



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCA NO. E 007 OF 2019

KPMG EAST AFRICA ASSOCIATION.....1ST APPELLANT

KPMG KENYA.....2ND APPELLANT

-VERSUS-

RICHARD BORO NDUNGU.....RESPONDENT

RULING

1. The issue is whether parties to an arbitration agreement who have agreed that an appeal may be lie to the High Court against an arbitral award made from a dispute arising within the agreement have an automatic right to escalate the matter by way of further appeal to the Court of Appeal without a specific agreement to that effect.

2. Section 39 of the Arbitration Act reads:-

“Questions of law arising in domestic arbitration;

(1) Where in the case of a domestic arbitration, the parties have agreed that—

(a) an application by any party may be made to a court to determine any question of law arising in the course of the 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 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 re-consideration or, where another arbitral 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 the time limit and in the manner 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.”

3. The agreement contemplated by subsection 3(a) is an agreement, made prior to the delivery of the arbitral award, that an appeal on a question of law lies to the High Court in the first instance and that the parties have a right to challenge the High Court decision by way of an appeal to the Court of Appeal. If a contrary construction was to be made, that is that the right to the Court of Appeal is automatic, then subsection 3(b) would be rendered redundant. This subsection gives a party a right to seek leave of the Court of Appeal to appeal to it against a decision of the High Court on a point of law of general importance which substantially affects the right of one or more parties.

4. In this matter, the agreement to invoke Section 39 was in Directions of 30th March 2017 in the following terms:-

“The parties reserve the right of appeal under Section 39 of the Arbitration Act.”

This was prior to the commencement of the hearing. What is clear is that the parties had reserved their right to appeal against the award to the High Court because the right of appeal under Section 39 is by necessity, in the first instance, an appeal to the High Court. What is not expressly reserved in those Directions is the right of a further appeal to the Court of Appeal. As the reservation amounts to a variation of the arbitration agreement then, it needed to be unequivocal as to the scope of reservation. That is, whether it was also a right to escalate the matter to the Court of Appeal.

5. Due to lack of clarity, this Court prefers to hold that the right of appeal to the Court of Appeal was not reserved. As a consequence, the Appellants who have signaled their intention to appeal this Court’s decision of 22nd January 2020 will have to move the Court of Appeal under Section 39(3) (b) of the Act.

6. To avoid a debate of this kind, parties need to be explicit as to the extent of right they reserve for themselves. And where the reservation is made in the course of arbitration proceedings, the arbitral tribunal is duty bound to insist on such clarity.

Dated, Signed and Delivered in Court at Nairobi this 27th Day of January 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Fraser SC for Appellants.

Kithinji Marete for Respondent