



**Prabhaki Developers Ltd v Structural Development Ltd (Civil Application  
E037 of 2022) [2022] KECA 917 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 917 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E037 OF 2022**

**K M'INOTI, JA**

**JULY 22, 2022**

**BETWEEN**

**PRABHAKI DEVELOPERS LTD ..... APPLICANT**

**AND**

**STRUCTURAL DEVELOPMENT LTD ..... RESPONDENT**

*(Application for extension of time to appeal out of time from the  
ruling and order of the High Court of Kenya at Nairobi (Majanja,  
J.) dated 10th January 2022 in HC Misc. App. No. E331 of 2021)*

**RULING**

1. The applicant, Prabhaki Developers Ltd., has moved the Court vide a motion on notice dated 8<sup>th</sup> February 2022, for extension of time to lodge an appeal against the ruling of the High Court of Kenya at Nairobi (Majanja, J.) dated 10<sup>th</sup> January 2022. The applicant prays that his notice of appeal, filed on the same date as the motion, be deemed to have been filed on time. Uncharacteristically, the applicant also seeks, in the application for extension of time, an order for stay of execution of the ruling of the High Court, pending the hearing and termination of the application. It is difficult to fathom how the applicant expects an order of stay of execution, which can only be granted by the full Court, to be issued in an application for extension of time by a single Judge. As has been stated time without number, an application for extension of time and an application for stay of execution in this Court should not be made in the same application. Sequentially the application for extension of time must be heard and determined first. (See *Martin Change v. Vitalis Odida*, C.A. No. E571 of 2021 and *Abdulrazak Rageh Haji v. Mabado Abdulrazak Adichare*, C.A. No. E.030 of 2020). I shall accordingly treat the application before me as one limited to extension of time only, which in any event, is my proper bailiwick.
2. The short background to the application is that the applicant and the respondent, Structural Development Ltd, had a construction contract dispute which they referred to arbitration. The



arbitral tribunal issued an award on 24<sup>th</sup> February 2021 by which it awarded the respondent Kshs 85, 560,514.02, interest at 18% until payment in full, and costs. On 5<sup>th</sup> May 2021 the applicant applied to the High Court under section 35 of the *Arbitration Act* to set aside the award or to remit the matter back to the Arbitral tribunal for what was called conclusive determination. The application was based on the grounds that the award was contrary to public policy and in excess of the arbitrator's scope of reference.

3. On its part, the respondent, on 15<sup>th</sup> May 2021, applied under section 36 of the *Arbitration Act* for enforcement of the arbitral award as a decree of the court. Majanja J. heard the two application and by the ruling dated 10<sup>th</sup> January 2022, found no merit in the applicant's application, which he dismissed with costs for lack of merit and as a disguised appeal against the merits of the arbitral award. As regards the respondent's application for enforcement, he allowed the same with costs.
4. The applicant was aggrieved and lodged a notice of appeal on 8<sup>th</sup> February 2022. By dint of rule 75(2) of the Court of Appeal Rules, the delay was 15 days (not seven days as the applicant claims), which in any event I would not consider inordinate granted the explanation that the applicant's Managing Director, Mr. Pradip Shah has proffered. The explanation set out in his supporting affidavit sworn on 8<sup>th</sup> February 2022 is that he was solely responsible for instructions on the filing of the appeal and that on 7<sup>th</sup> January 2022, a few days before the delivery of the ruling, he went down with Covid-1, which forced him to go into isolation and quarantine. He has attached the results of his covid-positive results from one of the hospitals in Nairobi, a fact which the even respondent does not dispute. Indeed, save for a notice of preliminary objection, the respondent has not filed any replying affidavit or grounds of opposition to the application. But for the notice of preliminary objection, which I shall revert to shortly, on the test for extension of time propounded in such cases as *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, C.A. Nai. 251 of 1997 and *Fakir Mohamed v. Joseph Mugambi & 2 Others*, CA No. Nai. 332 of 2004, I would have readily granted the application for extension of time.
5. Turning to the respondent's notice of preliminary objection, it is contended that the applicant has no automatic right of appeal to this Court from decisions of the High Court under Sections 35 and 37 of the *Arbitration Act* and further that the applicant has not obtained leave to appeal, either from the High Court or this Court.
6. It is trite that there is no automatic right of appeal from a determination by the High Court under section 35 of the *Arbitration Act*. To lodge such an appeal, an aggrieved party must obtain leave, and even then, leave will only be granted in rare and exceptional circumstances. The Supreme Court has pronounced itself on this issue as follows in *Nyutu Agrovet Ltd. v. Airtel Networks Kenya Ltd & Another* [2019] eKLR:-

"In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction." (Emphasis added).



7. The same Court took a similar view in *Synergy Industrial Credit Ltd v. Cape Holdings Ltd* [2019] eKLR, when it stated:

In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in *Inco Europe Ltd & others* (supra) hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances. Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law. Having said so, we are of the further opinion that a decision on whether the Court of Appeal should assume jurisdiction on appeals arising from Section 35 should be guided by the following consideration i.e. whether the High Court has overturned an award other than on the grounds in Section 35 of the Act.” (Emphasis added).

8. The above residual circumscribed and residual jurisdiction is not invoked as of right; it is invoked through an application for leave to appeal, in which the intended appellant demonstrates exceptional circumstances that would justify grant of leave to appeal. I have carefully perused the application before me. The applicant does not advert to having obtained leave to appeal the decision of the High Court which was rendered under section 35 of the *Arbitration Act*. There is also no evidence of such leave on record. Without obtaining leave to appeal, which leave is granted by the full Court, I cannot fathom why a single judge should extend time to appeal. It is an exercise in futility because without leave to appeal, the applicant cannot mount a competent appeal. Extension of time in such circumstance therefore serves no purpose.
8. In *Nairobi City Water & Sewerage Co Ltd v Capture Solutions Ltd* [2021] eKLR, Ouko, P. (As he then was), confronted a similar scenario where an applicant sought extension of time to challenge a decision of the High Court in arbitral proceedings without first obtaining leave to appeal. In evaluating one of the conditions for extension of time, namely the prospects of success of the intended appeal, the learned judge stated as follows:-

“It is equally doubtful if the appeal will be sustained if time is extended to file the notice of appeal, without first obtaining leave, what is sought to be challenged being an arbitral award.”

9. For the foregoing reasons, I am not persuaded of the merit of the applicant’s motion on notice dated 8th February 2022. The same is accordingly dismissed with costs to the respondent. It is so ordered.

**Dated and Delivered at Nairobi this 22<sup>nd</sup> of Day July, 2022**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

