



**National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited (Commercial Arbitration Cause E025 of 2021) [2025] KEHC 364 (KLR) (Commercial and Tax) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 364 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E025 OF 2021**

**PM MULWA, J  
JANUARY 23, 2025**

**BETWEEN**

**NATIONAL WATER CONSERVATION & PIPELINE CORPORATION ..... APPLICANT**

**AND**

**RUNJI & PARTNERS CONSULTING ENGINEERS & PLANNERS LIMITED ..... RESPONDENT**

**RULING**

1. The applicant filed a notice of motion application dated 8<sup>th</sup> June 2022 under Sections 35 and 39 of the *Arbitration Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Rule 39 of the Court of Appeal Rules for the following orders:
  - a. That this Honourable Court be pleased to grant leave to the Applicant to Appeal to the Court of Appeal against the decision of this Court made on 27th May 2022.
  - b. Spent.
  - c. That this Honourable Court be pleased to stay the execution of the Additional Award of Kshs. 13,317.194.00 (sic) dated 14th July 2021 arising from the Taxation of the Respondents Party to Party Bill of Costs by the Arbitrator, Tom Oketch Onyango, pending the hearing and determination of the intended Appeal.
  - d. That this Honourable Court be pleased to make such other and further orders as the interest of justice may demand.
  - e. That costs of this Application be provided for.



2. The grounds for the application were that the applicant herein had earlier filed an application dated 13<sup>th</sup> August 2021 seeking to set aside the additional award made upon the taxation of costs by the arbitration tribunal for reasons including that the tribunal was functus officio when the bill of costs was filed, that the bill of costs was time-barred under sections 32 and 34 of the *Arbitration Act*, 1995, and that the tribunal lacked jurisdiction. Furthermore, the applicant argued that they were denied the right to be heard on the bill of costs.
3. The applicant contended that the learned judge rendered a ruling on 27<sup>th</sup> May 2022 dismissing the said application and made several errors in law and fact, particularly in interpreting and applying the relevant provisions of the *Arbitration Act*. It asserted that the Supreme Court's jurisprudence supports the need for leave to appeal in arbitration matters to correct legal errors and ensure justice. The applicant emphasized the importance of safeguarding the right to a hearing and addressing procedural irregularities.
4. The applicant claimed that it filed the instant application without undue delay and referenced a similar application allowed in *University of Nairobi v Multiscope Consulting Engineers [2020] eKLR*, urging the Court to grant leave in the interest of justice.
5. In opposition to the instant application, the respondent filed a preliminary objection (PO) dated 14<sup>th</sup> June 2022.
6. In the PO, the respondent contended that the court lacks jurisdiction to hear and determine the application for leave to appeal under section 35 of the *Arbitration Act*. The respondent argued, relying on the Supreme Court's decision in *Synergy Industrial Credit Limited v. Cape Holdings Limited [2019] eKLR*, that only the Court of Appeal had the primary jurisdiction to consider and screen applications for leave to appeal under Section 35. The respondent highlighted that the Supreme Court clarified that not every High Court decision under Section 35 was appealable and that the Court of Appeal was tasked with guarding the appellate mechanism from frivolous appeals.
7. Furthermore, the respondent cited Section 39(3) of the *Arbitration Act* and Rule 39 of the Court of Appeal Rules, emphasizing that the High Court could not assume the jurisdiction reserved for the Court of Appeal. Consequently, the respondent sought to have the instant application struck out as incompetent, with costs awarded.
8. In rebuttal to the PO, the applicant filed grounds of opposition dated 7<sup>th</sup> November 2022.
9. It was contended that the High Court has the jurisdiction to determine an application for leave to appeal to the Court of Appeal as held in *Supreme Court and the Court of Appeal cases*.

### **Analysis and determination**

10. The applicant filed submissions in support of its application and submissions in opposition to the preliminary objection dated 29<sup>th</sup> April 2024 and 7<sup>th</sup> November 2022 respectively. The respondent, on its part, filed submissions in opposition to the subject application dated 26<sup>th</sup> June 2024.
11. I have considered the instant application, the response and submissions by the parties.
12. The first issue for determination is whether this court has the jurisdiction to grant leave to the applicant to appeal to the Court of Appeal and if it does, whether leave ought to be granted.
13. The background of this matter is that the parties herein entered into a contract and a dispute arose between them which was resolved through arbitration by a sole arbitrator, Mr. Tom Oketch Onyango.



