IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 218 OF 2015

BETWEEN

SAVINGS TEA BROKERS LTD.....APPLICANT

AND

KENYA TEA DEVELOPMENT AGENCY LTD....1ST RESPONDENT

KAPKOROS TEA FACTORY LTD.....2ND RESPONDENT

NYANKOBA TEA FACTORY LTD.....3RD RESPONDENT

RUKURIRI TEA FACTORY LTD.....4TH RESPONDENT

GIANCHORE TEA FACTORY LTD.....5TH RESPONDENT

MOGOGOSIEK TEA FACTORY.....6TH RESPONDENT

WERU TEA FACTORY.....7TH RESPONDENT

KAPSET TEA FACTORY LTD.....8TH RESPONDENT

(Application for extension of time to lodge an application for special leave to appeal the ruling of the High Court of Kenya at Nairobi (Gikonyo, J.) dated 13th July, 2015

in

MISC. CIVIL APPLN. NO. 129 OF 2014)

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RULING

By a notice of motion expressed as brought under **section 39(2)** of the Arbitration Act, No. 4 of 2015 and **Rule 4** of the Court of Appeal Rules, the applicant Savings Tea Brokers Limited prays for this order;

> ***"That the applicant be granted leave to file out of time an application to the Full Court for special leave to appeal to challenge the decision of F. Gikonyo J delivered on 13th day of July, 2015 in High Court Miscellaneous Application No. 129 of 2014 (in the matter of Arbitration Act)."***

The application is premised on two grounds appearing on the face of the motion, namely that;

> ***"1. In view of the uncertainty of time factors in matters relating to procedures under the Arbitration Act (No. 4 of 1995), counsel was unable to decide how to proceed to apply for special leave to seek leave of this court of appeal.***

2. Counsel was under the impression that 14 days limitation does not apply for application for leave to appeal in civil matters (as opposed to Arbitration matters).”

It is supported by the affidavit of a director of the applicant one **Ezekiel Machogu Ombaki** sworn on 11th August 2015. In that brief affidavit, the deponent swears that the applicant did file an application dated 24th March 2015 by which it sought the leave of the High Court to file an appeal against a ruling of Gikonyo, J which had set aside part of an arbitral award of Rtd. Justice Ringera made on 20th February 2014. That application was rejected by Gikonyo, J on 13th July 2015, he swore, “**making it necessary to seek leave of this Court to appeal against the said ruling of Gikonyo, J.”** He proceeded to attach a copy of the ruling sought to be appealed against.

By way of explaining the delay in bringing the application for leave to appeal, the deponent swore that he had been informed by the applicant’s advocate as follows;

“(c) That counsel was not quite sure until he obtained advice from a Senior Advocate as relating to time factor for lodging an application for leave to appeal against setting aside of an award (partial) by the High court in view of the wording of Sections 35 and 39 of the said Arbitration Act.

(d) That the issues to be raised for obtaining such leave to appeal are complex and not entirely settled.

(e) That the input of a seven Judge Bench of this Court is needed to decide if a Judge of the High Court can set aside an award based on argued grounds of facts, duly ruled upon by the Arbitrator.”

He concluded by opining that the issue of a right of appeal to this Court still begs a conclusive determination of this Court or the Supreme Court, and complained that the applicant aggrieved that the learned Judge shut it out from being heard by this Court on a matter of utmost importance.

The motion was opposed by the respondents through an affidavit sworn on 12th November 2015 by **Christopher Mwangi Kariuki**, an advocate in the firm representing the respondents. He swore that the applicant’s reasons for the delay had changed from not knowing whether it needed to bring its application within fourteen days of the delivery of the Judge’s decision, to uncertainty on how to progress on the part of its advocate who needed the advice of a senior. The deponent was dismissive of the latter reason as one commending itself to “***a plea of ignorance which does not constitute a „sufficient reason? for failure to take the step in time***.” He also swore that the applicant does not demonstrate any matter of general public importance and fails to meet the conditions laid out in **section 39(3)** for the right to apply for leave to appeal to crystallize in its favour. He urged the dismissal of the application as the original decision under challenge relates to a ruling in an application brought under **section 35** of the Arbitration Act, 1995. He averred that a 5-Judge bench of this Court had already settled that no right of appeal lies from such matters and there is no need for a 7-Judge bench to revisit the same.

The parties filed submissions and bundles of authorities as a prelude to hearing of the motion before me. Learned counsel **Mr. Bw’Omote** appearing for the applicant pointed out that the learned Judge considered the application before him a non-starter by reason of this Court’s decision in ***NYUTU AGROVET LTD vs. AIRTEL NETWORKS LTD*** **[2015] eKLR** which held that no right of appeal exists from a decision of the High Court in a **section 35** application. Counsel contended that the appeal intended to be preferred has reasonable prospects of success because the effect of the learned Judge’s decision as well as of the ***NYUTU*** decision is to confer finality, not on the arbitral award as ought, but on the decision of the High Court which may actually be inimical to it. He stated that the law in the subject is therefore not settled and cited this Court’s earlier decision of ***KENYA SHELL LTD vs. KOBIL PETROLEUM LTD [2006] 2EA 132*** to the effect that whether or not the court could grant leave to appeal in an arbitration matter remains in the discretion of the court. According to counsel, there is no hard and fast rule that leave is not grantable and that finality is in the decision of the arbitral award, not on the decision of the High Court upon challenge to such award.

Mr. Bw’Omote pointed out that he applicant was guilty of about 17 days delay, which was not in the circumstances inordinate. He explained that the applicant’s counsel delayed because they were seeking to clarify the correct legal position on whether they could appeal, a matter which, in counsel’s view, is still unclear with the Profession being generally unsure about the correct position. He next submitted that extending time for the filing of the requisite application would occasion the respondents no prejudice while, on the other hand to dismiss the instant application would deny the applicant the right of access to justice. He urged me to allow the applicant to explore the window of appeal by paving way for it to apply for leave.

For the respondents, learned counsel **Miss Lwila** commenced by stating that **Rule 4** of this Court’s Rules “***requires an applicant to show sufficient reason***” for the delay. She went on to say that the applicants had not given any cogent reason why extension of time should be granted. To her, the 17-day delay was inordinate and was evidence of indolence. The reasons given for it were wanting. She cited in aid of those submissions the cases of ***NJAGI vs. MUNYIRI [1975] EA 179*** and ***KIBORO vs. POSTS & TELECOMMUNICTIONS CORPORATION*** **[1974] EA 155.**

Counsel next contended that the applicant is not properly before this Court as it purports to invoke **section 39** of the Arbitration Act yet the decision of Gikonyo, J., to appeal against which leave is sought, was made under **section 35**. She termed the invocation of **Rule 39** as “*an embellishment to hoodwink the court*” and posited that on the authority of ***NYUTU*** (supra) the decision of the High Court is final, admitting to no appeal. To allow this application, argued counsel, would occasion injustice to the respondent as it will keep this litigation alive yet litigation should come to an end. She urged me to dismiss the application.

Mr. Bwo’Omote made a brief rejoinder stating that the substantive jurisdictional provision for this Court is **Article 164(3)** of the Constitution and it grants a broad jurisdiction to hear appeals. He cited the Ruling of a 5-Judge bench of this Court in ***JUDICIAL SERVICE COMMISSION & ANOR vs. HON. (LADY) JUSTICE KALPANA H. RAWAL*** **[2015] eKLR** to urge that under the 2010 Constitution, there is a general right of appeal to this Court which he pleaded that the applicant ought to be allowed to exercise. Counsel concluded that

there is still room and reason for this Court to depart from the position propounded by the ***NYUTU*** bench.

