Mennonite Board in East Africa v Simon Saili Malonza & another (Miscellaneous Civil Application E312 of 2019) [2021] KEHC 92 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 92 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E312 OF 2019

WA OKWANY, J

SEPTEMBER 23, 2021

BETWEEN

MENNONITE BOARD IN EAST AFRICA ..... APPLICANT

AND

SIMON SAILI MALONZA ..... 1ST RESPONDENT

THOMAS & PIRON GRANDS LACS ..... 2ND RESPONDENT

RULING

1. Through an earlier application dated 31st July 2019, the applicant herein sought, inter alia, orders for stay of further proceedings before the 1st respondent (the sole arbitrator) and the removal of the said arbitrator on grounds of bias. This court declined to grant the orders sought after considering the merits of the said application thus precipitating the filing of the application that is the subject of this ruling.

Application

2. This ruling is in respect to the application dated 29th March 2021 wherein the applicant (Mennonite Board in East Africa) seeks the following orders; -

    1. Spent
    2. Spent
    3. That this honourable court be pleased to grant the applicant leave to appeal against the ruling which was delivered herein by Honourable Lady Justice Wilfrida A. Okwany on 18th March 2021.

4. THAT this honourable court be pleased to grant a stay of further proceedings pending before the 1st respondent/arbitrator pending the hearing and determination of this application.

5. THAT this honourable court be pleased to grant a stay of further proceedings pending before the 1st respondent/arbitrator pending the lodging hearing of the Applicants intended appeal against the ruling which was delivered herein by Honourable Justice Wilfrida A. Okwany on 18th March 2021.

6. THAT cost of the application be in the cause.

3. The application is brought under section 39(3) and (4) of the *Arbitration Act* (hereinafter "the Act") and is supported by the affidavit of Robert Darby. The application is premised on the following main grounds: -

1. That the applicant is aggrieved by the ruling delivered on 18th March 2021 and wishes to appeal to the Court of Appeal and has filed notice of appeal and applied for certified copies of the same.

2. That the that leave of appeal under section 39(3) and (4) of the Act lies with this court.

3. That unless the orders sought are granted the applicant shall suffer substantial loss and its right to access justice under article 48 of the Constitution violated.

4. That this honourable court has jurisdiction to preserve the subject matter of the suit.

4. The 2nd respondent, Thomas & Piron Grands Lacs, opposed the application through the replying affidavit sworn by its Chief Executive Officer Coralie Piron who avers that the applicant's intention is to derail and delay the arbitral proceedings that are pending before the 1st respondent. He states that the application does not meet the requirements for an appeal as provided for under Section 39(3) of the Act. He adds that the application for stay of the proceedings before the arbitral tribunal is res judicata as it was dealt with and determined on in the earlier application dated 31st July 2019.

5. The application was canvassed by way of written submissions which I have considered. The applicant submitted that under Sections 13 to 15 of the *Arbitration Act*, the integrity of the arbitral process fundamental and that where there exists doubts in the impartiality and independence of the arbitrator, an application for his removal from office may be made.

6. The applicant also submitted on the principles governing the granting of orders for stay of proceedings and the centrality of the right of appeal as a fundamental right that underpins the right to fair trial under Article 50(1) of the Constitution.

7. The respondent, on the other hand, submitted that this court lacks the jurisdiction to entertain the application as no right of appeal exists against the court's decision. It was submitted that Section 39(3)(a) of the Act limits the option of appeal to instances where parties have expressly agreed that an appeal shall lie prior to the delivery of the arbitral award or where the Court of Appeal grants leave to a party to institute an appeal before it on a point of law of general importance.

8. The respondent argued that leave to appeal can only be granted by the Court of Appeal after interrogating the substance of the intended appeal.

9. On the issue of stay of execution, the respondent submitted that the court became functus officio once it delivered the impugned ruling.

10. I have considered the pleadings filed herein, the parties' rival arguments and the authorities that they cited. I find that the main issues for determination are whether the applicant should be granted leave to appeal the ruling dated 18th March 2021 and whether the Court should stay arbitral proceedings pending the intended appeal.

11. From the outset, it is worthy to point out that unlike ordinary civil proceedings that are generally governed by the rules in the *Civil Procedure Act* and Rules, arbitral proceedings are, except where it is expressly stated, governed by the *Arbitration Act*. This is to say that where parties choose to subject disputes arising from their agreement to arbitration, they must in the same vein be alive to the fact that, except where it is clearly stated, the Act removes such proceedings from the purview of the rules in the *Civil Procedure Act*.

12. The applicability of the provisions of the *Civil Procedure Act* to arbitral proceedings was discussed in *Kamconsult Ltd v Telkom Kenya Ltd & Another* [2016] eKLR, where the Court of Appeal referred to the case of *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR and to Mwera JA's statement that:

> " Certainly, I do not agree that the *Civil Procedure Act* applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the *Arbitration Act* is a complete code excluding any other law applicable in civil-like litigation, I do not see where the *Civil Procedure Act* applies in this matter...."

