



**Energy Sector Contractors Association v Accounting Officer, Kenya  
Electricity Transmission Company Limited & another (Civil Application  
E333 of 2021) [2022] KECA 605 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 605 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E333 OF 2021  
AK MURGOR, JA  
APRIL 28, 2022**

**BETWEEN**

**ENERGY SECTOR CONTRACTORS ASSOCIATION ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER, KENYA ELECTRICITY TRANSMISSION  
COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC PROCUREMENT AMINISTRATIVE REVIEW BOARD .... 2<sup>ND</sup>  
RESPONDENT**

*(An application for extension of time for lodging an Appeal against the entire judgment of the High Court, Commercial & Admiralty Division at Nairobi (J. Ngaah, J.) dated and delivered on 9th July, 2021 in Judicial Review Application No. E071 of 2021)*

**RULING**

1. By a Notice of Motion dated 21<sup>st</sup> September 2021, brought pursuant to rules 4, 20, 41 43, 47, and rule 75 of this *Court's rules* as well as other relevant legislation, the applicant, Energy Sector Contractors Association seeks for time to be extended for lodging of a Memorandum and Record of appeal out of time.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn on 21<sup>st</sup> September 2021 by Paul Gicheru, Advocate for the applicant, and in written submissions, where it was contended that the applicant was aggrieved by the decision of the trial court and lodged a Notice of appeal within time on 15<sup>th</sup> July 2021; that after it obtained the certified typed proceedings on 12<sup>th</sup> July 2021, it was unable to lodge the record of appeal within the specified timelines due to challenges faced with Judiciary e-filing system; that the applicant wrote to the Registrar on 9<sup>th</sup> September 2021 seeking an alternative way to lodge the appeal, but received no response, by which time the period for



lodging the appeal had lapsed; that thereafter, the applicant wrote another letter on 15<sup>th</sup> September 2021 requesting for assistance to lodge this application; that the Registrar responded on the same day informing the applicant that the e-filing system was up and running.

3. It was asserted that the delay in filing the record was not due to the applicant, but was occasioned by difficulties experienced in lodging the appeal; that the appeal raises triable, more particularly the differing decisions of the High Court with respect to the interpretation of section 42 of the *Public Procurement and Assets Disposal Act* 2015 (PPADA), which has necessitated this Court's determination of the issue so as to settle the law; that finally, no prejudice would be occasioned to the respondents were time to be extended.
4. In a replying affidavit sworn by Engineer Valentine Nyandika Moronge, an Electrical Engineer, Transmissions Systems Planning on behalf of the 1<sup>st</sup> respondent, it was deponed that the judgment of the High Court was delivered on 9<sup>th</sup> July 2021, and that section 175 (4) of the PPADA specifies that judicial reviews emanating from a procurement dispute and determined by the High Court may be appealed to this Court within 7 days of such decision and determined by this Court within 45 days; that the applicant's appeal was not filed within the timelines specified by the PPADA; and further, there were no provisions in the Act allowing for time to be extended. That as a consequence, this Court had no jurisdiction or discretion to extend time for filing of an appeal under the PPADA.
5. It was further deponed that the applicant had not satisfied the threshold requirements necessary for a grant of an order of extension of time under rule 4 for the reasons that, the applicant merely alleged that the appeal could not be filed due to disruptions in the e-filing system, but did not provide any evidence to support this assertion; that further, the Registrar's reply relied upon by the applicant did not contain an admission that the Judiciary e-filing system was experiencing difficulties; that therefore, the delay was inordinate, implausible and not backed by evidence.
6. It was also deponed that on the chances of success of the appeal that, the applicant's complaint turned on the interpretation of section 42 of the PPADA which has been settled by this Court; that the subject procurement was undertaken under a multilateral loan agreement dated 19<sup>th</sup> June 2019 between the Kenya Government and the Africa Development Bank and was exempt from the application of the PPADA by virtue of section 42; that on these premises the appeal had no chance of success. On the public interest element, it was deponed that any decision that would cause delay in the drawdown of the loan could result in termination of the multilateral loan agreement to the detriment of the general public who are the consumers of the power; that the 1<sup>st</sup> respondent stands to suffer great prejudice if the application was allowed under rule 4 of this Court's rules.
7. Having considered the application, the affidavits and the parties' submissions, it would be the prudent to begin with the 1<sup>st</sup> respondent's assertion that this Court lacked jurisdiction to extend time having regard to the provisions of the PPADA, and more particular to section 175 of the Act.
8. In addressing the issue, it should be appreciated that this Court's rules make provision for determination of applications by a single judge, or by a full bench. An application under rule 4, for extension of time is ordinarily determined by a single judge. Such is the nature of the application that is before me. The respondent's objection to the determination of this application for the reason that section 175 and not rule 4 is a matter that is beyond my remit and would require to be canvassed before another forum. I therefore decline the invitation to determine the issue raised with respect to section 175, and will instead address the application as brought.
9. Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously



having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.

10. In so far as the length of delay is concerned, the judgment was rendered on 9<sup>th</sup> July 2021 and this application was brought on 21<sup>st</sup> September 2021. A Notice of appeal was lodged on 15<sup>th</sup> July 2021 and duly served on the respondents. In effect, the Notice of appeal was filed and served within time. In accordance with rule 75, the applicant had 60 days from the date of the Notice of appeal to file the record of appeal. The applicant stated that when its counsel attempted to lodge the record of appeal on 9<sup>th</sup> September 2021, it could not be uploaded due to challenges faced with the Court’s e-filing system; that it complained to the Registrar but received no response. It again wrote to the Registrar on 15<sup>th</sup> September 2021 requesting for assistance to file an application for extension of time to lodge the appeal, as the period stipulated for filing the appeal had already lapsed. The Registrar responded on the same day and informed the applicant that the e-filing system was up and running.
11. The respondent on its part has argued that the reason for delay advanced by the applicant is insufficient since the applicant has not provided any evidence to show the attempts made to file the record, and that the Registrar’s response that the system was up and running was not indicative of the e-filing system having faced challenges on the date in question.
12. A consideration of the record does not disclose that the applicant provided any proof of its attempt to lodge the application or the record, and a reading of the email from the Registrar does not definitively confirm that the e-filing system had problems. Much as the applicant alleges that it experienced problems filing the application, of more importance is that, the record was eventually lodged, albeit with a delay of two days. This delay is not inordinate, and in the circumstances, I am prepared to exercise my discretion to extend time for lodging of the record.
13. As concerns the success of the appeal, the applicant has raised a number of grounds which in my view should be determined by this Court. As to whether the respondents will be prejudiced were time extended, the respondents’ complaint is that they will be prejudiced if time is extended without regard to section 175 (4) of the PPADA. As stated earlier, the application was brought under rule 4 and not the provision aforementioned, as such, the question of prejudice on this basis of section 175 (4) does not arise at this juncture.
14. In sum, I exercise my discretion to extend time for filing and service of the record of appeal. The Memorandum and record of appeal to be lodged and served in accordance with rule 82 of this Court’s rule.

Costs in the intended appeal.

It is so ordered

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> OF APRIL, 2022.**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

