



**Shreeji Wholesalers v Prasun Construction Co. Ltd (Civil Appeal  
25 of 2021) [2023] KEHC 26658 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26658 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL 25 OF 2021  
RPV WENDOH, J  
DECEMBER 20, 2023**

**BETWEEN**

**SHREEJI WHOLESALERS ..... APPELLANT**

**AND**

**PRASUN CONSTRUCTION CO. LTD ..... RESPONDENT**

**RULING**

1. This ruling is in respect to Shreeji Wholesaler's (the applicant) Notice of Motion dated 17/5/2023. The applicant seeks:-
  - a. Spent;
  - b. That this court be pleased to grant the applicant leave to appeal against the judgement of this court delivered on 4/5/2023;
  - c. There be stay of execution of all proceeding pending the hearing and determination of the intended appeal;
  - d. That costs of this application be provided for;
  - e. Any other orders that meets the end of justice.
2. The application is based on the grounds on its face and the supporting affidavit of Dipen Hasmukhlal Faldu, the Director of the appellant. It was deposed that an appeal arising out of an arbitration matter can only be filed with leave of court, whose decision is appealed against; that the intended appeal is arguable and not frivolous; that this application is for leave to appeal to the Superior Court; that the applicant stands to suffer substantial loss in the event that the stay of execution is not granted as the intended appeal shall be rendered nugatory in the event it succeeds; that the applicant herein furnished security for the due performance of the decree by depositing the original logbooks for motor vehicles



valued at more than Kshs. 8,000,000/=in court; that it is in the best interest of justice that the appeal be allowed against the ruling of this court.

3. The application was opposed. Maulik Patel (the respondent) the Director of the respondent, filed a replying affidavit dated 19/5/2023. It was deposed that the applicant has always demonstrated a spirit of unwillingness to have this matter settled; that the application dated 17/5/2023 is incompetent, bad in law and an abuse of the court process; that the respondent is only willing to accept deposit of the entire decretal sum in court as security; that the application does not fall within the confines of Order 46 of the Civil Procedure Rules; that in as much as the Constitution states that the applicant has a constitutional right to pursue his rights to the highest court, the respondent also has the constitutional right to be allowed to reap the benefits of its judgement. The respondent urged that the application be dismissed with costs.
4. Both parties filed their written submissions which I have duly considered together with the application and the response thereto.
5. I have understood the dispute between the parties to arise from arbitration proceedings. In the lower court, parties filed a consent on 14/1/2019. In the said consent, they agreed to refer the matter to arbitration. The arbitration proceeded and an award was delivered on 15/4/2020. It seems that the arbitrator failed to file the award in court within the prescribed time.
6. The appellant then filed an application dated 28/9/2020. In the application, the appellant asked the trial court to set aside the consent for referring the dispute to arbitration and the suit proceed to hearing, the arbitral award be set aside and costs of the application be provided for.
7. The respondent also filed an application dated 21/9/2020 in which it asked the court to extend the time for filing the arbitral award by the arbitration tribunal to include the date of filing its application, the arbitral award be deemed to have been filed in time, the court reads the arbitral award dated 15/4/2020 and enters judgement accordingly in line with the order dated 14/1/2019.
8. The Learned Magistrate dismissed the application dated 28/9/2020 seeking to set aside the consent orders which referred the matter to arbitration and allowed the application dated 21/9/2020 seeking to extend the time for filing the arbitral award.
9. Aggrieved, the appellant filed an appeal to this court. In its ground of appeal, the appellant challenged the decision of the Learned Magistrate on two broad grounds: that he had no jurisdiction to deal with the matter as it was beyond his pecuniary jurisdiction and the Learned Magistrate erred in failing to find that award was not capable of being filed in court outside the 14 days.
10. This court considered 5 issues for determination. On the jurisdiction of the trial court, this court found that the subject matter which arose from the pleadings was 5,741,796.80/= but not the value of the contract being Kshs. 31,162,002.06/= and therefore the trial court had jurisdiction.
11. On whether the arbitrator exceeded his scope of reference, this court relied on the provisions of Section 5 of the Arbitration Act which provides that a party is deemed to have waived its right to object when it proceeds with an arbitration proceeding without raising an objection. This court further held that a party who wishes to challenge the competence of an arbitrator should first do so before the arbitral tribunal as provided for in Section 17 (1) of the Arbitration Act. Therefore, the challenge of the arbitrator before this court was untenable.
12. This court also considered whether the Magistrate court had jurisdiction to set aside the arbitration award. The appellant faulted the trial Magistrate for dismissing its application dated 28/9/2020 to set



aside the arbitral award. This court referred to the provisions of Section 35 of the Arbitration Act which provides that it is only the High Court which has jurisdiction to set aside an arbitral award.

13. This court also found that since parties recorded a consent to refer the matter to arbitration, the consent cannot be set aside by this court unless fraud, misrepresentation, undue influence and/or coercion are proved.
14. The appellant now wants this court to grant it leave to file an appeal against the judgement of this court to the Court of Appeal. First, I make an observation that was made by Odera J in her judgement of 4/5/2023 that the proper forum that the appellant should have utilised to challenge the arbitral award should have been the High Court as provided for under Section 35 of the Arbitration Act. The appellant did not find it prudent to now file a proper application challenging the arbitral award but chose to appeal against the decision of the Learned Magistrate.
15. The appellant invoked the provisions of Sections 3A, 75, 78 and 79G of the Civil Procedure Act in bringing this application. However, this being an intended appeal against arbitration proceedings, the proper law to be invoked is Section 39 (3) of the Arbitration Act, Cap 49 Laws of Kenya which specifically stipulates the instances under which an appeal can lie to the Court of Appeal in arbitral matters having been dealt with by the High Court.
16. I will go ahead and reproduce the whole of Section 39 of the Arbitration Act as I find it relevant in the circumstances. It provides as follows: -

- “(1) Where in the case of domestic arbitration the parties have agreed that–
- (a) an application by any party may be made to court to determine any question of law arising in the course of arbitration; or
  - (b) an appeal by any party may be made to a court on any question of law arising out of the award;
- Such an application or appeal, as the case may be, may be made to the High Court.
- (2) On an application or appeal being made to it under subsection (1) the High Court shall-
- (a) determine the question of law arising;
  - (b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or, where another tribunal has been appointed, to that arbitral tribunal for consideration.
- (3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)-
- (a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or
  - (b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal



may exercise any of the powers which the High Court could have exercised under subsection (2).

- (4) An application or appeal under this section shall be made within time limit and in the matter prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.
- (5) When an arbitral award has been varied on appeal under this Section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.”

17. Section 39 (3) of the *Arbitration Act* comes into play if there is a decision made by the High Court under sub-section (2). Under sub-subsection (2), the High Court should have dealt with matters of law or matters touching on the arbitral award.

18. The Court of Appeal in *Okeno & Sons Building Contractors vs Bukura Agricultural College* (2018) eKLR considered the applicability of Section 39 (3) of the *Arbitration Act* on appeals to the Court of Appeal as follows: -

“It is also clear from Section 39(3) of the Act an appeal lies to the Court of Appeal from the decision of the High Court exercising jurisdiction under Section 39(2) on a point of law of general importance and with the leave of the Court of Appeal...Furthermore, an appeal to this Court from the decision of the High Court in exercise of its appellate jurisdiction under Section 39(2) must be with the leave of the Court of Appeal. There is no evidence that the Court of Appeal has granted such leave.”

19. From where I sit, I do not think that I have jurisdiction to grant leave for the appellant to file an appeal to the Court of Appeal. An appeal to the Court of Appeal under Section 39 (3) should either be agreed upon by both parties or the Court of Appeal must determine if the intended appeal raises a point a law. This court cannot on behalf of the Court of Appeal, scrutinize the draft Memorandum of Appeal and conclude whether or not it raises points of law since it will not be the court sitting on the intended appeal.

20. Therefore, I find that the proper avenue in accordance with Section 39 (3) of the *Arbitration Act* is to file the instant application to seek leave to appeal against the decision of this court dated 4/5/2023 in the Court of Appeal.

21. The application dated 17/5/2023 is unmerited. It is hereby dismissed with costs to the respondent.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.**

**R. WENDOH**

**JUDGE**

Judgement delivered in the presence of;

N/A for the Applicant.

N/A for the Respondent.

Emma & Phelix Court Assistants.

