We find and hold that the reference is incompetent and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OCTOBER, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

