Case Number:	Civil Application E307 of 2020
Date Delivered:	23 Apr 2021
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	William Ouko
Citation:	Nairobi City Water and Sewerage Company Limited v Capture Solutions Limited [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Misc. Civil Appl. No. E679 of 2020
Case Outcome:	Application dismissed with costs
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) (IN CHAMBERS)

CIVIL APPLICATION NO. E307 OF 2020

BETWEEN

NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.....APPLICANT

AND

CAPTURE SOLUTIONS LIMITED.....RESPONDENT

(An application for extension of time to file and serve notice of appeal out of time in an intended appeal from the Orders of the High Court of Kenya at Milimani Commercial & Tax Division Court (Majanja, J.)

delivered on 27th August, 2020

in

Misc. Civil Appl. No. E679 of 2020)

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RULING

The origin of this dispute are two contracts between the parties for the supply, delivery, development, installation, implementation and commissioning of GIS enabled system and meter census at a contract price of Kshs. 39,996,000.00 and Kshs. 118,802,000.00, respectively.

Following a dispute on the amount due under the two contracts, the parties went before a sole arbitrator pursuant to Clause 7.2. In his final award, the arbitrator made an award in favour of the respondent and declared that the applicant was in breach of the two contracts, the applicant was ordered to pay to the respondent a total of Kshs 57,729,720 inclusive of VAT at 16% for breach. The award was to be honoured within thirty days of the date of the decision.

In addition, the arbitrator ordered the applicant to pay to the respondent accrued interest at simple interest of 12% per annum on the said sum of Ksh 57,729,720 from the date of the commencement of proceedings, being 1st November, 2018 until payment in full, among other reliefs.

The respondent took out chamber summons under **section 36** of the Arbitration Act for the recognition, adoption and enforcement of the award as a decree of the court.

On 27th August, 2020 Majanja, J. allowed the application holding that the applicant had failed to prove that the award was contrary to public policy or that the arbitrator dealt with matters beyond the scope of the reference.

On the other hand, the Judge found that the respondent had met the conditions for recognition and enforcement of an award under **section 36** aforesaid. In the result, he allowed the application, effectively granting leave to the respondent to enforce the award as a decree of the court.

The applicant has come before me, as a single judge, with a motion to extend time for it to file and serve the notice of appeal, explaining the delay on **"a deliberate re-examination and scrutiny of facts pertaining to this matter, including seeking a second opinion on the matter, all of which took longer than the period anticipated by Law for the delay."**; that the decision arose at the height of the COVID-19 pandemic which affected institutional operations and the turnaround time in decision-making; that the intended appeal has very reasonable chances of success, considering that the award derogates from the principles of public procurement of prudent, responsible and lawful use of public finances.

In conclusion, the applicant submitted that a delay of 21 days is not inordinate but excusable; and that the intended appeal is arguable; and that, if the decision is not challenged, the applicant faces execution for an unconscionable sum of Kshs. 57, 729, 720, hence the plea for time to be enlarged to enable the applicant to challenge the decision in question.

For those arguments, the applicant relied on **Thuita Mwangi vs. Kenya Airways Ltd (2003)** eKLR to **Nicholas Kiptoo Arap Korir Salat vs. IEBC and 7 Others** (2014) eKLR.

The respondent, for its part, maintains that the delay was for a period 34 days and not 21 days as suggested by the applicant; that the intended appeal will have little chances of success; that the right of appeal to the High Court and an application to the High Court to set-aside an award are one and the same cause of action; that that right was extinguished when the High Court made an order recognizing the award after hearing arguments by both sides; and that the applicant has since filed another appeal, Civil Appeal No. Nbi. E514 of 2020, which relates to the very matter as the intended appeal.

Finally, the respondent submitted that the Court does not have jurisdiction to entertain the intended appeal, and to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the award.

When considering whether or not to extend time for the reasons given in this application, the single Judge will essentially be exercising a judicial discretion which is wide and unfettered. (See **Leo Sila Mutiso vs. Rose Wangari Mwangi,** Civil Application No. Nai. 255 of 1997).

Though wide and unfettered, the discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment. (See. **Julius Kamau Kithaka vs. Waruguru Kithaka Nyaga & 2 Others,** CA. No. 14 of 2013).

Some of the considerations to be borne in mind, and which are certainly not exhaustive of the catalogue, are the length of the delay, the reason(s) for the delay, the possible prejudice that each party stands to suffer; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity.

The delay, even of a single day, must be declared and satisfactorily explained. Put differently, no period of delay is inexcusable, so long as it can satisfactorily be explained.

Whether the delay was for 21 or 34 days, the critical question is what the applicant was doing for the period in question. I have reproduced applicant's explanation earlier in this ruling. It however bears repeating that the applicant took the entire period to re-examine and scrutinize **"facts pertaining to this matter, including seeking a second opinion on the matter".** Whichever way this explanation is looked at, it is insufficient to warrant the exercise of a discretion. There is nothing on record to support it.

The moment the High Court pronounced itself on the application for recognition, adoption and enforcement of the award as a decree of the court, and the applicant was aggrieved, it did not require a month to put a two sentence notice of appeal. Yet, in this application, counsel for the applicant is pleading how it is a public body, how the award is to be met from public funds, and how it is

in the greater public interest that the matter receives the Court's consideration.

While all these factors are important, the applicant's counsel, who has a duty to the applicant and to the Court, has not demonstrated that very commitment and understanding that they are expecting from others. The explanation, in brief, is implausible. The delay was, in those circumstances, inordinate.

Regarding the chances of the intended appeal, I reiterate what this Court said in **Thuita Mwangi vs. Kenya Airways Ltd** (supra) that that question is rarely answered by a single Judge because it is only in the appeal, where merit is investigation that it can be answered. But at the same time, a single Judge is not precluded from considering it, albeit, on a *prima facie* basis.

Prima facie, and based on the arguments in this matter, specifically that there is pending before the High Court another appeal, Civil Appeal No. Nbi. E514 of 2020, which relates to the very matter as the intended appeal, the intended appeal will be an abuse of the court process. That alone would disentitle the applicant of an equitable remedy. What he wants to achieve in the intended appeal can be realized in that other pending appeal. Depending on the outcome, the applicant will still have another opportunity to approach the Court. It is equally doubtful if the appeal will be sustained if time is extended to file the notice of appeal, without first obtaining leave, what is sought to be challenged being an arbitral award.

The conclusion I must reach is that this application lacks merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR