



Mweha Enterprises Limited v Kenya Industrial Estates Limited (Civil Application E215 of 2021) [2022] KECA 408 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 408 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E215 OF 2021
S OLE KANTAI, JA
MARCH 4, 2022**

BETWEEN

MWEHA ENTERPRISES LIMITED APPLICANT

AND

KENYA INDUSTRIAL ESTATES LIMITED RESPONDENT

(An application for extension of time from the Ruling of the High Court of Kenya at Nairobi (Muigai, J.) dated 13th April, 2021 in HC. Misc. Cause NO. E473 and E625 of 2019)

RULING

1. In the Motion brought under Section 35 of the *Arbitration Act*, Article 164 (3) (a) of the *Constitution* and Rules 4, 3,9(b), 41, 42 and 43 of the *Court of Appeal Rules, 2010* I am asked to extend time for filing of the application; that I grant the applicant time to file an appeal in this Court against the ruling and order of the High Court dated 13th April, 2021. In grounds in support of the Motion and in the supporting affidavit of Richard Matu Macharia, a director of the applicant (Mweha Enterprises Limited) it is stated amongst other things that the applicant had on 22nd April, 2021 filed an application before the High Court for leave to appeal but had withdrawn that application on 17th June, 2021 deciding to file this application instead; that delay in filing this application is excusable; that the ruling of the High Court should be interrogated on appeal; that the High Court went beyond the powers donated by Section 35 of the Arbitral Act; that the issues to be raised in the intended appeal are novel, weighty and deserve consideration and by this Court. It is further stated that the applicant and the respondent were parties to arbitration proceedings that culminated in a Final Award dated 30th September, 2019; that the High Court was moved to adopt the award as a Judgment of the court but the respondent moved that court to set aside the award and both applications were heard together and a ruling rendered on 13th April, 2021 where the award was set aside.
2. In a replying affidavit Charity Ndeke, Manager, Legal of the respondent Kenya Individual Estates Limited, says amongst other things that the applicant had by an application dated 22nd June, 2021



made an application asking for extension of time to file an application for leave to appeal out of time as well as leave to appeal that decision of the High Court; that grant of leave by this Court is an exercise of discretion and an applicant is required to explain reason(s) for delay; that the applicant has not given a good reason for delay; at paragraphs 11 and 12 of the affidavit:

11. That on the other hand, the Respondent is likely to suffer prejudice if extension of time is granted due to lack of knowledge. The Respondent is a public body whose functions and resources are well allocated before time and pre-determined through budget allocation. Therefore, when the superior court ruling was delivered and the Applicant failed to exercise its rightful powers under the law, the Respondent's resources were distributed as there was a clear indication that the matter had been concluded.

12. That therefore this Honourable Court should be careful to exercise its unfettered powers under rule 4 of the Court of Appeal rules and extend time to the applicant on basis of lack of knowledge on the due process as such the indolence of the Applicant should not be visited upon the court and other parties.”

3. It is further stated that there is some confusion on the prayers made in the Motion; that an appeal to this Court under Section 35 of the *Arbitration Act* can only lie in exceptional circumstances and there are many other things said which I, with respect, think I should not consider setting as a single Judge in an application such as this one.

4. I have seen and considered written submissions made on behalf of the parties.

5. The case of *Fakir Mohamed v Joseph Mugambi & 2 Others Civil Application No. 332 of 2004* has been cited many times as it set down the principles applicable in an application of this nature. Those principles are:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See *Mutiso v Mwangi*, Civil Application No. NAI. 255 of 1997 (ur), *Mwangi v Kenya Airways Limited* [2003] KLR 496, *Major Joseph Mwereri Igweta v Murika Methare & Attorney General* Civil Application No. NAI 8 of 2000 (ur) and *Murai v Wainaina (No. 4) 1982 KLR 38*.”

6. Ruling of the High Court intended to be appealed was delivered on 13th April, 2021. I am told by the applicant that it then moved that court in an application dated 22nd April, 2021, 9 days after the ruling for leave to appeal but that application which was met by a preliminary objection filed by the respondent was withdrawn the applicant choosing instead to file this application. The applicant admits through counsel that it was not sure of the procedure to follow once the High Court had set aside



Final Award which had been made by an arbitrator. The respondent depones at paragraph 8 of the replying affidavit:

That this is because the Supreme Court was extremely explicit in terms of the procedure to be followed in seeking leave to appeal from a decision of the High Court touching Section 35 of the *Arbitration Act* in Petition No. 12 of 2016 Nyutu Agrovet Limited – versus- Airtel Networks Kenya Limited & Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition No. 2 of 2017 Synergy Industrial Credit Limited –versus- Cape Holdings Limited [2019] eKLR as well as Petition 47 of 2019 Geo Chem Middle East –versus- Kenya Bureau of Standards [2020]eKLR.”

7. It is therefore clear from both the applicant and the respondent that until the Supreme Court made its findings in the cases set out at the said paragraph 8 of the replying affidavit parties were not sure which procedure to follow once the High Court had ruled in an application to enforce or set aside an award. I note in this case that the applicant moved the High Court 9 days after the ruling. A party who moves with haste as the applicant did cannot be accused of delay at all. The applicant moved the High Court shortly after the ruling and faced with a preliminary objection it filed this Motion which is dated 22nd June, 2021, slightly over 2 months after the ruling intended to be appealed. The applicant was always active from the date the ruling was delivered and showed its intention to appeal the ruling of the High Court. I have also considered the issues intended to be argued in the intended appeal and I think the applicant has satisfied the principles set out in the Fakir Mohamed (supra) case. I am in the circumstances prepared to exercise my discretion which I hereby do in favour of the application. Let the applicant file a Notice of Appeal within 14 days hereof and Record of Appeal within 30 days thereafter. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

