Kenya Sugar Research Foundation (As taken over by the Kenya Agricultural and Livestock Research Organisation) v Dinesh Construction Co. Ltd (Civil Application E148 of 2022) [2023] KECA 1479 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KECA 1479 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E148 OF 2022

M NGUGI, JA

DECEMBER 8, 2023

BETWEEN

KENYA SUGAR RESEARCH FOUNDATION (AS TAKEN OVER BY THE KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANISATION) ..... APPELLANT

AND

DINESH CONSTRUCTION CO. LTD ..... RESPONDENT

(Application for extension of time within which to apply for leave to appeal against the order of the High Court of Kenya at Nairobi (Mativo J.) issued on 3rd of March, 2021 in Misc. Application No. 272 of 2017)

RULING

1. The applicant has filed the application dated 5th May, 2022 which it indicates is an 'Application for extension of time within which to apply for leave to appeal' against the order of the High Court of Kenya at Nairobi (Mativo J., as he then was) issued on 3rd March, 2021 in Misc. Application No. 272 of 2017.

2. The application is expressed to be brought under rule 4 of the *Court of Appeal Rules* and all other enabling provisions of the law. The applicant seeks an order that this Court be pleased to extend time for it to 'seek leave from this Court to appeal against the decision made on 3rd March 2021 in respect of the notice of motion dated 9th February 2021. The application is based on the grounds on the face of the application and is supported by an affidavit sworn by Mr. Eliud Kireger, the applicant's Director-General, on 5th May 2022.

3. The applicant states in these grounds that the decision of the High Court made on 3rd March, 2021 made the Decree Nisi issued on 11th February, 2021 absolute. It states it felt that the said decision left the

dispute in limbo, unresolved and tantamount to unjustly enriching the 1st respondent, so its advocates on record sought for instructions from it on the way forward. It further states that due to 'internal management protocols and the need to widely consult on the next course of action, it took quite a while before a decision was made and instructions to appeal made to the advocates for the applicant.'

4. It avers that by the time it issued instructions to its advocates, the time within which to seek leave to appeal had lapsed. It had sought extension of time from the High Court by its application dated 28th July, 2021 but its application was declined in the ruling dated 18th February, 2022.

5. In his affidavit, Mr. Kireger avers that by an order issued on 17th July, 2017, the Final (Arbitration) Award was recognized and adopted as a judgment of the superior court. By the said order, the applicant was to pay Kshs 122,917,423 plus interest at commercial bank rates to the respondent, and the applicant made initial payments of Kshs 100,755,100.88 in reduction of the decretal sum. Mr. Kireger avers that computations had been done and the applicant was required to pay a further Kshs 52,555,848.41 as at 24th February, 2021.

6. The applicant further avers that the superior court, by its decision dated 3rd March, 2021, made the Decree Nisi issued on 11th February, 2021 absolute. The amount indicated in the decree nisi as due to the respondent was Kshs 83,933,529.58, an amount the applicant claims was computed unilaterally by the respondent or the court, without its input. It contends that by the said orders, the respondent received public monies unjustly as the applicant does not owe it the said Kshs 83,933,529.58. It is averred that the superior court had a duty to protect public resources by declining to sanction false computations as presented by the 1st respondent, hence the need to grant the applicant the orders that it now seeks so that this Court can revisit the matter.

7. With respect to why it was making the present application at this point in time, the applicant avers that after delivery of the impugned decision, its counsel sought instructions from the applicant on how to proceed with the matter. It did not give the instructions, however, attributing the failure to do so on internal protocols and the need to consult widely on the next course of action. It avers that it took quite a while before a decision was made and instructions given to the applicant's advocates to appeal against the said decision. The applicant avers that by the time the instructions were given to its advocates, the time within which to seek leave to appeal had since lapsed. It had filed an application 28th July, 2021 for extension of time within which to seek leave to appeal but the court declined to extend time by its ruling dated 18th February, 2022,

8. The applicant avers that after that ruling, it 'embarked on both internal and external consultations on how to proceed thereafter', which culminated in this application. It is its averment that the delay in filing the application was neither intentional nor inordinate but purely due to the reasons aforesaid, and no prejudice will be suffered by the respondent if the prayers sought are granted.

9. In submissions dated 16th January, 2023, the applicant reiterates the averments in Kireger's affidavit, attributing the delay in filing an application for leave to appeal due to internal management protocols and the need for it to widely consult on the next cause of action. It further submits that by the time the instructions to appeal were given, time had lapsed.

10. It further submits that it has an arguable appeal raising, among other grounds, whether the amount which the applicant should have paid to the respondent from public funds was Kshs. 83,933,529.58 or Kshs. 52,555,849.41; and that the appeal raises issues of public interest. The applicant cites the case of *Commissioner of Police & 2 others v Joseph Mburu Gitau & 641 others* (2019) eKLR, where time to file a notice of appeal in a matter with immense public interest was allowed despite being 8 years late.

11. The application has been opposed through a replying affidavit sworn by Fredrick Opondo on 2nd October, 2023. It is his averment that the subject matter arose from a Final Arbitral Award made by three arbitrators on 3rd October 2016 in favour of the respondent for a sum of Kshs 152,559,577.00.

12. The respondent further avers that the applicant having failed to meet the decretal sum for over a year, the parties eventually recorded a consent on 31st July, 2018, allowing the applicant to settle the decretal sum which had accrued interest and reached the sum of Kshs. 164,000,000 at the time in four equal instalments. The applicant had paid two instalments of Ksh 41,000,000 each and thereafter failed to honour the consent judgment.

13. The respondent had made an application for execution of the balance and, in allowing the motion, the court assessed the amount outstanding at Kshs. 83,033,529. Thereafter, garnishee proceedings were brought and allowed as prayed, attaching the applicant's account with the garnishee in execution of the consent order. The respondent avers that a Decree Nisi was issued on 11th February, 2021 and thereafter made absolute.

14. The respondent further avers that the garnishee deposited the monies in the respondent's Advocates' account for onward transmission to the respondent. The present application has therefore been overtaken by events, and there is no subject to appeal on.

15. It is the respondent's submission further that the delay in filing this application has been inordinate and inexcusable; and that the applicant does not raise any substantial issues with a chance of success as the issue it intends to raise on appeal has previously been raised and determined.

16. Rule 4 of the *Rules of this Court* gives the Court unfettered discretion to extend the time limited by the Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by the Rules, on such terms as it thinks just. The factors that the Court is required to consider in an application under rule 4 are well settled. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 this Court laid down the parameters for exercise of the discretionary power under rule 4 as follows:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

17. Similarly, in its decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court stated:

> "... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant."

18. The present application was filed on 5th May 2022. It seeks leave 'for extension of time within which to apply for leave to appeal' a ruling that was made on 3rd March 2021, a delay of over one year and two months. This, I find, was inordinate delay, given that a party is required to file a notice of appeal within 14 days of a decision, and the substantive appeal 60 days thereafter - see rules 77 and 84 of the 2022 *Rules of this Court*, which are in the same terms as the corresponding rules under the 2010 Rules.

19. The applicant explains the delay by averring that it needed to consult internally before it gave instructions to its counsel to file an application for leave to extend time to file an appeal. It also blames its own 'internal protocols' for the failure to give instructions within sufficient time to comply with the requirements of the Rules of this Court. The explanation, I find, coming from a party who was aware of the monies it was required to pay under the arbitration award; which has already paid a substantial part of it; and had fully participated in the applications before the trial court, leading to the ruling it now seeks to appeal from, is not sufficient to justify the exercise of the Court's discretion in its favour. The applicant has attempted to sway the court in its favour by contending that the trial court had a duty to protect public resources. However, the applicant, to whom these resources are allocated, which was fully conscious of the need to protect the said resources, cannot drag its feet for over a year, fail to comply with the Court's rules, and then try to lay the burden of its failure at the feet of the trial court.

20. I find, therefore, that the application dated 5th May 2022 is without merit, and it is hereby dismissed with costs to the respondent.

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

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

Deputy Registrar