



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 671 OF 2019

VISHNU BUILDERS & DEVELOPERS LIMITED.....APPLICANT

-VERSUS-

MAOW HOLDING LIMITED.....RESPONDENT

RULING

1. This ruling is precipitated by the Notice of Motion dated 28th October, 2020 filed by the applicant and supported by the grounds set out on its face and the facts stated in the affidavit of Bhimji M. Rabadia, the Managing Director of the applicant. The applicant sought the substantive order for leave to appeal out of time against the ruling delivered by the High Court on 15th October, 2020.

2. Mumin Mohamed, the Manager of the respondent, swore a replying affidavit on behalf of the respondent and in reply to the Motion.

3. Pursuant to the orders made by the court on 15th December, 2020 the parties filed and exchanged written submissions on the Motion.

4. I have considered the grounds presented on the face of the Motion, the facts deponed in the respective affidavits supporting and opposing it, and the rival submissions together with the authorities cited.

5. A brief background of the matter is that a dispute emanated amongst the parties, resulting in arbitration proceedings. Upon hearing the parties, the arbitrator vide the arbitral award made dated 2nd October, 2019 awarded the applicant a sum of Kshs.28,831,562.50 plus interest at 14% p.a. from the date of filing the claim.

6. Being aggrieved by the decision of the arbitrator, the respondent moved the High Court by way of the Chamber Summons application dated 17th October, 2019 under the provisions of Section 35 of the Arbitration Act (“the Act”) essentially seeking to have the arbitral award set aside. Upon hearing the parties, the High Court in the ruling delivered on 15th October, 2020 allowed the application and consequently set aside the arbitral award.

7. Before I consider the merits of the instant Motion, I will contemporaneously consider two (2) preliminary issues which were raised by the respondent: that is, whether the applicant has a right of appeal to the Court of Appeal in respect to the impugned ruling and whether the High Court has jurisdiction to grant the said applicant leave to appeal against its decision.

8. The respondent states and submits that the applicant herein has no right of appeal since Section 39 (3) (b) of the Act, being one of the provisions by which the instant Motion has been brought, would only apply where there has been an agreement between the parties, and that in the present instance, no such agreement existed between the parties. The respondent further cites the case of **Talewa Road Contractors Limited v Kenya National Highway Authority [2019] eKLR** where the court held the following:

“Further under section 39 of the Arbitration Act the courts are only permitted to intervene against arbitral award through an appeal process where “the parties have agreed” to appeal and the appeal is restricted to determining “any question of law arising in the course of arbitration or out of the award.” ”

9. The applicant responds by submitting that the right of appeal exists and quotes *inter alia*, the case of **DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited-Civil Application No. Nai. 302 of 2015 [2017] eKLR** where the Court of Appeal rendered itself as follows:

“In our view, the fact that Section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked.

It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution.”

10. The applicant is also of the view that this court has jurisdiction to entertain the instant Motion and to grant the order sought for leave to appeal.

11. Upon perusal of the record, it is undisputed that the application which gave rise to the impugned ruling was brought under Section 35 of the Act which sets out the instances under which an arbitral award can be set aside by the High Court. It is noteworthy that the said provision does not expressly state whether the decisions made by the High Court in that respect are final. It is similarly noteworthy that there has been no consensus among the courts on interpretation of Section 35 as read with Section 39 of the Act. Section 39 provides thus:

“(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).

12. In some instances, the Court of Appeal has held that no right of appeal exists from a decision of the High Court under that provision, as seen in the case of **Micro-House Technologies Limited v Co-operative College of Kenya [2017] eKLR** where the Court of Appeal determined that the right of appeal does not lie under Section 39(3) (supra) in the absence of leave, which leave ought to be sought and obtained from the Court of Appeal. In other instances, the Court of Appeal has determined that in view of the silence portrayed under Section 35, the decision of the High Court is appealable and that there is no bar to the right of appeal. This position was taken, inter alia, in the case of **DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited-Civil Application** (supra) cited by the applicant.

13. In that case, I considered the Supreme Court’s reasoning in the case of **Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR** that Section 35 of the Act does not expressly bar appeals lying from decisions by the High Court on arbitral awards. I am both inclined and bound to follow that reasoning, and therefore find that there is nothing in the Act expressly taking away the right of a party to challenge the decision of the High Court on appeal against an arbitral award.

14. Suffice it to say that on the question of jurisdiction, the Supreme Court in the above-cited case went on to reason that the jurisdiction of the Court of Appeal to entertain such appeals must be exercised judiciously and only in exceptional circumstances where it has been shown that the High Court arrived at an unfair and unjust decision in respect to an arbitral award.

15. Borrowing from the above decision and reverting to Section 39 (3) (supra), there is nothing to indicate that the parties herein had arrived at a consensus regarding appeals on the arbitral award. Section 39 (3) (b) further makes it clear that it is upon the Court of Appeal to determine whether to grant leave to appeal upon considering the factors set out therein.

16. For all the foregoing reasons, I am of the view that whether to grant leave to appeal against the decision of the High Court on an arbitral award is a preserve of the Court of Appeal hence this court lacks jurisdiction to entertain the instant Motion.

17. In the end, the Motion dated 28th October, 2020 is hereby dismissed with costs for want of merit.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021.

J. K. SERGON

JUDGE

In the presence of:

Ms. Joy Anani for Mutubwa for the Applicant

Ms. Etemere for Respondent