



**Patel v Transworld Safaris Limited (Civil Appeal 288 of 2018)
[2022] KECA 894 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 894 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 288 OF 2018
RN NAMBUYE, PO KIAGE & S OLE KANTAI, JJA
APRIL 28, 2022**

BETWEEN

KIRAN CHANDUBHAI PATEL APPELLANT

AND

TRANSWORLD SAFARIS LIMITED RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (R. Ngetich, J.) dated 20th July, 2018 in MISC. CIVIL CASE NO. 238 OF 2003)

JUDGMENT

1. By this appeal, the appellant Kiran Chandubhai Patel, who was the 2nd defendant in Miscellaneous civil case no. 238 of 2003, challenges the ruling and order of R. Ngetich, J. by which the court found it proper for the respondent to execute against him and disallowed his application dated 5th December, 2017. That application sought for orders;
 - “2. That the Notice to show cause dated 17th October 2017 and action for execution of Arbitrator’s award dated 19th July 2002 against the 2nd Defendant be stayed, set aside or dismissed;
 3. That the 2nd Defendant/Judgment-debtor be awarded costs of the Notice to show cause and of this application;
2. Pursuant to a lease agreement dated 1st October, 1999, the parties herein agreed to resolve disputes arising under the agreement through arbitration. A dispute concerning rent arrears was referred to arbitration and on 19th July, 2002, the arbitrator, Hon. Mr. Justice E. Torgbor (rtd), issued an award in favour of the respondent. What followed were multiple suits with the appellant challenging the arbitration process and the award, while the respondent sought to enforce the arbitral award. The



impugned ruling arose from one such suit where the appellant sought to challenge the notice to show cause why execution should not be granted, dated 17th October, 2017.

3. In challenging the notice to show cause, the appellant based his application on grounds that; the liability of the 2nd, 3rd and 4th defendant/judgment-debtor as enumerated in the court below as guarantors for payment by the 1st defendant/judgment-debtor of the principal debt due under the said contract, is joint and its severance by the plaintiff would prejudice and occasion injustice to the 2nd defendant; the action for enforcement of the arbitrator's award made on 19th July, 2002 has not been brought within 6 years of its making and is barred by the provisions of section 4(1)(c) of the [Limitation of Actions Act](#).
4. The learned Judge held that where judgment had been entered against parties jointly and severally as was in the instant appeal, the decree holder could proceed against all or any of the parties. As to whether enforcement of the arbitral award was statute barred, the judge held that following adoption of the arbitral award as a judgment of the court, the limitation period was 12 years pursuant to section 4(4) of the [Limitation of Actions Act](#) hence execution was not time barred.
5. Aggrieved by the High Court's ruling, the appellant filed a notice of appeal on 31st July 2018, followed by a lengthy memorandum of appeal contrary to Rule 64(2) of this Court's Rules. The Rule provides in mandatory terms that;

"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law, which are alleged to have been wrongly decided".
(Emphasis ours)
6. In summary, the appellant complains that the learned Judge erred by; Failing to determine whether application of section 36 of the [Arbitration Act](#) transformed the arbitrator's award into a judgment and decree of Court and changed the date of delivery of the award. Framing three issues for determination and failing to determine them. Failing to determine whether execution of an arbitral award was time barred after 6 years. Concluding that two separate periods of limitation applied and failing to give reasons for those findings. Failing to determine whether the cause of action to enforce the arbitrator's award arose on the date of delivery or on the date of adoption. Applying to the arbitrator's award the 12 years' limitation period under section 4(4) of the [Limitation of Actions Act](#) Failing to determine the significance of provisions of section 32(5) of the [Arbitration Act](#). Failing to uphold doctrines of stare decisis and the rule of law and violating the appellant's fundamental rights under article 27(1) of [the Constitution](#); Finding that release by the respondent of the 3rd and 4th Respondents in the Court below as guarantors of the 1st respondent's liability to the Plaintiff did not in fact and law and in equity effect a release of all the respondents from further liability on the award.
7. In consequence, the appellant prayed that the learned Judge's ruling be set aside and his application to set aside or dismiss the notice to show cause be allowed with costs.
8. The appellant through the law firm of F. N. Wamalwa & Company Advocates filed written submissions but the respondents did not and neither did they appear at the hearing. Learned counsel Mr Wamalwa for the appellant submitted that the appeal was about enforcement of an arbitral award 20 years later after the respondent had gone to sleep for not less than 11 years. It was urged that pursuant to this Court's decision in Kiran Chandubhai Patel v Transworld Safaris Ltd Civil Appeal No. 216 of 2003 at Nairobi (unreported), the date of delivery of the arbitral award was determined to be 14th



