



REPUBLIC OF KENYA



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Ensi Investments Limited v Vinya Wa AKA Group & 18 others (Civil Application E444 of 2021) [2022] KECA 763 (KLR) (24 June 2022) (Ruling)

Neutral citation: [2022] KECA 763 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E444 OF 2021**

F SICHALE, JA

JUNE 24, 2022

BETWEEN

ENSI INVESTMENTS LIMITED APPLICANT

AND

VINYA WA AKA GROUP 1ST RESPONDENT

VINYA WA AKA INVESTMENT COMPANY 2ND RESPONDENT

JANE WANZA MUTINDA 3RD RESPONDENT

JOYCE NTHENYA KIITI 4TH RESPONDENT

NDUNGE KIITI 5TH RESPONDENT

RHODA MUENI MUSYOKA 6TH RESPONDENT

FLORENCE NTHAMBI MUTHUSI 7TH RESPONDENT

DOLLY WANZA KIVUVANA 8TH RESPONDENT

RUTHY KAMENGELE WAKI 9TH RESPONDENT

LOIS MUTHANYA WAMBUA 10TH RESPONDENT

FLORENCE MWIKALI KIITI 11TH RESPONDENT

ALICE MANG'ELI MBINDU 12TH RESPONDENT

FLORA NDUKU MUTISO 13TH RESPONDENT

RUTH NDANU GICHOHI 14TH RESPONDENT

DORIS MUTINDI KIOKO 15TH RESPONDENT

CHRISTINE M WASANGA 16TH RESPONDENT

ANCHOR BUILDING TECHNOLOGIES LIMITED 17TH RESPONDENT



APEX HOLDINGS LIMITED 18TH RESPONDENT

NAMAKAO CAPITAL LIMITED 19TH RESPONDENT

(Being an Application for Extension of Time to lodge an application for leave to appeal and leave to appeal the Ruling of Bor J, delivered virtually on 20th July 2020.) IN (Nairobi ELC Misc Appl No. 49 of 2018))

RULING

1. The application before me sitting as a Single Judge is a motion dated 8th December 2021, brought pursuant to the provisions of Sections 3A & 3B of the *Appellate Jurisdiction Act*, Rules 4, 39, 40, 42 & 43 of the *Court of Appeal Rules* in which Ensi Investment Limited (the applicant herein), seeks the following orders;
 1. Spent.
 2. That the Honourable Court be pleased to grant leave to file out of time an application for leave to appeal the decision of Lady Justice K. Bor delivered on 20th July 2020, in ELC Misc Application No. 49 of 2018, (in the matter of *Arbitration Act*).
 3. That, the Honourable Court be pleased to grant the applicant leave to appeal the Ruling of the Environment and Land Court of 20th July 2021.
 4. That, the costs of this application do abide the result of the intended appeal.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Harun Osoro Nyamboki, one of the Directors of the applicant who deposed inter alia that the parties herein had submitted their dispute to arbitration whereupon an award was rendered on 2nd February 2018, by P. Mwaniki Gachoka, FCI Arb.
3. That, being aggrieved with the aforesaid award, the applicant filed an application dated 19th March 2018, in the Environment and Land Court in Nairobi, being; ELC Misc Appl No. 49 of 2018, seeking to set aside of the said award which application was dismissed by Bor J on 20th July 2020.
4. He further deposed that being aggrieved with the aforesaid ruling, the applicant herein filed an application dated 21st September 2020, seeking extension of time to file an application for leave out of time and leave to appeal to the Court of Appeal which application was dismissed vide a ruling dated 29th July 2021.
5. That, despite the applicant giving instructions to its counsel on record to seek leave to appeal the decision of the Environment and Land Court as of 29th July 2021; this was not achieved within the statutory period of 14 days for the reasons that there was a delay in receiving the Ruling dated 29th July 2021 which must be attached as a supporting document and that further the director of the applicant who has authority to sign the documents for the applicant in the suit, suffered successive misfortunes of deaths in his immediate family in the month of September (year not indicated) which made him unavailable to sign the affidavit in support of the application.
6. It was submitted for the applicant inter alia that the delay herein was not inordinate or unconscionable as judgment was delivered on 29th July 2019; therefore, time for filling an application for leave was within in 14 days of the judgment pursuant to Rule 39 (b) and that accordingly, the applicant was



- obliged to file its application by 12th August 2021. Though the applicant herein filed its application on 8th December 2021; some 132 days after the statutory period had lapsed (As per the applicant's words).
7. It was further submitted that no prejudice would be occasioned to the respondents which cannot be compensated by way of costs, if the application were to be allowed and that further the intended appeal raises issues of public importance.
 8. There was no response on part of the respondents.
 9. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions, the cited authorities and the law.
 10. The applicant's motion is brought inter alia under Rule 4 of this Court's *Rules*. The said Rule provides:
 4. Extension of time The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."
 11. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously. In *FAkir Mohamed V. Joseph Mugambi & 2 Others C.a.* No. Nai.332 of 2004, this Court stated as follows regarding discretion under the Rule and the factors that ought to guide its exercise:

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 ..."
 12. In the instant case, the impugned ruling that is sought to be appealed against was delivered on 20th July 2020 whereas the instant application is dated 8th December 2021. There has therefore been a delay 17 months which delay is certainly inordinate. It is also imperative to note that the applicant had vide an application dated 21st September 2020, filed before the High Court, sought leave to file an appeal out of time to this Court, which application was dismissed on 29th July 2021 by Bor J (though the applicant in its submissions erroneously referred to the said date as 29th July 2019.**
 13. The applicant contended that the delay in filling the appeal was due to inter alia the fact that there was a delay in receiving the ruling dated 29th July 2021, and that further a director of the applicant who has the authority to sign documents on behalf of the applicant, suffered successive misfortunes of deaths in his immediate family in the month of September (year not indicated) and was thus unavailable to sign the affidavit in support of the application. No evidence was however tendered to support these contentions/allegations. As a matter of fact, the record shows that the ruling of 29th July 2021 was actually delivered in the presence of advocates for the parties and there is no indication of the applicant's advocates having requested for the same.



14. From the circumstances of this case, I am of the considered opinion that the reasons put forth for the delay are not plausible and the same has not been explained to the satisfaction of this Court.
15. With regard to the possibility of the appeal succeeding, I have looked at the averments contained in paragraphs 21-23 of the supporting affidavit and I am not satisfied that indeed the applicant has an arguable appeal or that indeed the appeal raises issues of public importance as contended in the submissions. Of course I am alive to the fact that I cannot make a definitive finding on this issue sitting as a single Judge as that is a preserve of the full Bench.
16. As regards prejudice, it has not been demonstrated what prejudice the applicant will stand to suffer if the instant application is not allowed.
17. Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of this Court to extend time to file an appeal out of time and therefore decline the same.
18. Accordingly, the applicant's motion dated 8th December 2021 is without merit and the same is hereby dismissed with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

