



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Airports Authority v Machiri Limited (Civil Application
E229 of 2024) [2024] KECA 1611 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1611 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E229 OF 2024
F SICHALE, JA
NOVEMBER 8, 2024**

BETWEEN

KENYA AIRPORTS AUTHORITY APPLICANT

AND

MACHIRI LIMITED RESPONDENT

(Being an Application for leave to appeal to the Court of Appeal against the Ruling and Orders of High Court of Kenya at Nairobi (Mabeya J), dated 21st March 2024 in (Nairobi High Court Commercial Arbitration Case No. E057 of 2023 as Consolidated with HCCOMMARB No. E053 of 2023)

RULING

1. Before me is a Notice of Motion dated 16th May 2024, brought pursuant to the provisions of Sections 3A, 3B of the [Appellate Jurisdiction Act](#), CAP 9, Rules 41 (1) (a) (ii), (b) (i), 44 (1), (2), 45 (1), (3) (a), (4) of the Court of Appeal Rules 2022 and all other enabling provisions of the Law in which Kenya Airports Authority (the applicant), has invited this Court sitting as a Single Judge to grant the following orders:

- i. Spent.
- ii. This Honourable Court be pleased to extend time to file this application seeking leave to file an appeal against the Ruling and Order of the High Court delivered by Hon Justice Alfred Mabeya FCI Arb on 21st March 2024, in High Court Commercial Arbitration Case No. E057 of 2023 as consolidated with HCCOMMARB No. E053 of 2023.
- iii. This Notice of Motion application be deemed as having been filed within the prescribed period.



- iv. This Honourable Court be pleased to grant leave to the applicant to appeal against the Ruling of the High Court delivered by Hon Justice Alfred Mabeya, FCI Arb on 21st March 2024, in High Court Commercial Arbitration Case No. E057 as consolidated with HCCOMMARB No. E053 of 2023.
 - v. The cost of this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Margaret Munene the applicant’s legal counsel who deposed inter alia that on 16th June 2014, the parties had entered into a contract pursuant to the provisions of the Public Procurement and Disposal Act CAP 412 C, of the Laws of Kenya (now repealed), for demolition of existing airport halls baggage area and Multi-Storey Office Block at the Jomo Kenyatta International Airport.
 3. That, during the pendency of the contract, a dispute arose between the parties which was submitted to one Mr. Nyagah Boore Kithinji QS, FCI Arb as the sole arbitrator for determination pursuant to which on 6th April 2023, he made and published his final award in respect of the matter.
 4. She further deposed that being aggrieved with the decision of the aforesaid arbitrator, the applicant filed an application dated 30th June 2023, seeking to set aside the award which application was dismissed by Mabeya, J on 21st March 2024, who subsequently adopted the award as decree of the Honourable Court, pursuant to which on the same day, the applicant filed a Notice of Appeal signifying its intention to appeal against the aforesaid ruling.
 5. That, subsequently thereafter, on 8th April 2024, and even before taxation of costs awarded in the aforesaid ruling, the respondent filed an application seeking attachment of the applicant’s account numbers 30009XXXX and 300090XXXX at Citibank N.A Kenya Upperhill Branch, for recovery of the sum of Kshs 812,047,278.53 and that on 14th May 2024, the learned judge granted a Garnishee Order nisi over the applicant’s accounts.
 6. She thus deposed that consequently and in the process of considering and taking advice on challenging the Garnishee proceedings, the procurement for and issuance of instructions to lodge an appeal against the decision sought to be executed were inadvertently delayed.
 7. She thus urged this Court to enlarge time within which this application for leave should be made on account of delay.
 8. It was further deposed that the intended appeal raises serious jurisprudential questions worthy of consideration by the Court regarding the correct interpretation of Section 140 of the PPADA Act 2015 and its applicability on contracts entered before commencement of the Act.
 9. The motion was opposed vide a replying affidavit sworn on 22nd May 2024, by Eng. James Mbugua Macharia, the respondent’s Managing Director who deposed that the applicant had not given any sufficient cause for the delay in filing the application for leave to appeal and that the same was filed on 16th May 2024 and that
the applicant ought to have filed the same within 14 days from the date of the ruling dated 21st March 2024.
 10. He further deposed that the instant application was filed on 16th May 2024, upon issuance of the Garnishee Order nisi dated 14th May 2024, over the applicant’s accounts and that it was therefore evident that the application had been filed when execution was imminent and with the sole purpose of delaying execution proceedings in the high court.



11. He further deposed that an appeal against a decision of the high court under Section 35 of the *Arbitration Act* may only lie upon grant of leave in exceptional circumstances and that this Court had no jurisdiction to hear this application for leave to appeal the order of the high court issued on 21st March 2024.
12. The motion was canvassed by way of written submissions. It was submitted for the applicant that the ruling that they sought to appeal against was delivered on 21st March 2024 and that on the same day, they filed a Notice of Appeal signifying their intention to appeal against the same.
13. It was further submitted that the application seeking leave to appeal ought to have been filed on 4th April 2024, but the same was however filed on 16th May 2024, which was a delay of 43 days which delay was inadvertent on account of the applicant's procurement processes following the institution of the Garnishee proceedings against it in the superior court. It was thus submitted that in the circumstances, the delay was not inordinate and was excusable.
14. Regarding prejudice, it was submitted that if the extension sought was not granted, the applicant would stand to suffer great prejudice since it was a Statutory Corporation that gets its funds from taxes through appropriations which funds belong to the public and they would be used to settle the manifestly punitive decretal sum, which was likely to impede the applicant from performing its mandate under the *Kenya Airports Authority Act*.
15. It was thus submitted that the applicant had sufficiently demonstrated the principles for this Court to exercise its discretion in its favour. Consequently, I was urged to allow the application.
16. On the other hand, it was submitted for the respondent that there was a delay of about 43 days in filing the instant application and that the same being an appeal arising out of arbitration, a matter that should have minimal court interference, the delay herein was inordinate and that the reasons given for the delay could not stand.
17. It was further submitted that there were no chances of the intended application for leave succeeding as the law as set out by the Supreme Court of Kenya was that an appeal against a decision made in an application under Section 35 of the *Arbitration Act* could only lie with leave of the Court if the decision appealed against was one which set the arbitral award which was not the case in the instant appeal.
18. Finally, on prejudice, it was submitted that the respondent was claiming payment for work done, completed and handed over way back in 2015, which was 9 years ago and the parties had agreed to pursue arbitration as an efficient expeditious means of resolving disputes and that the applicant was only disputing the claim on the issue of interest but that fact notwithstanding, had refused to settle the undisputed sum and as such, the respondent was bound to suffer great prejudice by further delay of these proceedings through the instant motion.
19. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival written submissions by the parties, the cited authorities and the law.
20. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are now old hat. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion the Court should do so judiciously.
21. See *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in



Leo Sila Mutiso V Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus;

“It is now well settled that the decision whether or not to extend 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.”

22. In the instant case and as regards the length of the delay, it is indeed not in dispute that the impugned ruling was delivered on 21st March 2024, pursuant to which the applicant filed a Notice of Appeal on the same day. The respondent therefore has all along well been aware of the applicant’s intention to appeal against the aforesaid ruling.
23. It is also not in dispute that the instant motion was filed on or around 16th May 2024. There has therefore been a delay of about 56 days from the date of the impugned ruling on 21st March 2024, which delay I do not consider to be inordinate for reasons that I will allude to shortly.
24. Turning to reasons proffered for the delay, the applicant contended that the same was inadvertent due to the process of considering and taking advice on challenging the Garnishee proceedings. In my considered opinion, I find the reason offered for the delay to be reasonable/plausible. In any event, the instant motion was filed on 16th May 2024, which was exactly 2 days after the Garnishee Order nisi was issued on 14th May 2024.
25. With regard to the merits or otherwise of the intended appeal, it would not be in my place to determine the merits or otherwise of the same sitting as a Single Judge and I will therefore not delve further into this issue.
26. As regards prejudice, I am satisfied with the contention by the applicant that it will stand to suffer great prejudice if the instant motion is not allowed due to the fact that being a statutory corporation, it gets its funds from taxes through appropriations.
27. On the contrary, the respondent will have his day in Court and both parties will have the chance to ventilate their respective positions in Court leading to a logical conclusion of the matter.
28. The totality of my findings therefore, is that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court’s rules to extend time within which to file the intended appeal.
29. Accordingly, the applicant’s motion dated 16th May 2024, is merited and the same is hereby allowed as prayed.
30. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

F. SICHALE

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JUDGE OF APPEAL



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

Signed

Deputy Registrar

