



National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers Planners Limited (Civil Application E226 of 2021) [2021] KECA 108 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 108 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E226 OF 2021
F SICHALE, JA
OCTOBER 22, 2021**

BETWEEN

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION APPLICANT

AND

RUNJI & PARTNERS CONSULTING ENGINEERS PLANNERS LIMITED RESPONDENT

(Being an Application for extension of time to serve the Notice of Appeal and letter bespeaking proceedings arising from the Ruling of Mativo J dated 22nd February 2021.) IN (Nairobi High Court HCCOMMARB/E002 of 2020)

RULING

1 Before me is a motion dated 28th June 2021 and brought pursuant to Articles 48,50,159 and 259 of the *Constitution of Kenya 2010*, Sections 3A & 3B of the *Appellate Jurisdiction Act* CAP 9 of the Laws of Kenya and Rules 4, 77, and 82 of the *Court of Appeal Rules 2010* and all other enabling provisions of the Law in which National Water Conservation and Pipeline Corporation (the applicant herein) seek the following orders;

- "1. Spent.
2. THAT this Honourable Court be pleased to extend the time for serving the Notice of Appeal dated 4th March 2021 and the letter bespeaking proceedings arising from the ruling of the High Court (Mativo J) delivered on 22nd February 2021 in HCOMMARB/E002/2020.



3. THAT this Honourable Court be pleased to deem the Notice of Appeal dated 4th/ March 2021 and letter bespeaking proceedings both served on 26th May 2021 as properly served.
4. THAT this Honourable Court be pleased to make such other order as the interest of justice may demand.
5. THAT the costs of this application be in the appeal.”

2 The motion is supported on the grounds on the face of the motion and an unnecessarily lengthy affidavit sworn by Sharon Obonyo, the Acting Chief Executive Officer of the applicant who deposed *inter alia* that the applicant had filed an application dated 6th November 2020, seeking to set aside the arbitral award of Tom Onyango published on 10th August 2020, which application was considered by Mativo, J and a ruling delivered on 22nd February, 2021 in absence of the parties.

3 She further deposed that on 4th March, 2021, the applicant lodged on the judiciary e-filing portal both the Notice of Appeal and letter bespeaking proceedings and served the same upon the respondent vide their email address [Particulars Withheld] @yahoo.com. That, the applicant’s advocates had been using the said email address to serve documents upon the respondent’s counsel including the application for setting aside the arbitral award and that it was apparent that the arbitrator continued to use both [Particulars Withheld] @yahoo.com and [Particulars Withheld] @gmail.com as the respondent’s email address but the applicant’s advocates did not pick out the second email address due to a myriad email addresses then involved.

4 It was further deposed that the applicant’s advocates had all along honestly albeit mistakenly believed that the respondent’s advocates email address was [Particulars Withheld] @yahoo.com and that the delay in serving the Notice of Appeal was occasioned by the inadvertent oversight in capturing the respondent’s email address as well as the challenges understanding the nascent judiciary e filing portal and that the respondent will suffer no prejudice not compensated by way of costs if the application is allowed.

5 The application was opposed by an equally lengthy unnecessarily affidavit sworn by Runji Ngware the managing director of the respondent sworn on 12th July 2021, who deposed *inter alia* that vide their advocates email dated 31st May 2021, they had pointed out that they had earlier on vide email dated 21st June 2018, clarified that their email address wasn’t [Particulars Withheld] @yahoo.com

6 It was submitted for the applicant that the reason for the delay was because the email used by the applicant’s advocates to serve the Notice of Appeal and the letter bespeaking of the proceedings namely [Particulars Withheld] @yahoo.com turned out not to be the one used by the respondent’s and that as such the reason for the delay had been satisfactorily explained and that the delay was not inordinate and was excusable (2 months 16 days) and that the appeal had high chances of success and that the respondent would suffer no prejudice if the application was allowed.

7 I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the applicant’s submissions, the cited authorities and the law.

8 The applicants motion is brought *inter alia* under Rule 4 of this Court’s Rules. The said Rule provides:

“4

Extension of time



The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

9 The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997* where the Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

10 In the instant case, the impugned ruling was delivered on 22nd February 2021 and the applicant served the respondent with the Notice of Appeal and letter bespeaking of the proceedings on 26th May 2021 which was 2 months and 16 days after 11th March 2021 when the applicant ought to have served the Notice of Appeal. In my considered opinion and from the circumstances of this case, even though the delay of 2 months and 16 days may be considered to be inordinate, the same has been satisfactorily explained to the satisfaction of this court namely; that the email address used turned out not to be the one used by the respondent’s advocates and I find the same to be excusable.

11 As to whether there is a possibility of the appeal succeeding, I am mindful of the fact that I cannot say more regarding this issue sitting as a Single Judge.

12 As regards prejudice, the respondent has not demonstrated that it will suffer any prejudice that cannot be compensated by way of costs if the application is allowed.

13 Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in *Leo Sila Mutiso case*(supra), to grant extension of time.

14 Accordingly, the applicant’s application dated 28th June 2021 is hereby allowed as prayed in terms of prayer 2 and 3. The applicant is hereby granted 30 days from the date of this ruling to serve the Notice of Appeal and letter bespeaking of the proceedings upon the respondent failure to which these orders shall stand vacated.

The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.



DEPUTY REGISTRAR

