



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, J.A)

CIVIL APPLICATION NO. NAI 238 OF 2015 (UR 197/2015)

BETWEEN

DHL EXEL SUPPL CHAIN KENYA LIMITED.....APPLICANT

AND

TILTON INVESTMENTS LIMITED RESPONDENT

(An application for extension of time to lodge an Application for leave to appeal to the Court of Appeal against the Ruling of the High Court of Kenya at Nairobi (Lady Justice j. Kamau) dated 21st July, 2015

in

Miscellaneous Civil Application No.507 of 2014

RULING OF THE COURT

1. This is an application by **DHL EXEL SUPPL CHAIN KENYA LIMITED**, the applicant, under sections 3A and 3B of the Appellate Jurisdiction and rules 4, 39, 42 and 43 of the Court of Appeal Rules seeking the following main order:

“ 1. THAT the Court do extend the time for filing an Application seeking leave of the Court to appeal the Ruling of the High Court, Lady Justice J. Kamau, dated 21st July, 2015 in High Court Miscellaneous Application 507 of 2014 pursuant to section 39 of the Arbitration Act.”

The ruling by the trial judge related to the applicant’s chamber summons dated 22nd October 2014 brought under the provisions of sections 35(2) (a) (iv) and 35 (2)(b)(ii) of the Arbitration Act and rule 7 of the Arbitration rules. The trial judge did not find merit in the said application and proceeded to dismiss it. The applicant aggrieved by that ruling has now brought this application to extend time to lodge an application for leave to appeal.

2. The Applicant seeks to invoke the provisions of section 39(3) (b) of the Arbitration Act and seek this Court’s leave to appeal that ruling on the ground that a point of law of general importance is involved

whose determination will substantially affect the rights of the parties. The point of law intended to be raised is, *inter alia*, that the arbitral award contains decisions on matters beyond the scope of the reference to arbitration contrary to **section 35(2) (iv)** of the Arbitration Act, the arbitrator went outside the contractual documents and the applicable contract law and failed to appreciate that the parties were bound by their contractual terms and the arbitral award is against the public policy of Kenya. The applicant further contends that the arbitrator awarded both prayers that had been sought in the alternative.

3. The applicant concedes that the application for leave should have been filed within fourteen days in accordance with **rule 39** of this court's rules and adduces the following reasons, also set out in **paragraph 11** of the supporting affidavit by **Benedict Clay**, to explain the delay in filing the said application seeking leave to appeal:

- “ a) It took a while i.e. 11 days before the applicant obtained a signed copy of the ruling of the High Court as the same was said to be undergoing corrections after it was read in court,*
- b. The delay was further occasioned in (sic) the consultations between the applicant's representatives on the way forward.*
- c. the advocates received confirmation to file the application after the time limited for filing the application had lapsed.”*

The applicant had nevertheless filed the notice of appeal within prescribed time and argues that the delay was not inordinate and the respondent will not suffer prejudice which cannot be compensated by an award of costs. This position was further captured in the supporting affidavit of **Benedict Clay**, the applicant's Managing Director.

4. The application is opposed through a replying affidavit sworn on 2nd October 2015 by **John Muguiyi**, the respondent's managing director. The respondent contends that no appeal of any kind may be entertained by this court arising from a ruling of the High Court on any matter pertaining to arbitral award. In addition, the respondent argues that no point of law of general importance can arise for ventilation before this court as what was before the Arbitrator was a contractual dispute. The respondent believes that the application is misguided as it is yet another unjustified attempt by the applicant to deny the respondent the fruits of its arbitral award. The respondent further believes that the reasons furnished for lateness in filing the instant application are mere excuses of an indolent litigant keen to deny the respondent its legitimate rights of enjoying the fruits of its award and that the application should be dismissed with costs.

5. The application was argued orally before me by **Mr. Mwaniki Gachoka** for the applicant while **Mr. Chacha Odera** appeared for the respondent. In his submissions, Mr. Gachoka learned counsel for the applicant argued that the applicant seeks the discretion of this court to extend time to file an appeal from the ruling of the trial judge. Counsel referred me to **rule 75(4)** of this Court's rules and indicated that a notice of appeal had been filed on time. In explaining the delay, counsel referred to paragraph 11 of the supporting affidavit by Mr. Benedict Clay which has been reproduced above. In response to the respondent's replying affidavit, Mr. Gachoka submitted that the main contention in the replying affidavit in the affidavits is a reply to the intended appeal. The applicant also filed a list of authorities which included the Court of Appeal cases of **Nyayo Tea Zones Development Corporation v Njuca Consolidated Company Limited Civil Appl. No. Nai 192 of 2014 (unreported) and Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR.**

6. The **Nyayo Tea Zones case (supra)** set out the jurisdiction of this court to interfere with an arbitral award under **section 39(3)** of the **Arbitration Act** in which was not satisfied that the intended appeal raised any point of general importance whose determination will substantially affect the rights of the applicant. Consequently, leave to appeal against the ruling of the High Court judge was refused. I have to point out that the court in the said case, unlike in this application before me, was faced with an actual application for leave to appeal invoking **section 39(3)** of the **Arbitration Act**. The present application however is yet to reach that stage as the seeking of leave is only dependent on the determination of this

application.

7. The Aviation Cargo Support case (supra) on the other hand sought leave to extend time to file and serve its record of appeal where the learned judge held that the delay was inordinate and had not been satisfactorily explained as to favour the judge's exercise of discretion in the applicant's favour.

