



Villa Care Management Limited v Kengen Retirement Benefits Scheme (Civil Application 165 of 2022) [2022] KECA 998 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KECA 998 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 165 OF 2022
HA OMONDI, JA
SEPTEMBER 23, 2022**

BETWEEN

VILLA CARE MANAGEMENT LIMITED APPLICANT

AND

KENGEN RETIREMENT BENEFITS SCHEME RESPONDENT

(An application for extension of time for lodging a notice of appeal under Rules 4, 5(2)(b), 39(b), 42, 43 and 75(4) of the Court of Appeal Rules, Section 35 of the Arbitration Act, Article 159 of the Constitution of Kenya 2010 and the inherent power of the Court against the ruling of the High Court of Kenya at Nairobi, Commercial and Admiralty Division (Okwany, J.) dated 29th July, 2021 and for stay of proceedings in High Court Misc. Application No. 260 of 2019)

RULING

1. The motion dated May 16, 2022; seeks extension of time for lodging a notice of appeal as well as the appeal against the ruling dated July 29, 2021; in High Court Misc. Application No. 260 of 2019 Commercial and Admiralty Division (Okwany, J.), and stay of proceedings in High Court Misc. Application No. 260 of 2019; that the annexed Notice of Appeal and the appeal be deemed duly filed and properly on record; and costs of this application be in the intended appeal.
2. The dispute between the parties had been referred to a sole arbitrator who delivered an award dated May 20, 2019. An application dated August 14, 2019 seeking to set aside the arbitral award was dismissed in a ruling dated July 29, 2021 by the High Court (the ruling); and the applicant intends to appeal against the said ruling but at the stage of filing the initial application, the time within which to do so had lapsed by 22 days prompting the applicant to file an application dated September 4, 2021; to extend time to file the application (extension application), and the respondent had filed an application to enforce the award.



3. The applicant submits that the delay in filing the application for leave to appeal was neither inordinate explaining that there was a delay in transferring the file from its previous counsel (who was bereaved at the time) to a new counsel; an application for extension of time dated September 4, 2021; was filed soon after receiving the file from the applicant's previous counsel, but by a ruling dated April 1, 2022 by this Court. (Dr. K. I. Laibuta, J.A.) ruled that it had no jurisdiction to determine the application for want of a Notice of Appeal, therefore the application for extension not determined on the merits [reference is made to the case of *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others* [2014] eKLR].
4. The applicant further submits that unless this Court issues stay of proceedings in the High Court, its intended appeal against the said High Court's ruling shall be rendered nugatory as it shall have been overtaken by

events; and that it is worthwhile to note that the said matter has already been heard and determined and the High Court is set to deliver its ruling on the same on October 6, 2022.
5. The respondents in a replying affidavit sworn by Josephat Muriuki oppose the prayers, saying it is an attempt to re-argue what had been dealt with previously by this Court, and orders issued. It is argued that the delay has been inordinate, coming 10 (ten) months too late; that in any event, the application for enforcement of the award has been heard, and is pending delivery of a decision on October 6, 2022.
6. I have considered the submissions made by both counsels, if one only focuses on the ultimate when this application found its way to finally being heard, then the computation of time would be most skewed. The critical dates are award - 20th May, 2019; application to set aside - August 14, 2019; was dismissed on 29th July, 2021; resulting in application dated September 4, 2021; to extend time to file the application (extension application) was then filed.
7. That application was filed less than a month after the impugned decision, but an odd assortment of events which translated into obstacles slowed its pathway. I take note that the respondent does not dispute the bereavement faced by the initial advocate, and the only reasonable inference I can draw is that counsel for the respondent was aware of that. Then when it finally came to court in April, 2022; heard and a determination made rendering it dead on arrival due to want of Notice of Appeal. A fresh breath of air dated May 16, 2022; wafted and it then found its way back to this Court on July 13, 2022. If the court had simply rejected the application and given directions that no orders would issue for want of the notice of appeal that would have given the applicant a lease of life. However, in this instance this Court heard the matter and made a finding, and any attempt to now ameliorate the situation, is in my view tantamount to patching up the lapse that had informed the Judge's decision.
8. The situation thus does not predispose me to exercise my discretion favourably, and the application is dismissed with costs to the respondent.

DATED AND DELIVERED THIS 23RD DAY OF SEPTEMBER, 2022.

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

