



Collaboration Engineering Solutions and Products Limited v China Zhongxing Construction Co Ltd & another (Miscellaneous Civil Application E011 of 2022) [2024] KEHC 6944 (KLR) (Commercial and Tax) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E011 OF 2022**

FG MUGAMBI, J

JUNE 7, 2024

BETWEEN

COLLABORATION ENGINEERING SOLUTIONS AND PRODUCTS LIMITED APPLICANT

AND

CHINA ZHONGXING CONSTRUCTION CO LTD 1ST RESPONDENT

KENYA CONFERENCE OF CATHOLIC BISHOPS 2ND RESPONDENT

RULING

1. This ruling determines the application dated 6th October 2023 which seeks leave to appeal to the Court of Appeal against the Ruling and Orders delivered by this court on 22nd September 2023 in Miscellaneous Civil Application No. E011 of 2022 in which the court set aside an arbitral award dated 26th January, 2022.
2. The application is brought under section 75 of the *Civil Procedure Act*, Order 43 rule 1 of the *Civil Procedure Rules* together with Rule 39 of the *Court of Appeal Rules, 2010*.
3. The application is opposed by the respondents who by their separate replying affidavits argue that the application is fatally defective. The respondents' case is that the prayers sought in the application are not envisaged under the *Arbitration Act* and particularly section 10 and rule 11 thereof. The respondents warn that the jurisdiction for appeal is so narrow and deliberately so, so that an applicant would have to prove that the decision by this court was so grave and so manifestly wrong and has completely closed the door of justice to either parties.



4. The respondents further argue that no grounds have been set out to warrant the orders prayed for, noting that this court correctly limited itself to the grounds for setting aside as stipulated under section 35 of the *Arbitration Act*. It has also been urged that this court in determining whether to issue the prayers sought was being called upon to reconsider the substance of its ruling.

Analysis and determination

5. Upon considering the pleadings, submissions and authorities cited by the parties, I am of the view that the question for determination is whether this court has the jurisdiction to and if it should allow the application for leave to appeal against the decision of 26th January 2022 to the Court of Appeal.
6. I note that the application seeking leave has been brought under the provisions of the *Civil Procedure Act*, the *Civil Procedure Rules* and the Court of Appeal Rules. I hasten to point out that judicial pronouncements regarding the place of the *Civil Procedure Act* and Rules in arbitration matters is now well crystalized.
7. This position is best summarized by this court’s decision (Odunga, J as he then was) in *Erad Suppliers & General Contracts Limited V National Cereals & Produce Board* No. 636 of 2009 in the following words:

“...In light of the provisions of section 10 of the *Arbitration Act*, all the provisions, including the *Civil Procedure Act* and Rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the *Arbitration Act*. Accordingly, I do not have jurisdiction to intervene in any manner not specifically provided for in the *Arbitration Act*, and that includes entertaining the application seeking to stay proceedings subsequent to the award ... It is clear to me that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny the award finality and speedy enforcement, both of which are the major objectives of arbitration.”

8. Confirming this position the Court of Appeal further held as follows in the case of *Anne Mumbi Hinga v Victoria Njoki Gathara*, [2009] eKLR:

“We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the *Arbitration Act* or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or Court of Appeal against an award except in circumstances set out in section 39 of the *Arbitration Act*.”

9. The point in these and other judicial pronouncements is that this court is bound by the stringent provisions in the *Arbitration Act* to treat arbitration procedures as a self-contained process within the Act. This brings me to section 39(3) of the *Arbitration Act* which instructs that:

- “(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).” (emphasis mine)

10. Section 39 (3)(b) makes it very clear that it is upon the Court of Appeal to determine whether to grant leave to appeal upon considering the relevant factors. This position was reiterated in *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) in the absence of leave, which leave ought to be sought and obtained from the Court of Appeal.

Disposition

11. Borrowing from the above decisions and reverting to section 39 (3) I am of the view that whether to grant leave to appeal against a 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. In the end, the Motion dated 6th October 2023 is hereby dismissed with costs for want of merit.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 7TH DAY OF JUNE 2024.

F. MUGAMBI

JUDGE