8. Mr. Odera learned counsel for the respondent in opposing the application relied on the replying affidavit and the authorities filed on behalf of the respondent. Mr. Odera referred me to the recent five judge bench decision of this court in **Nyutu Agrovat Limited v Airtel Networks Limited [2015]eKLR** which settled the issue of appeals lying to the court of appeal on matters arising from arbitral awards and decided by the High Court. Counsel also referred me to this court's case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015]eKLR** which reiterated the issue of a court's jurisdiction flowing from the constitution, legislation or both. I however point out that this case is still subject to the appeal to the Supreme Court. All these cases referred to by counsel were delivered in March and May 2015 and were therefore in place as at the time the trial judge made her ruling on 21st July 2015.

9. Learned counsel argued that the delay of forty eight days was inordinate and that there was no arguable matter in the intended appeal as the matter would end up before a three judge bench which would not overturn the five bench decision cited above. Counsel urged me to dismiss the application and save judicial time by thwarting the matter escalating to a full bench.

10. In his brief reply, Mr. Gachoka learned counsel for the applicant reiterated that points of law arise and that in his interpretation of the **Nyutu Agrovat Limited case (supra)**, the provisions of **section 39(3)** of the Arbitration Act were not reviewed by the court. In counsel's view, the fact that he could not agree with the respondent's counsel on the import of the case yet they were senior lawyers was a demonstration of the arguability of the application.

11. At the outset, I note that this is an application for extension of time under **rules 4 and 39** of this court's rules. Therefore and from the prayers sought in the application, the applicant is not seeking the leave to appeal or invoking **section 39 (3)**. From the arguments adduced it is apparent that the parties have gone to the extent of arguing the merits of the intended application for leave and even the intended appeal itself. As tempting as it may be, I must restrain myself from delving into the merits of the intended application for leave and the intended leave, and focus on the present application for extension of time.

12. I take note that the orders sought are discretionary in nature which discretion is to be exercised judiciously with the ultimate intention of rendering justice, each case depending on its own merit. It is not in dispute that any intended appeal invoking **section 39(3)(b)** of the Arbitration Act is to be preceded by grant of leave of court. Under **rule 39** of this court's rules, such application for leave should be made within fourteen days of such decision sought to be appealed from. The determination of the application herein is dependant on the length of delay, the explanation for the delay and whether the same is inordinate or it can be excused. These considerations are largely factual in my view as I shall lay them out.

13. The ruling by the High Court judge was made on 21st July, 2015. To evince its grievance against the ruling, the applicant filed its notice of appeal pursuant to **rule 75(4)** of this court's rules on 23rd July 2015, barely two days after the said ruling by the High Court. This notice of appeal was timeously served upon the respondent's advocates and there was no contestation of this fact by the respondent. Concurrent with the filing of the notice of appeal, the applicant through its former Advocates on record vide its letter dated 22nd July 2015 and received by the court on 23rd July 2015, requested for a certified copy of typed proceedings and ruling.

14. The respondent's explanation for the eleven days it took to obtain a signed copy of the ruling of the high court is satisfactory. The further delay is explained by the respondent as being the time it took for consultations among the applicant's advocates on record, the lead counsel and the applicant's representatives in view of the recent five bench decision of this court in the **Nyutu Agrovat Limited case (supra)** and the receipt of instructions to file this application after the time limited for filing the

application had lapsed.

15. From this court's file, the application was filed on 9th September 2015. This was approximately forty eight days after the date of the ruling as was pointed out by learned counsel for the respondent. Under rule 39 of this court's rules the applicant was required to file the application within fourteen days barring any delay from the court in obtaining the ruling. In essence therefore the application is out of time by thirty four days and since I am satisfied with the eleven day delay by the applicant caused in obtaining the signed ruling and would excuse the applicant for the additional eleven days delay. The totality of the above tabulation is that the applicant delayed by approximately twenty three days, which delay is explained to my satisfaction, and which delay in my view is not inordinate.

16. Having said that, I have to point out that I was not in the least impressed by the argument by the applicant's counsel that the delay was as a result of consultations between the advocate, the lead counsel and their client on the way forward. One would expect the advocates to have taken charge of such Consultations within the imposed judicial timelines in mind. It is a tad arrogant and inconsiderate, a stretch of judicial patience and taking the other counsel's time for granted that everything has to come to a standstill to allow counsel to consult his client and expect everyone else to be available and ready to indulge counsel out of time.

17. However, for the greater interest of justice and the not inordinate delay involved, I have considered the issues raised of the existence of arguable points that will arise in the intended application for leave including the points of law and invocation of **section 39(3) (b) of the Arbitration Act**. As I am not the one seized of the application for leave, and therefore not in a position to apply myself to the determination of the entitlement of orders granting the applicant leave to appeal at this stage, I am inclined to allow the application as prayed. The respondent will have ample opportunity to ventilate its arguments before the trial court in the intended application for leave to appeal. It is not in my province at this stage to bar the applicant from accessing the court as the applicant's access to court does not in any way assuage the hopelessness or strength of a case. I have a duty under **sections 3A and 3B of the Appellate Jurisdiction Act** to ensure that the factors considered are in consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court

18. Accordingly, I allow the Notice of Motion dated 7th September, 2015 and filed on 9th September 2015. Costs to abide by the outcome of the intended application for leave to appeal. I direct and order that the application for leave to appeal be filed within 21 days of the date of this ruling, in default of which the extension of time hereby granted shall automatically lapse.

Dated and delivered at Nairobi this 4th day of December, 2015.

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR