



Kenya Pipeline Company Limited v Kenya Oil Company Limited & another (Civil Appeal (Application) E344 of 2022) [2022] KECA 1352 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1352 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E344 OF 2022
GWN MACHARIA, JA
DECEMBER 2, 2022**

BETWEEN

KENYA PIPELINE COMPANY LIMITED APPLICANT

AND

KENYA OIL COMPANY LIMITED 1ST RESPONDENT

KOBIL PETROLEUM LIMITED 2ND RESPONDENT

(Being an application for extension of time and leave to appeal to the Court of Appeal against the Ruling and Order of the High Court (W.A. Okwany, J.) delivered on the 18th day of August, 2022.)

RULING

Brief background

1. *Vide* an agreement between the applicant and the respondents dated May 10, 1999, it was an express term of the agreement that all disputes arising between the parties would be referred to a single arbitrator agreed among them. A dispute arose and Mr Ahmednasir Abdullahi was appointed as the arbitrator who, in a final award dated December 10, 2009 awarded the respondents a net sum of USD 37, 909,879.50 and Kshs.1,866,494,783.00.
2. The applicant being aggrieved appealed to the High Court which set aside the award and referred the matter back to the arbitrator for determination. The respondents being aggrieved by the High Court's decision appealed to the Court of Appeal, which appeal was dismissed. The arbitrator reassessed the matter and, in an award, dated May 26, 2016 awarded the respondents USD. 19,758,594.70.
3. The applicant being aggrieved that the arbitrator did not do the assessment in strict conformity with the High Court and Court of Appeal's directions appealed to the High Court which, *vide* a judgment



dated August 18, 2022 held it lacked jurisdiction on the ground that the reassessment orders emanated from the Court of Appeal, a superior court to the High Court.

Application

4. The applicant filed a notice of motion dated September 21, 2022, brought under articles 48, 50(1) and 159 (2) (d) of the *Constitution of Kenya*; sections 3, 3A & 3B of the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya; sections 10, 35 and 39 of the *Arbitration Act*, No 4 of 1995; Rules 4, 41 (1) (b), 44 & 45 of the *Court of Appeal Rules, 2022*, seeking the following orders; -
 - a. This honourable court be pleased to extend time for filing an application for leave to appeal to this court as prescribed under rule 41 (1) (b) (i) of the Court of Appeal Rules, 2022;
 - b. This honourable court be pleased to deem this application as duly lodged within time;
 - c. This honourable court be pleased to grant the applicant leave to appeal to this court against the ruling and order of the High Court (Lady Justice WA Okwany) delivered on August 18, 2022 in High Court Miscellaneous Application No 380 of 2016 – Kenya Pipeline Company Limited v Kenya Oil Company Limited & Kobil Petroleum Limited;
 - d. This honourable court be pleased to stay enforcement and/ or further proceedings based upon the reassessment of loss and damages dated and published on May 26, 2016 by the Arbitrator, Mr Ahmednasir Abdullahi SC in arbitral proceedings between Kenya Oil Company Ltd & Kobil Petroleum Ltd v Kenya Pipeline Company Limited pending the hearing and determination of this application and/ or the intended appeal;
 - e. Costs of this application be provided for.
5. The application is supported by the grounds on the face of it and an affidavit sworn by Flora Okoth, the applicant’s general manager, company secretary and head of legal services, who avers that the delay was unintentional thus excusable. That the order from the High Court was not received in due time due to the court’s August vacation hence the delay and the intended appeal is arguable and has high chances of success. That such extreme and highly prejudicial consequences would subvert the ends of justice and render the intended appeal nugatory and as such, it would be in the interests of justice and fairness if the application was allowed.
6. The respondent opposed the application *vide* a replying affidavit sworn on October 31, 2022 by John Githiomi, the group chief finance officer of Rubis Energy Kenya PLC which previously traded and operated in the name and style of the 1st respondent. He averred that the application is an abuse of the court process, lacks merit and should be dismissed, that there is no right of appeal arising from a decision under section 35 of the *Arbitration Act* and one can only invoke this court’s jurisdiction by filing a proper notice of appeal which was not done as leave had not been granted. Further, this court does not have the jurisdiction to hear and determine applications for leave to appeal decisions under section 35 of the *Arbitration Act*. That the applicant should first seek leave in the High Court before approaching the Court of Appeal and that no sufficient reason has been given for the delay.

The application proceeded by way of written submissions



Submissions

- 7 The applicant filed its submissions dated September 27, 2022 whilst those of the respondents are dated November 7, 2022. In view that they restate the averments in the application and the response thereto, I see no reason to rehash them. I however add that the applicant relied on the following cases to buttress its submissions: *Imperial Bank Limited (In Receivership) & another v Alnashir Popat & 18 others* [2018]eKLR, *Leo Sila Mutiso vs Rose Wangari Mwangi* CA No Nai 255 of 1997, *Julius Kamau Kithaka v Wanguguru Kithaka Nyaga & 2 others* [2013] eKLR, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, Mwangi S.

Kimenyi v Attorney General & another [2014] eKLR, Kenya Airports Authority v Mitu-Bell Welfare Society & Another [2014]eKLR, Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019]eKLR.

Analysis and determination

8. I have considered the application, the affidavits in support of, and opposition to, the application, respective submissions and authorities cited. The issue for determination is whether the application has any merit.
9. The respondent avers that this court lacks jurisdiction to hear and determine the application on the ground that leave to appeal was not sought by the applicant in the High Court and that under section 35 of the *Arbitration Act*, an arbitral award is an unappealable. The first issue for determination therefore, is whether this court is vested with the jurisdiction to hear and determine the application.
10. The above question can be answered by first determining whether the applicant ought to have sought leave to appeal before the High Court. Section 75 of the *Civil Procedure Act* provides for orders from which appeals lie. Under the provision, appeal would lie as of right and/or with the leave of the court. Section 75 must be read together with the provisions of order 43 rule 1 of the *Civil Procedure Rules* which sets out the orders and rules in respect of which appeals would lie as of right. Order 43 Rule 1(2) provides that an appeal shall lie with the leave of the court from any other order made under the Rules.
11. The above requirement is couched in mandatory terms. In the present application, the applicant seeks leave to appeal out of time against the ruling that was delivered on August 18, 2022 striking out its application on ground of want of jurisdiction. Though the root matter stems from an arbitral award, that is not what is before this court. To me, the issue at hand is not the arbitral award but rather, the High Court's decision to strike out the applicant's pleadings on account of lack of jurisdiction.
12. From the above, I do find that the applicant's appeal falls within the ambit of pleadings under order 43 and any appeal arising from the striking out of pleadings does not require the leave of the court. An intended appeal is thus, of right, according to order 43(2) of the *Civil Procedure Rules*, properly before the court. I find that this court has jurisdiction to hear the intended appeal.
13. Having found that this court has jurisdiction to hear and determine the intended appeal, the next issue is whether this court should exercise its discretion and extend time to appeal out of time. The High Court's ruling was delivered on August 18, 2022, a notice of appeal was filed and served on the respondents on the August 26, 2022 which was within the 14 days' statutory period. The application herein is dated September 21, 2022. The applicant had sixty days from the date of lodging its notice of appeal to file its memorandum and record of appeal which would have been by October 17, 2022.



Be that as may, having found that leave of the High Court to file an appeal was not a requirement, the application herein is misplaced.

14. The applicant also sought for stay of enforcement of further proceedings based upon the reassessment of loss and damages dated and published on May 26, 2016 by the Arbitrator, Mr Ahmednasir Abdullahi, SC in arbitral proceedings between [Kenya Oil Company Ltd & Kobil Petroleum Ltd v Kenya Pipeline Company Limited](#) pending the hearing and determination of this application and/or the intended appeal. This prayer does not fall for consideration by a single Judge and is accordingly struck out.
15. For the above reasons, I find the application dated September 21, 2022 devoid of merit. However, as at the time of delivering this ruling the statutory timeframe of filing an appeal had run out. Consequently, in the interest of justice I do order that the applicant do file their record of appeal within 30 days of this ruling. Costs shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