I have given due consideration to the application, the rival submissions, both written and oral, as well as the authorities cited. My task is limited to a consideration only of whether or not I should extend time under **Rule 4** of our Rules for the filing of an application by which the applicant will be seeking this Court's leave to appeal. **Rule 4** therefore is the fulcrum on which the fate of this application rests. It is in terms simple enough;

> ***"4. 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."*** (My emphasis)

An application such as before me lies in my discretion. That discretion, both from a plain reading of the Rule and from many decisions of this Court, is wide and unfettered. All I need do is ensure that I decide the matter in a manner that conduces to the doing of justice between the parties. The discretion is wide alright, and it is untrammeled by anything, but it is first and last a judicial discretion to be judicially and judiciously exercised. It is not one left to whim, caprice or individual idiosyncrasy. Rather, it is exercised in accordance with principles that have crystallized over time. See ***PAUL WANJOHI MATHENGE vs. DUNCAN GICHANA MATHENGE*** **[2015] eKLR**.

I need to point out at the outset, and with respect to the respondents' learned counsel, that under our current **Rule 4**, there is no requirement that an applicant do show "*sufficient cause*." That used to be the requirement under the law as it previously stood in the 1970's when the two cases referred to by said counsel as well ***ESSO STANDARD vs. INCOME TAX*** **[1971] EA 127** cited in ***NJAGI vs. MUNYIRI*** (supra) were decided.

The proper considerations for a single Judge to bear in mind when deciding whether or not to extend time have been restated in numerous cases. They are not exhaustive but merely indicative as aspects of the logical quest for the doing of justice on a case by case basis. They include;

> **(a) The length of the delay**
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> **(b) The reason for the delay**
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> **(c) (Possibly) the prospects of the appeal succeeding**
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> **(d) The degree of the prejudice (if any) that may be suffered by the respondent in the case of grant**
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> **(e) The general conduct of the parties, so that concealment, non-disclosure, lack of candour or any inequitable conduct is more likely to disentitle an applicant.**

See, ***PRINCIPAL SECRETARY MINISTR OF DEFENCE & THE ATTORNEY GENERAL vs. DOROTHY KANYUA & ANOR*** Nyeri Civil Application NO. 19 of 2016; ***GITETU vs. KENYA COMMERCIAL BANK LTD*** **[2009] KLR 545;** ***POTHIWALLA vs. KIDOGO BASI HOUSING CO-OP SOCIETY LTD & 31 OTHERS*** **[2005] KLR 733**.

Regarding the length of delay, both parties agree it was somewhere the region of 17 days at most. The delay related to the filing of an application for leave to appeal. It did not involve the simple, straight-forward issue of say, filing a notice of appeal. I do not consider, in the totality of circumstances, that 17 days is so inordinately long a period of delay as to make it unconscionable, on that basis alone, for me to allow an extension of time.

It is not enough, however, that the delay was not inordinate. Even a short period of delay may, if unexplained to the Court's satisfaction, disentitle an applicant of the extension sought; while a comperatively long delay, if fully explained, may yet lead to grant of the application for extension. In the present case, the applicant's explanation, spoken through its advocates, is that the advocates were, to prophrase, literally stuck as to the next steps after failing before the learned Judge. They seem to have unsure untrue whether they could prefer an appeal from the Judge's decision. They seem to have been caught in a legal and procedural bind, a form of paralysis and conundrum of sorts. They found themselves seeking the input of a senior in the profession to help them navigate the next steps. In the meantime the clock ticked, time moved inexorably forward, and they were out of time for applying for leave.

Was this a case of sloth and negligent inattention on the part of the applicant's advocates? Does their plea before me amount to an admission of ignorance, as the learned counsel for the respondents contends? I am unable, with respect, to express such a harsh opinion on the said advocates. I think that far from meriting vilification from me for alleged limited knowledge, the said advocates win my admiration for their candour in admitting to being perplexed as to whether a right of appeal lies to this Court from a decision of the High Court made under **section 35** of the Arbitration Act. This perplexity is the reason given for the delay and I find that explanation to be plausible enough.

It is the respondent's retort that there is neither confusion nor uncertainty the 5-Judge NYUTU bench having categorically stated that no right of appeal lies. I do not think the matter is that simple. To say that the law is certain and settled for all time may not be entirely correct. Indeed, I hear the applicant to be saying that the NYUTU decision attached finality to the decision of the High Court upon challenge to arbitral awards, including those upsetting those awards, whereas both the Act and the United Nations Model Law both intended that finality is of the arbitral award itself. The applicant therefore hopes to have a seven-Judge bench of the Court revisit the issue. I do not think it to be an entirely idle or fanciful wish but it is not for me to say anything about it.

Enough for me to say that I am aware that the NYUTU decision has since been escalated to the Supreme Court as **Petition No. 12 of 2016**. There it awaits decision together with Petition No. 2 of 2017 arising from this Court's decision along the same lines in ***SYNERGY INDUSTRIAL CREDIT LTD vs. CAPE HOLDINGS LIMITED*** Civil Appeal No. 81 of 2016. I am in no position to second-guess the apex court on what decision it will arrive at. All that these developments do show, however, is that the jury is still out on whether or not this Court can entertain appeals from High Court decisions in arbitral matters.

I am acutely aware that whether leave will be granted to the applicant or not is in the province of the bench that will be seized of such application, should it be made. All I can say is that I do not find the reasons given for the delay to be shadowy or implausible. I also am unable to hold that the applicant's intended quest is a hopeless, lost cause good only for fanciful imaginings. I say so mindful of my own difficulties on the state of the law as expressed by the ***NYUTU*** bench, which I voiced thus, in my concurring opinion in ***JUDICIAL SERVICE COMMISSION vs. KALPANA H. RAWAL*** (supra);

> ***"I now must comment on the NYUTU case cited to us by Mr. Abdullahi, SC. I must, with great respect, confess to having much difficulty with conclusions made by this Court in that case which I have anxiously read and re-read. I am not sure, from my said reading, that there is a discernible engagement with the epochal shift of jurisdictional and right of appeal source location from statute to the Constitution that I have adverted to herein. I apprehend that there was not sufficient weight placed on the cases, including ANARITA, which all show the legal consequence of a situation where jurisdiction is constitutionally conferred, as now is under Article 164 (3) of the Constitution. I am not, moreover, convinced that Sections 35 and 39 of the Arbitration Act, separately or together, have the effect of denying a right of appeal from a decision of the High Court. It is indeed perplexing that the Court construed Section 39 of that Act in exclusionary as opposed to inclusionary terms. I am also troubled that in professing to respect and uphold finality of the arbitral process, this Court inadvertently invested the High Court and not the arbitrator, with finality – even where the High Court may have set aside or refused to set aside an award, or otherwise acted in plain error. Far from being a basis for the contention that even post-2010 this Court?s jurisdiction and the right to appeal to it must still be donated or conferred by some statute in express terms, I would for my part treat the NYUTU decision with much caution. It denies a right of appeal absent express statutory exclusion and I find it quite confounding. At any rate, I am persuaded that the majority decision in KENYA SHELL represents the correct position in law."***

As to whether allowing this application will occasion the respondents any prejudice, the answer is easily in the negative.

Beyond the assertion that there will be prejudice in the form of continuation of litigation, which to my mind will be no more than mere inconvenience, no real prejudice has been alleged, an none is apparent.

Finally on the general conduct of the parties, I do not see anything, in the appellant's conduct that would offend my conscience were I to extend time. I have not been shown any concealment, non-disclosure or other inequitable conduct. If anything, I have already observed that there were disclosures by its advocates that were of a character quite unflattering to counsel and their making them is a testament to candour. It would not be fair to punish honesty.

From all I have said this application is meritorious and is for granting. The applicant shall file and serve the application for leave to appeal within ***SEVEN (7)*** days of the date hereof. The costs of this motion shall be in the application for leave to appeal.

Dated and delivered at Nairobi this 16th day of February, 2018.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR