



**Kuria v Gachanjo & another (Civil Application 101 of 2019)
[2021] KECA 3 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 3 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 101 OF 2019
HM OKWENGU, JA
SEPTEMBER 23, 2021**

BETWEEN

JOHN GATHARA KURIA APPLICANT

AND

MUNYAMBU NJUGUNA GACHANJO 1ST RESPONDENT

KEZIAH WANGARI MUNYAMBU 2ND RESPONDENT

(Being an application for extension of time to file an application for leave to appeal against the Ruling of the High Court of Kenya at Nairobi (Makau, J.) dated 17th January, 2019 in HC Misc. Cause No. 444 of 2017)

RULING

- [1] On 17th January 2019, the High Court (Makau, J.) delivered a ruling in which he ordered that the final award made on 31st May, 2017 by an arbitrator Eunice Lumallas, FCI Arb., be recognized as binding, and leave be granted for its enforcement as a decree of the court. Upon an oral application being made, the learned Judge declined to grant John Gathara Kuria the applicant, leave to appeal against the judgment in which the learned Judge had declined to set aside the award.
- [2] The applicant filed a notice of appeal on 31st January, 2019. He is now before this Court with a notice of motion dated 29th March, 2019 seeking to have time extended to enable him file an application for leave of the Court to appeal the ruling of the High Court. The applicant explains that although his notice of appeal was filed in good time, he was unable to reach his advocates to execute the affidavit in support of the formal application seeking leave to appeal, as he was overwhelmed and preoccupied by the illness of his wife, who was recuperating from surgery done in India in December 2018. The applicant maintains that he has an arguable appeal as he is challenging an award which has contravened section 35(2) (A)(iv) of the *Arbitration Act*. The applicant further explains that he applied for certified copies of the order of the High Court, and the same was availed to him on 19th March, 2019.



- [3] The applicant has filed written submissions in which he reiterates that his intended appeal is meritorious as a heavy contractual burden has been placed on him without any justification as the remedy given by the arbitrator does not arise from the sale agreement. The applicant argues that no undue prejudice will be caused to the respondent, if time is extended for him to obtain leave to file an appeal. In addition, the applicant states that the delay was forced by circumstances beyond his control, and that it is only a delay of two months, which is not inordinate.
- [4] The respondents object to the applicant's motion. They have filed written submissions in which they maintain that the applicant is not deserving of the exercise of the Court's discretion. They point out that the decision that the applicant seeks to appeal was made on 17th January 2019, and the applicant did not file his application for extension of time until 1st April, 2019, which is a delay of 73 days. The respondents fault the applicant for failing to provide any evidence in support of his explanation that his wife was ailing in India and Kenya, and that the allegation that he lost all documents relating to his travel in India was unusual, and in any case, he could have obtained copies of the treatment documents from Kenya.
- [5] The respondents also fault the applicant's counsel for failing to file the application for leave to appeal in a timeous manner. Finally, the respondents urge that the intended appeal is not meritorious as it intends to challenge the jurisdiction of the arbitrator when the applicant had not challenged the earlier ruling of the arbitrator made on 28th September, 2016 on the issue of jurisdiction. The Court was urged that there were no special circumstances to warrant an appeal in this Court. In that regard *Nyutu Agrovet Ltd vs Airtel Networks (K) Limited*, was relied upon.
- [6] What is before me is an application as a single Judge under Rule 4 of the *Court of Appeal Rules*, to extend time for the applicant to file an application for leave to appeal to this Court. That is to say, that I am not dealing with the application as to whether the applicant should be granted leave to appeal the ruling of 17th January 2019, but simply, whether he should be given the opportunity to ventilate such an application by having time extended for him to seek the Court's leave to appeal.
- [7] Rule 39 of the *Arbitration Act* states that:
- “ 1. Where in the case of a domestic arbitration, the parties have agreed that –
 - (a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
 - (b) an appeal by any party may be made to a court on any question of law arising out of the award. Such application or appeal as the case may be, may be made to the High Court. **
 2. On an application or appeal being made to it under subsection 1 the High Court shall –
 - (a) determine the question of law arising;
 - (b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.
 3. Notwithstanding section 10 and 35, an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection 2:



- (a) if the parties have so agreed, an appeal shall lie prior to the delivery of the arbitral award; or
 - (b) the Court of Appeal being of the opinion that a point of law of general importance is involved, the determination of which will substantially affect the rights of one or more of the parties grants leave to appeal and on such appeal, the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection 2.
4. An application or appeal under this section shall be made within the time limit and in the manner prescribed by rules of court applicable as the case may be in the High Court or the Court of Appeal.” (Emphasis added)

[8] It is clear that under Section 39 (3)(b) of the *Arbitration Act*, an intending appellant must obtain leave of the Court to appeal against the judgment of the High Court arising from an arbitration award. Section 39(4) applies the timelines in the Court of Appeal Rules in such a situation. Under Rule 75 (2) of the Court of Appeal Rules, a notice of appeal is required to be lodged within 14 days of the date of the decision intended to be appealed against, and under Rule 82(1), the appeal should be lodged within 60 days of the date when the notice of appeal was lodged.

[9] It is not disputed that the applicant filed a notice of appeal on 31st January 2019, which was within the required time frame of 14 days. However, no record of appeal has been filed to date. There is no time frame provided in the Court of Appeal Rules for obtaining leave to appeal.

[10] I take note that Rule 75(4) of the Court of Appeal Rules provides that:

“Where an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”

[11] As there is no equivalent provision in the Court Rules regarding the lodging of the record of appeal, where leave to appeal has been granted, it is implicit that once a notice of appeal is lodged within the 14 days from the date of impugned decision, the applicant will apply for leave to appeal before lodging the record of appeal, as the record of appeal must be lodged within 60 days from the date of the notice of appeal, as provided under Rule 82(1) of the Court Rules.

[12] This means that the applicant ought to have moved this Court and obtained leave to file the appeal so as to enable him file the record of appeal within 60 days from 31st January, 2019 when the notices of appeal was lodged. The current application having been made on 29th March, 2019, it was made 57 days from the date of lodging the notice of appeal. Other than the judgment of the court, the filing of the application for leave did not require typed proceedings.

[13] The applicant has relied on the alleged illness of his wife. However, once a decision was made to file an appeal as evidenced by the notice, it was the work of the advocate to file the application for leave to appeal, and it was not imperative that the affidavit in such an application be sworn by the applicant as the advocate who was seized of the matter could swear the affidavit. That is to say that the alleged illness notwithstanding, the application for leave to appeal could still have been made by the advocate within time. Moreover, as pointed out by the respondents, the applicant has not substantiated his allegation concerning his wife’s alleged illness. The Court has not been given the specific dates when she travelled to India and back, and even if I was to accept that he lost the documents, there was nothing to prevent him from getting other documents or copies.



- [14] In addition, the applicant in his submissions has indicated that there was delay in filing the application because they had to raise the deposit legal fees for the filing of the application. This has not been deposed to by the applicant in the affidavit sworn in support of the motion. I therefore find that the applicant has not satisfactorily explained the reasons for the delay in filing his application for leave to appeal.
- [15] Nevertheless, given that the period of delay was not inordinate, and that the effect of an order declining to extend time will have the effect of totally shutting out the applicant from the seat of justice, and the respondent not having demonstrated that it will suffer any prejudice, I am inclined to exercise my discretion in the applicant's favour.
- [16] Accordingly, I allow the notice of motion dated 29th March, 2019 and grant leave to the applicant to file and serve his application for leave to appeal within 14 days from the date hereof.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify this is a true copy of the original.

Signed

DEPUTY REGISTRAR

