



**Portside Freight Terminals Limited v Kenya Ports Authority (Civil Suit E065 of 2013) [2024] KEHC 6290 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E065 OF 2013  
DKN MAGARE, J  
MAY 23, 2024**

**BETWEEN**

**PORTSIDE FREIGHT TERMINALS LIMITED ..... PLAINTIFF**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**RULING**

1. This is a ruling on an application dated 26/10/23. It seeks the following orders:-
  1. Spent
  2. This Honourable Court be pleased to grant leave to the Kenya Ports Authority to Appeal the orders, decree and Ruling of the Honourable Court delivered on 11/10/23.
  3. Pending hearing and determinations of this motion, there be stay of execution and implementation of the order decree and Ruling of the Honourable Court.
  4. Costs be awarded to the Application.
2. There is no single ground as identified in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch* (Petition 12 of 2016) [2019] KESC 11 (KLR) (6 December 2019) (Judgment) for the court to make an order for leave to appeal. There is no right of Appeal. In the said case the supreme court stated as doth: -
  - (57) Thus, it is reasonable to conclude that just like Article 5, Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of



the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

(58) Having stated as above therefore we reject Nyutu’s argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal’s jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court’s intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court made under Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question.”

3. The court has perused all the 50 pages of the said application. There is nothing addressing the question of leave. Any losses incurred can only be addressed in the arbitration. There is no right of Appeal from an order indicating interim measures under Section 7 of the Arbitration Act. The same provides as follows:-

“7. Interim measures by court

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure. (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

4. There is no allegation that the Agreement is against Public policy or that there is no arbitration agreement. There are 6 page grounds of opposition. They state that the proceedings were based on Section 7 of the Arbitration Act.

5. It was their case that Rule 11 of the Arbitration Rules cannot override Section 7 of the Arbitration Act. It is their case that Section 10 of the Arbitration Act preemptorily provides that: \_

“Except as provided in this Act, no court shall intervene in matters governed by this Act.

6. The Respondent filed submission on the same day and stated that an appeal can only be looked at in terms of the confines of the Arbitration Act and not otherwise. They relied on paragraph 9 of the decision of Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR) (6 December 2019) (Judgment, the supreme court stated as hereunder; -

(33) What exactly does the term “jurisdiction” mean? In Republic v Karisa Chengo & 2 others SC Petition No. 5 of 2015; [2017] eKLR, we defined jurisdiction as the “the Court’s power to



entertain, hear and determine a dispute before it.” Also, “the sphere of the courts operations.” Is jurisdiction therefore synonymous with a right of appeal? In other words, does Article 164(3) grant a litigant a right of appeal to the Court of Appeal? Nyutu urges that Article 164(3) indeed grants such a right of appeal. We disagree. As urged by Airtel, this provision does not confer a right of appeal to any litigant. It only particularises the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate Court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal. There is thus no direct access to the Court of Appeal by all and sundry. As such, Article 164(3) defines the extent of the powers of the Court of Appeal but does not grant a litigant an unfettered access to the Court of Appeal.

- (36) By this provision therefore, jurisdiction and the right of appeal are clearly delineated to the extent that jurisdiction is only excised where the right of appeal exists. We also note that this same issue was canvassed before the Court of Appeal in this matter and Mwera JA had this to say on it:

“I do not agree that Article 164(3) of *the Constitution*, section 3(1) of the *Appellate Jurisdiction Act* and even section 75 of the *Civil Procedure Act*, giving this Court jurisdiction to hear appeals from the High Court, should be read to mean that these provisions of law also confer the right of appeal on the litigants. ... This Court has jurisdiction to hear any matters coming on appeal from the High Court and any other court or tribunal prescribed by law. But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal before us. However, be it appreciated that such leave does not constitute the right to appeal (sic). The right must precede leave.”

7. Of course the Respondent is wrong to submit that where there is no right of Appeal, leave cannot be granted. It is where there no right of appeal that leave is granted. Where there is a right, then an appeal is automatic. This is succinctly set out in Section 75 of the *Civil Procedure Act*:-

“75. Orders from which appeal lies

- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
  - (b) an order on an award stated in the form of a special case;
  - (c) an order modifying or correcting an award;
  - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
  - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
  - (f) an order under section 64;



- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

8. The applicant filed submission arguing that they rely on the grounds on the face of the Application. They submitted that the court should use inherent powers under Articles 159 and 165 of *the Constitution* and Section 1A and 3A of the *Civil Procedure Rules*.

9. They relied on the *Halsbury's Laws of England, 4th Edn. Vol.37 Para. 14* where the following is said of inherent powers of the Court;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process...In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

10. They submitted that the Court is enjoined to allow the Defendant/Applicant appeal the ruling delivered on 11.10.2023 for in any event, nothing in the *Arbitration Act* clogs a right to appeal except within the confines of Section 35 and 39.

11. They also relied on the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2015] eKLR, where the court stated as hereunder; -

“The Court’s intervention in arbitral process is limited as stated in Section 10 of Cap 49 as follows-

“Except as provided in this Act, no Court shall intervene in matters governed by this Act.”

