



Rural Electrification Authority v Limelight Creatures Limited & 2 others (Civil Appeal (Application) 26 of 2019) [2022] KECA 1284 (KLR) (18 November 2022) (Ruling)

Neutral citation: [2022] KECA 1284 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 26 OF 2019
DK MUSINGA, AK MURGOR & F TUIYOTI, JJA
NOVEMBER 18, 2022**

BETWEEN

RURAL ELECTRIFICATION AUTHORITY APPLICANT

AND

LIMELIGHT CREATURES LIMITED 1ST RESPONDENT

ALLAYS SOUTHERN CORPORATION LIMITED 2ND RESPONDENT

GLOBAL TRADE MARKETS PLACE (EA) LIMITED 3RD RESPONDENT

(Being an Appeal from the Judgement of the High Court of Kenya at Nairobi (Ngetich, J.) Dated 19th December, 2018 in Misc. No. 246 of 2017)

RULING

Ruling of the Court

1. The notice of motion dated January 15, 2019 has run into a strong headwind. In that motion, rural electrification authority, the applicant, seeks leave of this court to institute an intended appeal from the judgment of Ngetich, J delivered on December 19, 2018 in Misc 246 of 2017 and a temporary injunction prohibiting Limelight Creations Limited, Allays Southern Corporation Limited and Global Trade Markets Place (EA) Limited, the respondents, from executing the said ruling and decree therefrom pending the hearing and determination of the applicant's intended appeal.
2. The motion was confronted by a notice of preliminary objection dated February 4, 2022 raising five grounds. Of concern to us now, for reasons that will become apparent shortly, is the call for rejection of that application because;
 1. That said application dated January 15, 2019 is bad in law and fatally defective since the applicant failed to comply with the provision of rule 39 (B) of the [Court of Appeal Rules](#) prior to filing the application which required the applicant to seek leave to file appeal within 14 days



of the delivery of the ruling on December 19, 2018 at the superior court and the respondent did not seek leave to file the application herein within the statutory timeline as required.

2. Further the application is bad in law and fatally defective for the reason that the applicant being aware of its omission to seek leave of this honourable court within 14 days filed an application dated February 4, 2019 under Nairobi Civil Application No 41 of 2019 (U/R 47) for extension of time within which to file and serve an application. Leave to appeal against the superior court's ruling dated September 19, 2018, which was allowed in a ruling dated June 21, 2019, by Lady Justice Martha Koome (as she then was) whereby she explicitly gave the applicant seven (7) days from the date of ruling to file the application for leave, which order the applicant failed to comply with.
3. The applicant's application dated January 15, 2019 herein was therefore time barred at the time it was filed and the applicant also failed to comply with the ruling of this honourable court dated June 21, 2019 that required it to file an application for leave to appeal within 7 days of the ruling dated June 21, 2019.
4. The applicant did not seek that the application dated January 15, 2019 be deemed as properly filed upon obtaining extension of time but rather sought extension of time to file a complainant application upon the extension of time being granted which it did not file thereby rendering the application herein fatally defective.
5. That in any event applicant's application for leave to appeal is fatally defective for the reason that this honourable court lacks jurisdiction to hear the appeal from the superior court's decision dated December 19, 2018 since the applicant's application dated October 11, 2017 before the superior court did not invoke section 39 of the *Arbitration Act* and the superior court did not make any determination under section 39(2) of the *Arbitration Act*.
3. The gravamen of the objection being that the motion is brought out of time is also reiterated in the further affidavit sworn by Samuel Kangethe Mburu on February 4, 2022 which was filed with the leave of the court granted on January 28, 2022. A short walk of the events leading to the current motion gives the context of the objection.
4. The applicant entered arrangements with the respondents for the supply, installation and commissioning of diesel generators under various contracts. The applicant's case before a sole arbitrator, who heard and determined a dispute arising from the contracts, was that the respondents delayed in the provision of goods and services under the contracts and the applicant opted to exercise its right to withhold a penalty amount being 10% of the contract price for delayed completion. The sole arbitrator issued an award on or about May 10, 2017 in which he dismissed this argument by the applicant.
5. The publication of the award triggered two applications before the High Court. One for partial setting aside of the award by the applicant and another for adoption by the respondents. Upon hearing the applications, the learned Judge of the High Court delivered a ruling on December 19, 2018 dismissing the application for setting aside of the award and allowing the application for adoption.
6. The applicant is aggrieved by the decision but it being common ground that it is a decision against which an appeal lies only with leave of this court, the applicant was required by rule 39 (b) (now 41(b)) of the *rules* of this court to apply for such leave within fourteen (14) days of the decision or if an application for leave had been made before the superior court below in the first instance and refused, within fourteen (14) days of such refusal. As the applicant was in breach of the timelines, it sought extension of time through a notice of motion dated February 4, 2019 which was granted by Koome,



