



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**COMMERCIAL DIVISION, MILIMANI**  
**MIS. APPLICATION NO. 719 OF 2003 (O.S)**

**IN THE MATTER OF ARBITRATION ACT**

**AND**

**IN THE MATTER OF AN ARBITRATION BETWEEN ERNIE CAMPBELL & COMPANY LIMITED**

**AND**

**GITHUNGURI DAIRY PLANT COMPANY LIMITED**

**GITHUNGURI DAIRY PLANT COMPANY LIMITED .....PLAINTIFF**

**VERSUS**

**ERNIE CAMPBELL & COMPANY LIMITED.....DEFENDANT**

**R U L I N G**

The Respondent had filed a Preliminary Objection and sought to raise it before the hearing of the pending application hereof.

The Objection is in the following terms: -

**“That under Section 39 (3) of the Arbitration Act, 1995, no appeal may lie against the decision of the High Court save in the circumstances therein set out. The parties have not agreed that an appeal may lie to the court of Appeal, and the application is therefore bad in Law. That the application should be dismissed with costs.”**

The applicant by its application dated 15th September 2003 sought to set aside an arbitration award and an Order for retrial by the arbitrator or the court. The court ruled on that application on 29th June 2004 whereby the same was dismissed.

The applicant by its application dated 8th July 2004 is seeking stay of execution of the arbitration award pending appeal to the Court of Appeal, and also leave of this Court of Appeal.

It is that application that the Preliminary Objection is directed toward.

Mr. Kembi counsel for the Respondent argued that Section 39 (3) of the Arbitration Act is very clear that a party can only appeal from a High Court decision by, firstly obtaining the other party’s agreement/consent and secondly on obtaining leave of the court. Mr. Kembi argued that those two ingredients have to be present. In this present case, he said, parties had not agreed on the applicant filing

an appeal and the applicant cannot therefore proceed with the appeal.

Mr. Mwiti for the applicant said that appeal lies with leave of the court which was why the applicant had filed its application dated 8th July 2004. He said that even if the High Court did not give that leave the applicant could obtain it from the Court of Appeal since a Notice of Appeal was filed on 1st August 2004.

Section 39 (3) provides that an appeal shall lie from the High Court: -

*(a) "If the parties have so agreed that an appeal shall lie; and*

*(b) the High Court grants leave to appeal, or failing leave by the High Court, the Court of Appeal grants special 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 Sub Section (2)."*

Consideration of the aforesaid subsection (3) I do agree that the two portions of subsection (3) (a) and (b) have to be satisfied for an appeal to be filed in the Court of Appeal; the use of the word 'and' between (a) and (b) make it clear that they both have to be satisfied. The applicant has failed to obtain the agreement to lodge the appeal from the Respondent and accordingly the application filed on behalf of the respondent dated 8th July 2004 must fail.

The order of this court is that the application dated 8th July 2004 is dismissed with costs to the respondent.

**Dated and delivered this 1st day of December 2004.**

**MARY KASANGO**

**AG JUDGE**