



Kamimi Company (1976) Limited v Soil Merchants Kenya Limited (Civil Application E272 of 2022) [2023] KECA 1517 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KECA 1517 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E272 OF 2022
P NYAMWEYA, JA
DECEMBER 8, 2023**

BETWEEN

KAMIMI COMPANY (1976) LIMITED APPLICANT

AND

SOIL MERCHANTS KENYA LIMITED RESPONDENT

(An application for leave to appeal and extension of time to file appeal against the Ruling and Orders of the High Court at Nairobi (Okwany J.) dated and delivered on 5th May 2022 in High Court Commercial Miscellaneous Civil Application No. E277 of 2021)

RULING

1. The issue that presents for determination in this ruling, is whether Kamimi Company (1976) Limited, the Applicant herein, should be granted leave to appeal and extension of time to file an appeal out of time against a ruling delivered on given on 5th May 2022 by the High Court at Nairobi (Okwany J.) in High Court Commercial Miscellaneous Civil Application No. E277 of 2021 on the setting aside of an arbitral award. The Applicant in this respect filed an application by way of a Notice of Motion dated 29th July 2022, in which it sought the said leave to appeal, and extension of time. Further, that the Court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances of this case, and the costs of the application do abide the outcome of the intended appeal.
2. The application is supported by an affidavit sworn on 29th July 2022 by Elizabeth Waiyaki, a director of the Applicant, who detailed the circumstances leading to the impugned ruling, which are not relevant for this application, save for the fact that the learned Judge in the said ruling allowed the Respondent's application to strike out the Applicant's application that was seeking to set aside an arbitral award. The Applicants' case in this respect is that after Okwany J. dismissed their application in the High Court, it proved difficult to obtain prompt instructions as the Applicant's directors are based in various countries around the world, and they could not meet in time to deliberate and instruct their advocates on record.



3. Further, that the advocate having the personal conduct of the matter on behalf of the Applicant resigned from the law firm of the advocates on record without undertaking a proper handover of the files she had been dealing with including the instant one, and that it is only when a new advocate took over the conduct of the matter and shared a copy of the impugned ruling, and the applicant's directors met, that the applicant instructed the advocates on record to lodge an appeal. Therefore, that the delay in filing they intended appeal was not inordinate, the mistake by counsel was an intentional and, in the circumstances, should not be visited upon the Applicant who was desirous of appealing against the ruling.
4. The Applicant proceeded to detail its perceived errors in the impugned ruling, to demonstrate that the intended appeal raises an important jurisprudential issue regarding the interpretation of Section 35(3) of the *Arbitration Act* that requires determination by this Court. To support its averments, the Applicant attached a copy of the ruling delivered on 5th May 2022 in High Court Commercial Miscellaneous Civil Application No. E277 of 2021, a certified copy of the proceedings therein, a draft Notice of Appeal, and a draft memorandum of appeal.
5. Soil Merchants Kenya Limited the Respondent herein, opposed the application in a replying affidavit sworn on 15th September 2022, by its director, one George Gacheru Mungai, Grounds of Opposition dated 30th October 2023 and in submissions of the same date filed by his advocates. The Respondent's case is that the Applicant reasons for the delay in filing an appeal are not satisfactory, and in particular, that the Applicant's advocates on record have not provided any evidence to prove the allegation that the Applicant's directors are based in different countries, that nothing stopped them from filing a Notice of Appeal as they waited for instructions, and that in any event no such evidence of instructions has been provided if at all it was a prerequisite. In addition, that the Applicant has not provided any evidence to prove that the advocate having the personal conduct of the matter on behalf of the Applicant resigned from the firm of their advocates on record without conducting a proper handover. Therefore, that there has been unreasonable delay by the Applicant of close to 3 months in filing this application since the delivery of the ruling on 5th May 2022, and the delay is inordinate.
6. The Respondent also averred that the Applicant's application seeking to set aside the arbitral award was struck out for being filed out of time and that the Court did not step out of the grounds prescribed under Section 35 of the *Arbitration Act*, that the parties, having voluntarily submitted themselves to arbitration, should be willing to accept the finality of the arbitral award, and granting the orders sought will go against the principle of finality of the entire arbitral process.
7. The issue of the procedure in from rulings on arbitral awards was the subject of the Respondent's Grounds of Opposition, which were as follows:
 1. The Court of Appeal does not have jurisdiction to grant the order seeking leave to appeal as the same should at first instance be sought from the Court making the order sought to be appealed from as per Rule 41 of the *Court of Appeal Rules* 2022.
 2. The Applicant did not seek leave of the High Court to appeal against the impugned ruling.
 3. The procurement of leave to appeal is a sine qua non to the lodging of a notice of appeal since there is no automatic right of appeal against the impugned ruling/order. Therefore, without leave to appeal, there can be no valid notice of appeal.
 4. Consequently, no useful purpose will be served by granting the order seeking extension of time to file notice of appeal since in the circumstances of this case there can be no valid notice of appeal in the absence of leave to appeal.



8. The foregoing averments and grounds were reiterated in the Respondent’s submissions, and reliance was placed on the holding by this Court in the case of *Peter Nyaga Muvake vs Joseph Mutunga* [2015] eKLR, that the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal
9. A preliminary issue has been raised by the Respondent as regards the jurisdiction of this Court which needs to be determined first. The Applicant did not respond nor address the objections raised by the Respondent in this regard. It is notable that section 35 of the *Arbitration Act* does not provide for appeals from orders made under the section on applications for setting aside of arbitral awards, and appeals from such orders are also not included in section 75 of the *Civil Procedure Act* as appeals that lie as of right. Order 43(3) of the *Civil Procedure Rules* provides that an application for leave to appeal under section 75 of the *Act* shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
10. In addition, the procedure for appealing orders of the High Court on questions of law arising in domestic arbitration is provided in section 39(3) and (4) of the *Arbitration Act* as follows:
- “(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—
- a. if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or
- b. the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).
- (4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.”
11. This Court (G.B.M. Kariuki, J. Mohammed & Otieno-Odek, JJ. A) held as follows in *Peter Nyaga Muvake vs Joseph Mutunga* [supra] as regards the implications of applications for leave to appeal on the issuance of notices of appeal:
- “21. In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant’s appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.”



12. Rule 41 of the *Court of Appeal Rules* of 2022 in this regard provides as follows on applications for leave to appeal in civil matters:

“ 41.

- (1) 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. in the manner laid down in rules 44 and 45 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.”

13. Rules 44 and 45 provide for the forms of applications to the Court and the supporting affidavits to be provided. It is also notable in this respect that under Rule 55 (2), an application for leave to appeal is one of the applications which cannot be heard and determined by a single judge, and can therefore only be heard by a full bench of the Court.

14. The implications of the above provisions are therefore three fold. Firstly, that the jurisdiction of a single Judge to hear and determine applications for extension of time to file an appeal only applies to those appeals that lie as of right under Rule 76 of the *Court of Appeal Rules* of 2022, which are the appeals that are subject to the time limits set in Rule 77 (2) of the *Court of Appeal Rules* of 2022. Secondly, applications that require leave to appeal, including the application before us to appeal against the orders of the High Court on setting aside of an arbitral award, are outside the jurisdiction of a single Judge. Lastly, such leave to appeal must first be granted before any application for extension of time to file the appeal is granted.

15. The Applicant’s Notice of Motion dated 29th July 2022 is therefore not properly before me as a single Judge, and shall accordingly be listed by the Registrar of this Court before a full Bench of this Court for hearing and determination. In light of these directions, I shall not make any order as to the costs of the application.

16. Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