Once an award is issued, as in this case, the Court is restricted to act as provided under Sections 35 and 37, as discussed above. However even under those Sections the Courts have, in discussing arbitral matters, stated that the guiding principle should always be the concept of finality of arbitral process. The Court of Appeal in the following decisions stated thus-

“*Ann Mumbi Hinga -vs- Victoria Njoki Gathara* [2009]eKLR viz-



The concept of finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modeled on the UNCITRAL Model Law. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of the Act are wholly exclusive except where a particular provision invites the Court's intervention or facilitation.

To illustrate the point we will cite two United States cases. The first one is the Supreme Court's decision in *Hall Street Associates, L.L.C., Petitioner vs Mattel, Inc* 552 U.S. – (2008). In this case the Court struck down an arbitration agreement that allowed the Courts to overturn an arbitration award that contained legal errors or factual findings that were not supported by “substantial evidence.” The Court recognized that where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the Federal *Arbitration Act* (“FAA”) policy of allowing flexibility to the parties clashes with the equally important policies of finality and efficiency in arbitration. Permitting enhanced Court review of arbitration awards the Court said, “opens the door to the full-bore evidentiary appeals that render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.” The Court viewed that as unacceptable outcome especially in light of what it saw as clear language in the text of the “FAA” restricting judicial review to the grounds specifically listed in the statute. The Court held that the goal of flexibility must yield to:-

“A national policy favouring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straightaway.”

This was also the finding in the case *National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* [2014]eKLR viz-

“The *Arbitration Act*, Act No. 4 of 1995 is based on a Model Law on international commercial arbitration adopted in 1985 by the *United Nations Commission on International Law* (UNCITRAL). One of the principles underlying the Model Law and in turn the *Arbitration Act* is the severe restriction on the role of the Court in the arbitral process. That principle finds expression in Section 10 of the Act. Section 35 of the *Arbitration Act* is itself underpinned by that principle. Our Courts have, since the coming into force of that statute, observed and given effect to that principle. .... In *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR for instance the Court stated-

‘Again no intervention should have been tolerated firstly because of the underlying principles in the *Arbitration Act* is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards ....’

12. The applicant correct to the extent that in matters where there is no right of Appeal leave may be granted. It is however not given as a matter of course. Indeed, Article 159 (2) (c) enjoins this court to promote alternative dispute resolution mechanism. It is not done by interfering with the arbitration process.
13. It should be recalled that the arbitration process was ongoing. This is the application for leave to Appeal from the decision made on 11/10/2023, was made in the context of.
14. In the Ruling on 11/10/2023, I issued an injunction pending arbitration and held this matter in abeyance pending arbitration.



15. The intended Appeal basically questions the merit of the decision. The main issue raised is that they were aggrieved by the Ruling. However, there is no demonstration on what issues within the competence of this court are being appealed it is purely on the merit or demerit of the arbitration. The questions of jurisdiction are matters within the exclusive competence of the arbitration.
16. In other words, there is no appealable order made. The order for conservatory orders is not an appealable order. The supreme court in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [supra] stated as follows: -

“(47) The issue of the extent of the Court of Appeal’s jurisdiction under Section 35 was considered in this case by the Court of Appeal which agreed with Airtel that no right of appeal exists against decisions of the High Court made under Section 35. In holding so, the appellate Court took into consideration the principle of finality of arbitral awards and the desired limited participation by the Courts. In particular, as expressed by Mwera JA, the appellate Court was of the following view:

“... that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrators’ award shall be final, it can be taken that as long as the given award subsists, it is theirs. But in the event it is set aside as was the case here, that decision of the High Court final remains their own (sic). None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved.”

17. The rest of the issues are in the realm of kompetenz - competence. It is the Arbitrator who will deal with the same. In the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020)* [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling), justice Mativo as then he was stated as doth: -

“The party’s intentions were clear. In any event, the question of whether there existed a dispute or not touched on the jurisdiction of the arbitrator. The arbitrator’s jurisdiction could be challenged by attacking the agreement’s validity or the tribunal’s jurisdiction over the subject matters, among other challenges. Section 17 of the *Arbitration Act* provided for the doctrine of kompetenz-kompetenz, a jurisprudential doctrine whereby a legal body, such as an arbitral tribunal, could have competence, or jurisdiction to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz was enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules. Article 16(1) of the Model Law and article 23(1) of the Arbitration Rules both dictated that the arbitral tribunal was to have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”

18. This court has no jurisdiction to deal with the jurisdiction of the arbitrator before the arbitrator makes a decision on the issue. There is nothing that has been demonstrated to enable me grant the orders sought.



19. Consequently, I find no merit in the Application and dismiss the same in limine with costs.

**Determination**

- i. The Application dated 26/10/2023 lacks merit and is consequently dismissed with costs.
- ii. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 23<sup>RD</sup> DAY OF MAY, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

No appearance for parties

Court Assistant- Brian