13. Section 39(3) of the *Arbitration Act* stipulates as follows: -

39(3) Notwithstanding Sections 10 and 35 an appeal shall lie to the Court of Appeal against the decision of the High Court under subject (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).

14. In *Kenyatta International Convention Centre v Greenstar Systems Limited* [2018] eKLR it was held: -

> " My construction of the above provision is that there are three ways in which a party can access the appellate jurisdiction of this court in a matter arising from an arbitral process. The first is by way of provision of an agreement to that effect in the arbitration clause contained in the agreement pursuant to which the arbitral process is anchored, that a right of appeal to the Court of Appeal exists. Secondly, through leave granted by the High Court under the same provision. Thirdly, through leave granted by the Court of Appeal under the same provision."

15. In the recent Supreme Court decision in *Synergy Industrial Credit Limited vs Cape Holdings Limited* [2019] eKLR, (the Synergy Industrial Appeal), it was held: -

> " [77] In the above context, on behalf of the Respondent, it is urged that it is only Section 39 of the *Arbitration Act* which contemplates appeals against decisions of the High Court. On our part, we take the position that, unlike other provisions in the Act, Section 39 specifically provides intervention by the Court of Appeal where parties to a domestic arbitration agree that an application should be made to the High Court for a determination of a question of law arising in the arbitration process or the award. Such a High Court decision is appealable to the Court of Appeal if the parties have agreed so, or if the Court of Appeal finds that a point of law of general importance is involved. That Section is thus very particular on when it can be invoked. It is an independent provision separate from all others and particularly Section 35 which is our main concern.
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> [80] As regards the Court of Appeal's intervention under clause 39 (now Section 39) the Attorney General explained (Hansard Report of 20th July, 1995) that the courts of law are the ultimate authority on interpretation of the law and so any question of law that would arise in a domestic arbitration could be referred to the High Court for settlement with a further appeal to the Court of Appeal especially where the High Court has committed an error of law.
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> [81] In the above context, we take the position that even though Section 39 is not the subject of our interpretation in the instant case, to the extent that the Respondents rely on it to advance their argument, we are of the view that the jurisdiction of the Court of Appeal under Section 39 is very specific on when it can be invoked, that is, determination of questions of law arising in the cause of arbitration proceedings. Section 39 does not prescribe or affect the jurisdiction of any other Court as provided in any of the other provisions of the *Arbitration Act*. And as explained by the Attorney General, the purpose was to ensure that determination of a question of law particularly where issues of general public importance arise, are subject to appeals. And even though Section 35 provides that "recourse to the High Court against an award may be made only by an application for setting aside", Section 39 provides further circumstances when an award may be set aside either by the High Court or the Court of Appeal hence the use of the term "notwithstanding Section 10 and 35" as expressed above.
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> [82] In our view therefore, contrary to what is proposed by the Respondent, Section 39 cannot be justifiably interpreted so as to oust the jurisdiction of the Court of Appeal, if at all, in any other section of the Act."

16. In *Micro-House Technologies Limited v Co-operative College of Kenya* [2017] eKLR, the Court observed that an appellant has no right of appeal to this Court to challenge an arbitral award if leave is not obtained under Section 39(3)(b) of the Act.

17. In view of the foregoing decisions, I find that Section 39(3) of the Act permits leave to be granted if the parties have agreed that an appeal shall lie prior to the delivery of the arbitral award and when the

Court of appeal is of the opinion that a point of law of general importance, the determination of which will substantially affect the rights of the parties, is involved.

18. In the instant case, it is clear that the arbitration agreement did not provide for the right of appeal against the decision of the High court. The Second test lies within the province of the Court of Appeal. I note that Section 39(3) of the Act does not confer the High Court with the jurisdiction to grant leave of appeal. Needless to say, jurisdiction is everything without which a court cannot act and must down its tools. (See *Owners of Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd* [1989] KLR I).

19. From the foregoing observations, I find that this court lacks jurisdiction to entertain the application for leave to appeal for want of jurisdiction. As regards the prayer for stay of the arbitral proceedings pending the intended appeal, the respondent argued that the prayer is res judicata in light of the decision in the impugned ruling dismissing a similar prayer. I however find that the res judicata doctrine is not exactly applicable to this application as the circumstances under which stay of proceedings was sought in the earlier application differs from the circumstances in the instant application. Be that as it may, having found that this court does not have the jurisdiction to grant leave to appeal against the impugned ruling, I in the same vein find that the prayer for stay of proceedings before the arbitrator pending the intended appeal falls on the wayside and cannot succeed as the two prayers are joined to the hip. This means that an order for stay of proceedings pending appeal was dependent on the outcome of the prayer for leave to appeal, in which case, this court cannot find that it lacks the jurisdiction to grant leave to appeal and at the same time grant stay of proceedings pending the intended appeal.

20. In a nutshell, I find that the instant application is not merited and I therefore dismiss it with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kamau Kuria Senior Counsel for Applicant.

Mr. Dachi for 2nd Respondent.

Court Assistant: Sylvia.