14. The arbitrator published his award on 10<sup>th</sup> August 2020 in favour of the respondent. Subsequently, the applicant applied to set aside the entire arbitral award and the said application was dismissed with costs vide the ruling dated 22<sup>nd</sup> February 2021 by Mativo, J (as he then was).
15. The respondent filed party and party bill of costs dated 21<sup>st</sup> April 2021 before the arbitrator seeking costs of the arbitration proceedings. The arbitrator issued an award on costs and expenses for Kshs.13,317,194.00 on 14<sup>th</sup> July 2022. Aggrieved by the arbitrator's assessment on costs, the applicant filed an application dated 13<sup>th</sup> August 2021 seeking to set it aside under Sections 34 and 35 of the [Arbitration Act](#).
16. The court pronounced itself on the application vide its ruling dated 27<sup>th</sup> May 2022 dismissing the application. The applicant now seeks leave to appeal to the Court of Appeal against the impugned ruling.
17. Is this court clothed with the jurisdiction to grant leave to appeal to the Court of Appeal?
18. The Supreme Court of Kenya in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch* [2019] KESC 11 (KLR) stated the following:
 

“In stating as above, we reiterate that courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. The High Court and the Court of Appeal particularly have that onerous yet simple task. A leave mechanism as suggested by Kimondo, J. and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end. We would expect the Legislature to heed this warning within its mandate.”
19. The Court of Appeal in *Kenya Electricity Transmission Co. Limited (Ketraco) v Instalaciones Inabensa S.A* [2021] KECA 151 (KLR) held:
 

“An appeal from a decision setting aside or refusing to set aside an arbitral award under Section 35 of the [Arbitration Act](#) does not lie as of right, and requires the leave of the High Court. This is not disputed by the applicant, hence its application for leave. Where such leave has been sought but is not granted by the High Court, Rule 39 of the Court of Appeal Rules allows for the making of such application before this court. Where leave has not been obtained from the High Court in a matter where leave to appeal is required, then, as was held in *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR cited by the respondent, there can be no valid notice of appeal filed.”
20. From the authorities above, it can be concluded that both the High Court and the Court of Appeal have the jurisdiction to determine applications for leave to appeal.
21. The court will now consider whether such leave ought to be granted as prayed in the instant application.
22. In the case of *Nyutu Agrovet* case (*supra*) the Supreme Court held:
 

“Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real



and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.

Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in *AKN* and another (*supra*) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the ‘no Court intervention’ principle.

In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.”

23. From the foregoing, one can conclude that appeals to the Court of Appeal from decisions of this court under Section 35 of the *Arbitration Act* are very limited. Leave should only be granted in exceptional instances of process failures as opposed to the merits of the arbitral award itself or when the court, in setting aside an award, has stepped outside the grounds set out in Section 35 of the *Arbitration Act*.
24. In this case, the applicant’s appeal to the Court of Appeal is anchored on the grounds set out in its draft memorandum of appeal which is annexed to its supporting affidavit.
25. Those grounds include that the court in the ruling dated 27<sup>th</sup> May 2022 erred in failing to find that the arbitral tribunal was functus officio by the time the bill of costs was filed; that the court erred in failing to find that the bill of costs was time barred pursuant to Sections 32 and 34 of the *Arbitration Act* and that the court erred in failing to find that the arbitral tribunal did not have the jurisdiction to determine the bill of costs.
26. I have looked at the impugned ruling dated 27<sup>th</sup> May 2022, where Mwita, J. considered an application filed by the applicant herein which sought to declare the tribunal’s award dated 14<sup>th</sup> July 2021 on the party and party bill of costs null and void.
27. The court made a determination that the award dated 14<sup>th</sup> July 2021 amounted to an assessment of costs in the manner agreed to by the parties but it was not an additional award in terms of Section 34 of the *Arbitration Act*. The court came to the conclusion that the arbitrator was not functus officio and had the power to deal with the bill of costs dated 21<sup>st</sup> April 2021. Further that the bill of costs was not time barred and the award dated 14<sup>th</sup> July 2021 was not null and void.
28. As I see it, the court addressed the issues raised in the application before it which essentially sought to nullify the award of 14<sup>th</sup> July 2021. The applicant has not demonstrated any exceptional circumstances as set out in the *Nyutu Agrovot* case to warrant leave to appeal against it.



29. In the circumstances I decline to grant leave to the applicant to appeal against the ruling of 27<sup>th</sup> May 2022 to the Court of Appeal.
30. The second issue for determination is whether the court ought to stay the execution of the additional award of Kshs.13,317,194.00 dated 14<sup>th</sup> July 2021 pending the determination of the intended appeal.
31. Having declined to grant the applicant leave to appeal, there is no need to consider this issue as it is now moot.
32. The upshot of the deliberations hereinabove, is that the application dated 8<sup>th</sup> June 2022 lacks merit and I hereby dismiss it with costs granted to the respondent.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**P.M. MULWA**

**JUDGE**

In the presence of:

Mr. Opwaka for Applicant

Mr. Njagi for Respondent

Court Assistant : Carlos

