



REPUBLIC OF KENYA



**Lloyd Masika Limited v Stanbic Bank Limited (Miscellaneous Application
E206 of 2022) [2023] KEHC 2447 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
MISCELLANEOUS APPLICATION E206 OF 2022**

DAS MAJANJA, J

MARCH 17, 2023

BETWEEN

LLOYD MASIKA LIMITED APPLICANT

AND

STANBIC BANK LIMITED RESPONDENT

RULING

1. By the ruling dated January 27, 2023, the court dismissed the Applicant's application dated March 18, 2022 seeking to set aside the Award dated December 20, 2021, the Additional/Corrected Final Award dated February 3, 2022 and the Additional Award on Quantum of Costs dated May 2, 2022 made by Dr Wilfred A Mutubwa, the Sole Arbitrator and allowed the Respondent's application dated May 16, 2022 recognizing the Award and granting leave for its enforcement ("the Ruling"). The Applicant has now filed an Amended Notice of Motion dated February 23, 2023 seeking leave to appeal against the decision and stay of execution of the resulting decree and orders. It has invoked Article 164(3) of *the Constitution*, section 75 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 42 rule 6 and Order 43 rules 1, 2 and 4 and Order 51 of the *Civil Procedure Rules*.
2. The application is supported by the affidavit and supplementary affidavits of Peter Muswii, sworn on February 10, 2023 and February 23, 2023. It is opposed by the Respondent through the replying affidavit of its officer, Amos Mugambi, sworn on February 14, 2021. Counsel for both sides made brief oral submissions supplemented by case digests and authorities which they relied on.
3. The Applicant has filed its Notice of Appeal and now seeks leave to appeal against the Ruling. Both parties agree that leave is required to lodge an appeal to the Court of Appeal from a decision made under sections 35 and 36 of the *Arbitration Act* since a right of appeal is not conferred under the *Arbitration Act*. Citing seminal decisions of the Supreme Court on the issue of the right of appeal under



the *Arbitration Act*, M’Inoti JA., in *Prabakhi Developers Limited v Structural Development Limited* [2022] KECA 917 [KLR] summarized the position as follows:

[6] It is trite that there is no automatic right of appeal from a determination by the High Court under section 35 of the *Arbitration Act*. To lodge such an appeal, an aggrieved party must obtain leave, and even then, leave will only be granted in rare and exceptional circumstances. The Supreme Court has pronounced itself on this issue as follows in *Nyutu Agrovet Ltd. v. Airtel Networks Kenya Ltd & Another* [2019] eKLR:

“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.” (Emphasis added).

[7] The same Court took a similar view in *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2019] eKLR, when it stated:

“In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in *Inco Europe Ltd & others* (supra) hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances. Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law. Having said so, we are of the further opinion that a decision on whether the Court of Appeal should assume jurisdiction on appeals arising from Section 35 should be guided by the following consideration i.e. whether the High Court has overturned an award other than on the grounds in Section 35 of the Act.” (Emphasis added).

4. The residual jurisdiction created by the Supreme Court is not invoked as of right, it is invoked on the basis of leave granted on the basis that the appellant must demonstrate exceptional circumstances that would justify the grant of such leave to appeal. The question then is whether this court, the High Court, has jurisdiction to grant leave to appeal to the Court of Appeal.
5. A reading of the decisions of the Supreme Court are clear that it is the Court of Appeal that has residual jurisdiction to set aside an award in “exceptional circumstances”. That jurisdiction has not been reposed in the High Court. It is for the Court of Appeal to determine whether the case before it meets the grounds for it to exercise the residual jurisdiction once the High Court has dealt with the application under section 35 of the *Arbitration Act* (see *Mercantile General Assurance Company Limited and Others v Dilip Shah and Others* HCOMM No 550 of 2006 [2021] eKLR).



6. Likewise, the provisions of section 75 of the *Civil Procedure Act* and Order 43 of the Rules which regulate the right of appeal against certain orders made under the Rules do not apply to the *Arbitration Act* (see *Attorney General v Bea International Limited* [2020]eKLR). The *Arbitration Act* is a complete code that excludes the application of the *Civil Procedure Act* unless otherwise incorporated (see *Kamconsult Ltd v Telkom Kenya Ltd & Another* NRB CA Civil Appeal No 92 of 2009 [2016] eKLR). I therefore hold that High Court lacks jurisdiction to grant leave to appeal to the Court of Appeal under the *Arbitration Act*.
7. The upshot of my findings this court lacks jurisdiction to grant leave to appeal against a decision made under section 35 of the *Arbitration Act*. Such leave must be sought and obtained at the Court of Appeal. I also hold that for the same reason, it is the Court of Appeal that must entertain and consider whether to stay of execution of the arbitral award duly recognized by the High Court. Consequently, the Applicant's Amended Notice of Motion dated February 23, 2023 is struck out with cost to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Katasi instructed by Matemu, Katasi and Associates Advocates for the Applicant.

Mr Gichuhi, SC instructed by Wamae and Allen Advocates for the Respondent.

