



IN THE COURT OF APPEAL

AT NAIROBI

**(CORAM: KOOME, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 41 OF 2019**

BETWEEN

RURAL ELECTRIFICATION AUTHORITY.....APPLICANT

AND

LIMELIGHT CREATIONS LTD.....1<sup>ST</sup> RESPONDENT

ALLAYS SOUTHERN CORPORATION LTD.....2<sup>ND</sup> RESPONDENT

GLOBAL TRADE MARKETS PLACE (EA) LTD.....3<sup>RD</sup> RESPONDENT

*(Being an application for extension of time to lodge an application for special leave to appeal the ruling of the High Court of Kenya at Nairobi (R. Ng'etich J.,) dated 19<sup>th</sup> December, 2018*

in

MISC. APPL. NO. 246 OF 2017)

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**RULING**

1. The Notice of Motion before me is by Rural Electrification Authority (applicant). It seeks an order of extension of time within which to file and serve an application seeking leave to appeal against the decision of Ngetich J., delivered on the 19<sup>th</sup> December, 2018 in **MISC Applications No 246 of 2017 and 410 of 2017**. The application is principally brought under **Rule 4** of this Court Rules and **Sections 39 (b), Arbitration Act**

2. A brief background of the matter is that the parties to this application had a dispute that was determined by a sole Arbitrator, Mr P. Mwaniki Gachoka. The award by the Arbitrator gave rise to two applications that fell for hearing before Ngétich J., who after hearing both delivered a single ruling on the 19<sup>th</sup> December, 2018. The Judge dismissed the application seeking to set aside the award and allowed the one that sought to adopt the award in the following terms;

***“i. Application dated 11<sup>th</sup> October, 2017 is hereby dismissed.***

***ii. Application dated 30<sup>th</sup> May, 2017 is hereby allowed. The final award delivered by sole Arbitrator P MWANIKI GACHOKA and published on 16<sup>th</sup> May, 2017 is hereby adopted and enforced as the judgment of this court.***

***iii. Costs for both applications to the claimants.”***

3. The applicant wishes to appeal against the aforementioned decision. Towards that end, an application seeking an order for leave to appeal the said decision was filed on 29<sup>th</sup> January, 2019. However this was outside the period provided for filing such an application under **Rule 39 (b)** of this Court's Rules. As such an application ought to have been made within fourteen (14) days after the decision sought to be appealed against.

4. The reasons for the delay in filing the application are articulated in the supporting affidavit sworn on 4<sup>th</sup> February, 2019 by **Kevin Wakwaya** counsel for the applicant. He deposes that the delay in filing the application was inadvertent, it was a delay of one day which he discovered on or about 30<sup>th</sup> January, 2019 as he was going through the record, he realized the application was filed one (1) day out of time. This was occasioned by miscalculation of Christmas vacation where he erroneously omitted the days between 20<sup>th</sup> of December, 2018 and 15<sup>th</sup> January, 2019 both days inclusive which mistakenly gave him the 29<sup>th</sup> January, 2019 as the last day for filing. Counsel apologised for the mistake and urged the application be allowed as he contended it was filed timeously immediately the error was discovered.

5. Opposing the application was Mr. Thuo, learned counsel for the respondents. He relied on the replying affidavit sworn by **Samuel Kang'ethe Mburu** on the 1<sup>st</sup> April, 2019. The respondents view is that the application lacks merit, is bad in law and incompetent for reason that there are numerous decisions of this Court that held the decision of the High court is final under **Section 35 and 36** of the **Arbitration Act**. Moreover the application alluded to the supporting affidavit by **Kevin Wakwaya** where he states that he filed an application for leave but as a matter of fact it seeks orders for stay of execution. Moreover the applicant and his advocate are deemed to know the law since ignorance of the law is no defence. The applicant and its counsel should bear the blame; they filed a Notice of Appeal within fourteen (14) days but failed to file the application for leave to appeal as required by the law. Counsel for the applicant was also faulted for failing to give reasons why it took them until the 8<sup>th</sup> February, 2019 to file the instant application upon realizing the mistake. Counsel urged the application be dismissed as in his view its sole purpose is to deny the respondents their right to realize the fruits of their judgment from the arbitration award by seeking to file a frivolous appeal.

6. I have considered the application, the replying affidavit and the rival arguments. The prayers sought in this application for extension of time call for the exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words, judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The parameters that guide the Court are well set out in a long line of authorities. See the case of; - **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur)**:

**“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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.”**

The above list is of course not exhaustive as held in the case of; - **Mongira & Another v Mukaria & Another, 2005 2 KLR 103 at page 106-107**, where the Court again cited **Leo Sila Mutiso**, (supra), and went on to state:

**“Those, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general” Rule 4 gives the Judge unfettered discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. ... To limit such issues only to the grounds set out in the above paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way”.**

7. With the above principles in mind, I now deal with the application before me, to answer the question whether the applicant has offered justifiable reasons for the delay and whether granting leave will prejudice the respondent. The reason for delay here is attributed to a mistake by counsel for the applicant. Ordinarily a mistake by counsel is usually excusable if it is genuine and does not cause prejudice to the other side. See the case of; - **Belinda Murai & others vs Amoi Wainaina**, (supra) **Madan, J.A.** (as he then was) astutely explained what constitutes a mistake in the following words:-

**“A mistakable is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”**

8. As regards the instant application, the applicant was late to file it by a few days for which his counsel attributed to his own mistake in miscounting the days while trying to exclude some days covered by the Christmas vacation. Upon realizing the mistake on the 30<sup>th</sup> January, 2019 that the application was filed out of time, this application seeking extension of time was filed timeously on the 8<sup>th</sup> February, 2019. This was a mistake or oversight which in my view is not a grave oversight by counsel; and as was postulated in the **Belinda Murai case** (supra) the doors of justice should not be closed on the applicant in the circumstances of this matter. On the argument by counsel for the respondent that the application that was filed on 30<sup>th</sup> January, 2019 was seeking stay of execution only and not leave to file an appeal; that is not entirely true as prayer No 2 states;

**“This honourable court be pleased to grant leave to the applicant to institute the intended appeal”**

9. I have also not taken casually the arguments by the respondent that the intended appeal does not lie, however as a single Judge and with the material before me, the uncertainty of the law regarding a right of appeal to the Court of Appeal on arbitration decisions of the High court, I am unable to tell one way or the other whether the intended appeal is without merit which should be left to the bench that will interrogate the merits of the matter. On the issue of prejudice, although the respondents have been delayed from the fruits of their judgment, which is an inconvenience, the applicant cannot be stopped from their quest for justice. The delay for a few days and the inconvenience of defending this application can be compensated with costs which should be awarded to the respondent.

10. In the upshot, the notice of motion dated 4<sup>th</sup> February, 2019 is hereby allowed in terms of prayer No 2. 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 Nge'tich J., delivered on the 19<sup>th</sup> December, 2018 in Misc. Application No 246 of 2017 and 410 of 2017. The respondent shall have the cost of this application in any event.

**Dated and delivered at Nairobi 21<sup>st</sup> this day of June, 2019**

**M.K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a

True copy of the original.

**DEPUTY REGISTRAR**