JA(as she then was) on June 21, 2019. The leave granted being of seven (7) days from the date of the ruling.

7. At plenary hearing learned counsel Mr Wakwaya for the applicant, referring to paragraph 8 of her ladyship's Ruling, argued that the learned Judge was aware that there was already an application in court and the current application was therefore filed with leave of court. It was pointed out by the court that the application was improperly filed, and it was for this very reason that leave to file it out of time had been sought. Mr Wakwaya answered that it was an error on the part of counsel that the application was already on record.
8. On another front, learned counsel for the applicant submitted that the preliminary objection itself was improperly before us as it was filed more than 30 days after service of the record upon the respondents contrary to the rules of this court.
9. On January 29, 2019 the applicant filed an application for leave to appeal against the decision of Ngetich, J That application was filed outside the fourteen (14) days period provided by rule 39 (b). It was on realization of the lapse that the applicant brought the motion dated February 4, 2019 for extension of time. The court, upon allowing the application, made the following order;

“The applicant is given seven (7) days from the date of this ruling within which to file the application for leave to appeal the decision of Ngetich J delivered on the December 19, 2018 in Misc. Application No 246 of 2017 and 415 of 2017”

10. The order is as plain as can be and does not require any further interpretation. The applicant was to file the application for leave within seven (7) days from the date of the ruling, that being June 28, 2019. The order did not deem the already late application duly filed. The applicant was required to file the application within the time granted by court and we fear that the application now before us which is the one filed on January 29, 2019 is not the application contemplated by the rather clear order of the court. Simply, we do not have a proper application before us.
11. We think the argument by learned counsel for the applicant that the current challenge by the respondents ought to have been filed or taken up within 30 days of the service of the record upon the respondent to be pertinently flawed. Learned counsel for the applicant was perhaps making reference to rule 84 (now rule 86) which is in regard to the time within which an application to strike out a notice or an appeal is to be brought. What we are asked to determine is an application for leave to appeal (rule 39). A respondent who wishes to respond to such application does so by filing an affidavit or affidavit in reply in accordance with rule 50 (now rule 52) which reads:

50.

Affidavits
in reply

1. any person served with a notice of motion under rule 49 may lodge one or more affidavits in reply and shall as soon as practicable serve a copy or copies thereof on the applicant.

2. Any such person may, with the leave of a judge or with the consent of the applicant, lodge one or more supplementary affidavits.

12. Since the objection was taken up by way of preliminary objection and supplementary affidavit, we are unable to find any breach of the provisions of rule 50.
13. The importance of parties keeping to timelines set by statute or imposed by court has been underscored by this court on several occasions. See *Mae Properties Limited v Joseph Kibe & another* [2017] eKLR, a decision which counsel Mr Wakwaya would be familiar with as he represented one of the parties.



When parties to a contract, through exercise of their autonomy, choose the path of arbitration as their preferred mode of dispute resolution, they would be aspiring for an expeditious resolution of any dispute that may arise between them. To fail to keep to timelines set for achieving that goal is to detract from a central feature of arbitration, the speedy resolution of disputes. Such failure is not to be tolerated.

14. The plea by the respondents that no application has brought within the time granted by court is unanswerable and on that account, the fate of the application before us is sealed. The notice of motion dated January 15, 2019 is hereby struck out with costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