- February, 2002. Consequently, counsel argued, on application of section 4(1)(c) of the [Limitation of Actions Act](#), the action for enforcement of the arbitral award 6 years later was time barred.
9. Mr. Wamalwa contended that proceedings commenced in the High Court by virtue of section 36 of the [Arbitration Act](#) were incapable of yielding a judgement or decree. Further, the learned Judge was faulted for exercising jurisdiction she did not have by extending timelines that are barred under the [Limitation of Actions Act](#). In this respect counsel cited the following cases;
[M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe](#) [2007] eKLR; [Kenya Civil Aviation Authority v Wk & 2 Others](#) [2019] eKLR; [Osman v The United India Fire And General Insurance Co. Ltd](#) [1968] EA 102.
 10. Having carefully considered the submissions made before us, we decipher that the central issue for our consideration is whether the learned Judge exercised her discretion judiciously in holding that enforcement/execution of the arbitral award against the appellant was not statute barred.
 11. It is trite that when a court is called upon to exercise its discretion, it ought to do so judiciously. That is because discretionary power is derived from the law and must be exercised upon certain legal principles and according to the circumstances of each case, to the end of doing substantial justice to the parties. See [Patriotic Guards Limited v James Kipchirchir Sambu](#) [2018] eKLR.
 12. The appellant is inviting this Court to interfere with the discretion of the learned Judge. We are cognisant of the fact that this Court can only interfere with the judicial discretion of the learned judge if satisfied that she misapprehended the facts; or misdirected herself on law; or that she took into account matters of which she should not have; or failed to take into account considerations which she should have; or that her decision was plainly wrong. See [Shah v Mbogo & Another](#) [1967] EA 116.
 13. The appellant contests the learned Judge's application of 12 years' limitation period under section 4(4) of the [Limitation of Actions Act](#), to the enforcement of the arbitral award arguing that the time applicable is the 6-year limitation period under section 4(1)(c) of the same Act. In the result he urges that the arbitral award delivered on 14th February, 2002 was time barred. We note that the learned Judge while analysing this contention observed that pursuant to section 36(1) of the [Arbitration Act](#) domestic arbitral awards were only recognisable and enforceable, upon application to the High Court. Hence to the learned Judge, the award having been adopted as a judgment of the court and leave granted to the respondent to enforce it on 30th October, 2006, time started running from that date. The Judge held;

"Execution begins after issuance of the decree by the Court from the judgment of the Court. Time for execution of decree is provided under Section 4 (4) of the [Limitation of Actions Act](#). [...]

The award was adopted as the judgment of this Court on 30th October 2006. The Plaintiff filed Notice to Show Cause against the 2nd Defendant on 16th August 2017. The application was filed within the 12 year period for execution of a decree for judgment. Execution against the 2nd Defendant is not therefore time barred".
 14. We find the learned Judge's reasoning cogent and there is no reason for us to disturb it. We observe that, ironically, even as the appellant seeks to be protected by the statute of limitation, claiming delay in enforcement of the award, he seems to have contributed to the delay by seeking to strike out the award and the respondent's application for enforcement in this Court, in [Kiran Chandubhai Patel v Transworld Safaris Ltd Civil Appeal No. 216 of 2003 at Nairobi \(unreported\)](#) and [Kiran Chandubhai Patel v Transworld Safaris Limited](#) [2015] eKLR.



15. Ultimately, we find no reason to fault the Judge. She addressed herself properly on the law and took into account all relevant factors in exercising her discretion. This Court must always be slow to interfere with the decision made by first instance Judges in exercise of discretion. The discretion lies with such Judges, and not with this Court, hence the clear strictures we impose on our interference. The appeal is devoid of merit and we therefore dismiss it with costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

