



**Environmental Solutions Ltd v Maasai Mara University (Civil Case 294 of 2015)  
[2025] KEHC 1450 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1450 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 294 OF 2015  
F GIKONYO, J  
FEBRUARY 27, 2025**

**BETWEEN**

**ENVIRONMENTAL SOLUTIONS LTD ..... PLAINTIFF**

**AND**

**MAASAI MARA UNIVERSITY ..... DEFENDANT**

**RULING**

1. The significant order sought in the plaintiff/applicant Notice of Motion dated 15<sup>th</sup> November 2025, is; leave to appeal the court's ruling of 7<sup>th</sup> November 2024.
2. The application is expressed to be brought under Section 75 of the *Civil Procedure Act*, Order 43 Rule 1 of the *Civil Procedure Rules* and Rule 41(1)(a)(ii) of the *Court of Appeal Rules* 2022.
3. The application is premised on the grounds set out in the application, the supporting affidavit sworn by the plaintiff's director, Mutua Patrick Nzoka, on 15<sup>th</sup> November 2024 and written submissions dated 27<sup>th</sup> January 2025.

**Background**

4. The plaintiff instituted this suit against the defendant through a plaint dated 16<sup>th</sup> June 2015 claiming breach of contract and seeking entry of judgment against the defendant for Kshs. 76,380,000.
5. Matter was referred to arbitration and the suit was accordingly stayed.
6. Through a ruling dated 7<sup>th</sup> November 2024, the court dismissed the suit for want of prosecution.
7. The plaintiff then filed a notice of appeal dated 19<sup>th</sup> November 2024 according to the court orders issued on 18<sup>th</sup> November 2024. It relied on Sections 66 and 75 of the *Civil Procedure Act* and Rule 41(1)



(a)(ii) of the [Court of Appeal Rules](#), 2022 in asserting leave is required to appeal against the impugned ruling.

### **Applicant's arguments**

8. The plaintiff submitted that the appeal raises triable issues that should be ventilated before the Court of Appeal as raised in the draft Memorandum of Appeal. This is because its suit was dismissed without it being heard on the merits in violation of Article 48 of the [Constitution](#) which guarantees every person the right to access to justice. It accused the Defendant for failing to prosecute its preliminary objection. It also indicated that the matter was stayed upon referral for resolution through arbitration; that the contract required a joint appointment of the arbitrator; and that it proposed an arbitrator but the Defendant neglected to do so.
9. The plaintiff also submitted that it should not be locked out as the justice system aims to hear and determine disputes fully. It relied on Article 50 (1) of the [Constitution](#) which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court. It also relied on the Court of Appeal decision in [Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others](#) [2015] eKLR for the proposition that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint.

### **Response**

10. The application is opposed by the Defendant through written submissions dated 28<sup>th</sup> January 2025.
11. The Defendant submitted that the Plaintiff has not established sufficient grounds for grant of leave to appeal because it was not vigilant in prosecuting its case. It pointed out that on numerous occasions, the Plaintiff sought leave but failed to institute arbitration proceedings.
12. The Defendant highlighted that on 20<sup>th</sup> September 2019, Hon. Muigai J delivered a ruling staying the proceedings and set down the matter for hearing of the Respondent's pending Preliminary Objection. On the 5<sup>th</sup> October 2021, the Plaintiff then obtained leave to institute arbitration proceedings within thirty days but failed. Thereafter, on the 9<sup>th</sup> November 2021, the Plaintiff obtained leave to institute arbitration proceedings within fourteen days but failed. Therefore, it sought orders for dismissal of the entire suit vide an Application dated 24<sup>th</sup> February 2022.
13. The Defendant relied on the decisions in [J. P. Machira T/A Machira & Company Advocates v Wangethi Mwangi & another](#) [2002] eKLR to the effect that the Court will only do so where the appeal has overwhelming chances of success; [Almond Resort Limited v Mohamed Mabat Kuno & another](#) [2020] eKLR that leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration and [Sango Bay Estates Ltd & Others v Dresdner Bank A. G.](#) 1971 EA 17 that if the orders from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out for the grant of leave to appeal.

### **Analysis and Determination**

#### **Issue**

14. A singular issue arises from the application, submissions and authorities cited: -  
Whether the plaintiff has made a case for the grant of leave to appeal.



## Analysis

15. Although opinion is divided on the requirement of leave to appeal, but where it is required, it is at the Court's discretion. Section 75 of the Civil Procedure Act, Order 43 Rule 1 of the Civil Procedure Rules and Rule 41(1)(a)(ii) of the Court of Appeal Rules 2022.
16. The discretion is, however, exercised upon defined principles, *inter alia*; whether leave has been applied for timeously; whether the appeal is arguable; and whether the respondent is likely to suffer great prejudice if the leave is granted.
17. The impugned ruling was delivered on 7<sup>th</sup> November 2024 and the present application is dated 15<sup>th</sup> November 2024. Therefore, the application was filed in time.
18. I have perused the draft memorandum of appeal annexed to the application and it raises matters of constitutional right to a fair hearing under Article 50 (1) of the Constitution. This is an arguable point.
19. The applicant also argued that the court stayed these proceedings and referred matter for arbitration. Once the court 'stay the proceedings and refer the parties to arbitration' under section 6(1) of the Arbitration Act;

“Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
20. This provision especially that, 'the matter remains undetermined' requires precise interpretation. Relevant and fundamental questions related to this formulation include; the role of the party not at default in appointing an arbitrator under section 12(3) & (4) of the Arbitration Act vis-a-viz applying for striking out of suit; the role of the court in appointing an arbitrator under section 12(7) & (9) of the Arbitration Act; and, the purport of the declaration in section 12(8) of the Arbitration Act. Yielding a thought; whether, on the cumulative wisdom from these provisions; the court may deal with a proceeding so stayed otherwise than in accordance with section 12 of the Arbitration Act where a party fails to appoint an arbitrator. These matters making this appeal of real practical relevance.
21. Although not directly flowing from this application, it is worth noting that, a practice has emerged where, after an arbitral award is made, parties file separate proceedings for setting aside or recognition and enforcement of the award without reference to the proceedings which were stayed and in which referral to arbitration was made under section 6 of the Arbitration Act. The practice breeding huge dilemmas- legal and practical. Such suit that was stayed remains in the system undetermined.
22. And, ultimately, I do not think that the defendant stands to suffer great prejudice if leave is granted to appeal in the circumstances of this case.
23. Accordingly, the plaintiff's notice of motion dated 15<sup>th</sup> November 2025 is allowed. And, special leave is hereby granted for the applicant to appeal within 30 days.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**F. GIKONYO M**

**JUDGE**

In the presence of: -



1. Ms. Musando for Ms. Awuor for Respondent
2. Ms. Onsongo for Ms. Kilonzo
3. CA - Kinyua

