



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 60 OF 2014

BETWEEN

CARGILL KENYA LIMITED NAWAL.....APPLICANT

AND

NATIONAL AGRICULTURAL

EXPORT DEVELOPMENT BOARD.....RESPONDENT

(An application for extension of time to file an application under Rule 84 of the Court

of Appeal Rules in Civil Appeal No 60 of 2014 arising from the judgment

and decree of the High Court of Kenya at Mombasa, (Kasango, J.)

dated 13th May 2014

in

H.C. MISC. APP. No. 390 of 2012)

RULING

On 24th March 2015, the applicant, *Cargill Kenya Limited*, filed an application principally under **rule 4** of the **Court of Appeal Rules**, for extension of time to enable it file a further application under **rule 84** (erroneously indicated as **rule 80**) of the Court of Appeal Rules. The purpose of the intended application under rule 84 is to strike out **Civil Appeal No. 160 of 2014**, filed in this Court by the respondent, **National Agricultural Export Development Board**. The applicant intends to argue that following the unanimous decision of a bench of 5 judges of this Court handed down on 6th March 2015 in **NYUTU AGROVET LTD V. AIRTEL NETWORKS KENYA LTD, CA No 61 of 2012**, the respondent has no right of appeal to this Court.

The short background to the application is that on 25th September 2012, a sole arbitrator, **Mr. Steven Gatembu Kairu** (now **Gatembu, JA.**) issued an arbitral award in favour of the applicant. Aggrieved by the award, the respondent, on 20th November 2012, applied to the High Court under **section 35** of the

Arbitration Act to set aside the arbitral award. **Kasango, J.** heard the matter and dismissed the same with costs on 13th May 2014.

Aggrieved by the dismissal of its application, on 15th December 2014, the respondent filed **Civil Appeal No. 60 of 2014** which is pending for hearing before this Court. The record of appeal was served upon the applicant's advocates on 17th December 2014. By dint of the proviso to rule 84 of the Court of Appeal Rules, the applicant was obliged, if it wished to apply to strike out the record of appeal, to do so within thirty days from the date of service of the record of appeal. The applicant's intended application under rule 84 is meant to facilitate compliance with the proviso.

The reason why the applicant was not able to file its application to strike out the appeal, within the prescribed time, is given in the affidavit sworn on 24th March 2015, by **David Irungu**, its East African Controller, to the effect that the applicant was waiting for this Court to determine whether there was a right of appeal to the Court of Appeal from a decision of the High Court made under section 35 of the Arbitration Act. That determination was made in the ruling of this Court dated 6th March 2015 in **NYUTU AGROVET LTD V AIRTEL NETWORKS KENYA LTD (supra)**, and it was in the negative.

Rising to press the applicant's case, its learned counsel, **Mr. Wilson Mwihuri**, submitted that on the authority of the ruling of this Court in **AFRICAN AIRLINES INTERNATIONAL LTD V. EASTERN & SOUTHERN AFRICA TRADE & DEVELOPMENT BANK (PTA) (2003) KLR 140**, that the delay in making the application for extension of time was slightly over two months; that it did not constitute inordinate delay; that the reason for the delay had been sufficiently and candidly explained; that the intended application to strike out the record of appeal was not only arguable but had overwhelming chances of success in light of the decision in **NYUTU**; and that the respondent did not stand to suffer prejudice if the application was granted. He accordingly urged me to allow the application and extend time to enable the applicant file its intended application under rule 84.

For the respondent, **Mr. Gikandi Ngibuini**, learned counsel, opposed the application on the strength of a replying affidavit sworn on 14th April 2015 by **Francis Twagirayezu**, the respondent's representative in Mombasa. Counsel submitted that no good reason had been put forth to explain the delay in filing the application; that the pending ruling in **NYUTU** did not in any way stop the applicant from filing an application to strike out the record of appeal within the prescribed time; that once filed such application could have been stayed to await the 5 judge bench ruling.

It was further contended that, to the extent that the respondent had invoked the provisions of the Constitution in its application in the High Court to set aside the arbitral award, its appeal in this Court did not arise solely from Section 35 of the Arbitration Act; that by that reason **NYUTU** was not applicable; that in any event, it was the respondent's considered view that **NYUTU** was not a correct statement of the law and lastly that the respondent stood to suffer prejudice arising from delay in the determination of the dispute.

The only concession Mr. Ngibuini made was that the applicant's intend application was not, *prima facie*, frivolous and that it was arguable. Indeed on his part, counsel was of the view that he could convince the Court that on the authority of **JARED ODOYO OKELLO & ANOTHER V. IEBC & 6 OTHERS, CA NO. 16 OF 2013**, **NYUTU** is not a correct statement of the law.

Rule 4 empowers this Court, on such terms as it thinks just, to extend the time prescribed by the Court of Appeal Rules for the doing of any act. Subject only to the requirement that it must be exercised judicially, the discretion conferred by that rule is wide and unfettered. The considerations articulated by the applicant therefore do not constitute a closed catalogue of considerations; they are but just some of the relevant considerations.

In **FAKIR MOHAMED V. JOSEPH MUGAMBI & 2 OTHERS C.A. No. NAI. 332 of 2004**, this Court stated as follows regarding discretion under the rule and the factors that ought to guide its exercise:

“The exercise of this Court’s discretion under rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors ...”

(See also LEO SILA MUTISO V. ROSE, C.A. NAI 255 of 1997).

It is common ground that the application that the applicant intends to pursue under rule 84 is not frivolous granted the unanimous decision of a bench of judges of this Court in NYUTU. Indeed the respondent states that it cherishes the opportunity to demonstrate that there is still a right of appeal to this Court under section 35 of the Arbitration Act. It is however not for me to surmise whether or not the intended application under rule 84 will succeed or not; that is a decision for the full court if and when the application is presented. (See AFRICAN AIRLINES INTERNATIONAL LTD V. EASTERN & SOUTHERN AFRICA TRADE & DEVELOPMENT BANK (PTA), (*supra*)).

The reason put forth for the delay is, in my opinion, plausible and candid enough, granted the agreement between the parties that the respondent’s advocates were representing one of the parties involved in NYUTU. I am persuaded that the applicant’s decision to first await the outcome the matter before the bench of 5 judges was not, in the circumstances, unreasonable.

I also find that the length of delay in presenting this application is not inordinate. On the degree of prejudice that the respondent will be exposed too, I am satisfied that it is not of the kind that cannot be adequately remedied by award of costs.

Ultimately, I allow the Motion dated 24th March 2015 and direct the applicant to file and serve its intended application within seven days from the date of this ruling. The costs of this application shall be in the intended application or in the appeal should the applicant fail to file the application.

Dated and delivered at Mombasa this 15th day of May 2015.

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR