



REPUBLIC OF KENYA



KENYA LAW
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Liquid Telecommunications Kenya Limited v Communications Authority of Kenya (Appeal 4 of 2020) [2021] KECMAT 665 (KLR) (4 June 2021) (Ruling)

Neutral citation: [2021] KECMAT 665 (KLR)

**REPUBLIC OF KENYA
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL
APPEAL 4 OF 2020**

**ROSEMARY KURIA, MARGARET NYAMBURA NDUNG’U, COLLINS
WANDERI, RAMADHANI ABUBAKAR MUKIRA, VIVIENNE
ATIENO, DAMARIS NYABUTI & MBESA MALOMBE, MEMBERS**

JUNE 4, 2021

BETWEEN

LIQUID TELECOMMUNICATIONS KENYA LIMITED APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

RULING

1. The Application dated 3rd December 2020 seeks the following orders:-
 1. Spent
 2. Leave be and is hereby granted for the Appellant to file and serve an appeal out of time.
 3. The Memorandum of Appeal and Statement of Facts of Appeal filed simultaneously herewith be admitted and service be allowed out of time
 4. The costs of this application be provided for.
2. The Application is opposed.

The Applicant’s case

3. In an affidavit sworn by Judy Njeru on 3rd December 2020 in support of the application, the Applicant deposes that it applied for a Sub-Marine Cable Landing Rights (SCLR) Licence from the Respondent on 6th September 2019. The Respondent communicated its decision denying the application vide a letter dated 24th June 2020, which decision the Applicant has applied for the extension of time to appeal. The Applicant urges that it did not lodge the appeal within the 60 days the law prescribes because the Respondent did not give it reasons for its decision as required by law, despite request by a



letter dated 1st July 2020. The Applicant also deposes that the Respondent did not respond to a request vide a letter dated 7th August 2020 for authority to collaborate with the Respondent's other licencees in order to fulfil contractual obligations to a third party. The Applicant also says that it stands to suffer loss if it breaches its agreement with a third party, that the Respondent will not suffer any prejudice because its omissions in fact caused the delay in appealing, and that justice should be done without undue regard to procedural technicalities.

Respondent's case

4. The Respondent opposes the application through a replying affidavit sworn by Edward Rinkanya on 26th February 2021 in which he deposes that the Appellant has not given a satisfactory reason for the delay in filing the appeal. Analysis and Finding
5. The intended appeal is against a decision made by the Respondent on 24th June 2020. The instant application was filed on 3rd December 2020 which is more than five months after the impugned decision. An application for extension of time must be made timeously without inordinate delay. The cardinal question before this tribunal is therefore whether the Applicant has explained to the satisfaction of the tribunal the delay between 24th June 2020 when the Respondent gave its decision and 3rd December 2020 when it filed the instant application.
6. The Applicant has presented one main ground to justify the delay, namely, the failure by the Respondent, despite request, to give reasons for its decision as required by law. Is this a satisfactory explanation for the delay? The Applicant requested for reasons by a letter dated 1st July 2020. The Respondent did not oblige. This prompted the Applicant to write a letter dated 7th August 2020 in which it appeared to acquiesce to the decision noting that the Respondent [had] "pronounced itself" on the application for the licence. It then proceeded to request, apparently as an alternative measure, for the Respondent's authority to collaborate with other licencees. Then on 10th November 2020, the Applicant changed tack, this time requesting for a reconsideration of the decision of 24th June 2020 or reasons for said decision. From this sequence of events, we find that the decision to lodge an appeal and the application for extension of time was an afterthought, and that the delay thereof cannot be directly attributed to not getting reasons from the Respondent.
7. We also find that the Applicant did not need reasons for the impugned decision in order to lodge an appeal in this tribunal. It is true that section 79 of the *Kenya Information and Communications Act* (KICA) requires the Respondent to give reasons for refusal to issue a licence within 30 days of such refusal. It is also true that section 5(3) of the *Fair Administrative Action Act* enjoins a public agency to furnish every person who is materially or adversely affected by any administrative action with reasons for such action within thirty days of request. Under this subsection, the Respondent in the instant application would have been required to give reasons by 1st August 2020, which is thirty days from the request of 1st July 2020. When it did not do so, the Applicant had recourse under section 5(4) of the *Fair Administrative Action Act* to lodge an appeal in which it could have invoked a rebuttable presumption that the refusal to grant a licence was taken without good reason. This recourse would have been available up to 24th August 2020, when sixty days from the impugned decision lapsed. Consequently, we find the explanation for delay given by the Applicant to be insufficient.
8. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour, and there has to be valid and clear reasons upon discretion upon which discretion can be favorably exercised (See *George Kiptaput Lelei & Another v. Fanikiwa Limited* (2019) eKLR.
9. The Applicant urges us to extend time to lodge an appeal and not to pay undue regard to procedural technicalities. In *Anchor Limited v. Sports Kenya* (2017) eKLR, the High Court defined a procedural



technicality to be a lapse in form that does not go to the root of the suit, such as citing a wrong provision of law. Article 159(2) of the Constitution does not propose to outlaw procedure, but requires that procedure be used appropriately to advance the ends of justice. In the instant application, we are not persuaded that section 102F (2) of KICA defining the period within which a party should lodge an appeal and which confers and limits substantive rights to parties is a procedural technicality, in the manner that the Applicant suggests.

10. Similarly, we do not find that the fact that the Applicant may suffer loss if it breaches its agreement with a third party to be a material consideration in determining this application.
11. In the upshot, we make the following orders:-
 1. The Intended Appellant's Application dated 3rd December 2020 is dismissed.
 2. Each party to bear its own costs

R. KURIA - MEMBER

M. MALOMBE - MEMBER

M. N. NDUNG'U - MEMBER

C. WANDERI - MEMBER

R. MUKIRA - MEMBER

V. ATIENO - MEMBER

C. NYABUTI - MEMBER

DELIVERED VIRTUALLY THIS 4TH DAY OF JUNE 2021

