IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) (IN CHAMBERS)

CIVIL APPLICATION NO. 61 OF 2017

BETWEEN

NJAMA LIMITED.....APPLICANT

AND

KENYA AGRICULTURAL AND

LIVESTOCK RESEARCH ORGANIZATION....RESPONDENT

(Being an application for leave to appeal against the Order of the High Court of Kenya at Nairobi (Justice Fred Ochieng', J.) issued on 18th January, 2017 in respect of the Notice of Motion dated 23rd August, 2016

in

Misc. Application No. 514 of 2014)

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RULING

On 17th day of April, 2015 F. Ochieng, J. found that the sole arbitrator in this dispute had acted beyond his jurisdiction, by flouted **Section 29 (5)** of the Arbitration Act; and that he had also acted against public policy by applying double-standards on the issue as to which party had the onus of proving the claim.

In the end, he set aside the final arbitral award published on 31st August, 2012,and delivered on 19th August, 2014 with costs.

The applicant then moved the learned Judge with an application of 23rd August, 2016 to refer the dispute back to the arbitrator as the setting aside of the award did not, with finality resolve the dispute. That request was resisted by the respondent who argued that the arbitrator was *functus officio* and the decision of the court resolved the dispute. By a ruling of **18th January, 2017** dismissing the application, the learned Judge agreed with the respondent and found that his order setting aside the award was final; and that the parties would have to live with it or go for fresh arbitration.

The applicant was aggrieved and orally applied to the learned Judge for leave to appeal. The application was rejected *ex tempore*.

By **Rule 39** of the Court of Appeal Rules, the applicant had 14 days to move the Court for leave to appeal. This was not done and time for doing so lapsed. The applicant, by the instant application, now prays that time be enlarged for it to apply for leave to challenge that decision.

Whether or not to extend time within which to do an act under **Rule 4** of the Court of Appeal Rules is in the discretion of the single Judge, subject only to the requirement that it must be exercised judicially. In the exercise of that discretion, the judge takes into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed. See**Hon. John Njoroge Michuki & Another vs. Kentazuga Hardware Limited** [1998] eKLR.

An application for extension of time should be granted liberally unless the applicant is guilty of unexplained and inordinate delay, and further that the opposite side is not prejudiced by it.

We reiterate that the decision in question was given on **18th January, 2017**. The application for leave ought to have been brought on 8th February, 2017, being 14 days from the date of the impugned decision. Instead this application was taken out on 28th March, 2017, 34 days late. That delay has been attributed to the fact that after the proceedings of 18th January, 2017, the court file was not immediately available as it had been locked up in the Judge's chambers; that when it resurfaced the applicant's advocate was supplied with the wrong ruling; that at the time this application was being filed, copies of the proceedings had not been supplied.

In a 16-paragraph replying affidavit, the respondent has concentrated its arguments on the merit of the intended appeal, only contending it will be prejudiced if an extension of time was granted. It did not attempt to rebut the reasons proffered by the applicant for the delay.

> **Rule 39** aforesaid requires that in civil matters—
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> **"(b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal".**

In its decision in **Nyutu Agrovet Limited vs Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)** [2019] eKLR, the Supreme Court confirmed **"that the Court of Appeal ought to determine *in limine*, whether the threshold for admitting … appeal has been met and if the appeal before it ought to be heard at all"**, hence the application for leave.

Taking into account the threshold of the instant application, I am persuaded that the delay was not inordinate; that the applicant has sufficiently explained the delay; and that, what it wishes to raise in the intended appeal is not idle. Equally, the respondent has not explained in what way it be prejudiced if the application is allowed.

In the circumstances, I allow the application and grant the applicant 14 days from the date of this ruling to lodge an application for leave to appeal. Costs of the application are awarded to the respondent.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR