REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLN NO. 532 OF 2018

IN THE MATTER OF THE ARBITRATION ACT, I995 AND IN THE MATTER OF AN

APPLICATION FOR SETTING ASIDE AN ARBITRATION AWARD.

(APPLICATION FOR LEAVE TO APPEAL AGAINST THE RULING OF THE HIGH COURT COMMERCIAL AND ADMIRALTY DIVISION AT NAIROBI BY HON. LADY JUSTICE MAUREEN A. ODERO DATED 29th MAY 2020 AND DELIVERED ON IST JUNE 2020

BETWEEN

FUTUREROCK LIMITED..... PLAINTIFF/RESPONDENT

(Formerly Futureways Limited)

VERSUS

NATIONAL OIL CORPORATION OF KENYA....DEFENDANT/APPLICANT

R U L I N G

1. The subject of this ruling is the defendant's application dated 10/6/2020. It was brought *inter-alia* under **Order 42 Rule 6(1), (2), and (4); Order 50 Rule 6 of the Civil Procedure Rules; Section 1B and 3A of the Civil Procedure Act and Article 159(2) (a) and (d) of the Constitution of Kenya 2010.**

2. The applicant sought leave to appeal to the Court of Appeal against the ruling of Odero J dated 29/5/2020, leave to file the Notice of Appeal out of time and a stay of execution against the whole of the arbitral award obtained pursuant to the arbitral proceedings between the applicant and respondent.

3. The application was predicated on the grounds set out in its body and the supporting affidavit of **Lilian Waweru** sworn on 10/6/2020. These include that; the application was made timeously; the applicant would suffer substantial loss of approximately Kshs. 40,934,866.80; that the intended appeal has a high probability of success as the impugned ruling was erroneous on numerous points of law touching on jurisdiction and public policy.

4. Further that, the ruling made a determination on matters that were not raised by the parties, either at the arbitration or before this Court, and that no prejudice would be suffered by the respondent if the court allowed the application.

5. A brief background to this matter is that, the parties entered into a framework agreement on 1/8/2014 for the provision of petroleum transportation services by the respondent to the applicant. A dispute arose due to the termination of the contract and the matter was referred to arbitration before a sole arbitrator, **Dr. Kariuki Muigua**, appointed by the Chairperson of the Chartered Institute of Arbitrators.

6. On 8/8/2018, the arbitrator published his award in which he found the applicant to have breached the contract and awarded the respondent damages totaling Kshs. 40,934,866.80. Aggrieved by the award, the applicant moved the court, vide its application dated 21/1/2019 to set aside the arbitral award. By a ruling dated 29/5/2020, the court dismissed the said application with costs. It is against that background that the applicant brought this application for the aforesaid orders.

7. The court has considered the record. The two main issues for determination are; whether there is recourse to the Court of Appeal against a

ruling of this Court under ***section 35 of the Arbitration Act*** and if so, whether the applicant has met the threshold therefor.

8. The applicant has relied on the case of **Nyutu Agrovet v Airtel Networks Kenya Limited and another (2019 Eklr**, in seeking the present prayers. In that case 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.**
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> **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.**
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> **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".**

9. It is clear from the foregoing that, appeals to the Court of Appeal from decisions of this Court under ***section 35 of the Arbitration Act*** are very limited. That it should only be on procedural lapses when leave should be granted. That the principle of 'no court intervention in arbitral matters' should be jealously safeguarded.

10. The purpose of arbitration is to provide efficient alternative dispute resolution. For that reason, the court's intervention should be extremely minimal and on fixed set of circumstances in order to encourage and sustain the finality of arbitral proceedings. In this regard, an appeal to the Court of Appeal from a decision of the High Court under ***Section 35 of the Arbitration Act*** should only be allowed in exceptional instances of process failures and not the merits of the arbitral award.

11. In view of the foregoing, has the applicant met the threshold for leave to apply to the Court of Appeal to be granted? The applicant's contention is that the impugned ruling was an unfair determination which raises exceptional circumstances and invites the intervention of the Court of Appeal.

12. It contended that the ruling contained process failures which it identified as; the court's failure to address the issue raised by the applicant that the arbitral award violated the ***Public Procurement and Disposal Act and Public Procurement and Disposal Regulations of 2006.*** That the award did not determine the issue of unjust enrichment which was raised by the applicant and which was contrary to public policy.

13. It was further contended that the ruling failed to evaluate the three aspects raised in the applicant's application as to why the award was against public policy. That court determined an issue that was not raised before it when it considered the immorality or otherwise of the contract between the parties.

14. It was contended that under paragraphs 19, 21 and 22 of the said ruling, the court failed to appreciate that the arbitrator has discretion to rule on his/her jurisdiction either at a preliminary stage of the proceedings or in the final award. In the circumstances, the court should not have faulted the applicant for participating in the proceedings. Further, that the court failed under paragraph 17 and 18 of the ruling to respect the fact that the jurisdiction of an arbitrator was limited to specific matters.

15. The respondent strenuously opposed the application. It submitted that the court clearly identified the primary clause that conferred jurisdiction upon the arbitrator and gave due consideration to the applicant's contention that some disputes were not subject to arbitration. The Court however concluded that the dispute was capable of being resolved through arbitration. That the applicant's pleadings on public policy were properly evaluated in paragraphs 24 to 29 of the ruling.

16. This Court cannot attempt to evaluate, review or question the impugned ruling. All that it can do is to weigh the allegation made by the applicant and determine whether it has brought itself within the strict strictures of the **Nyutu Case.** It is not for this Court to find or investigate whether the impugned ruling was right or wrong.

17. The grounds for leave are that the issue of jurisdiction was wrongly determined, that the Court failed to consider the issues of public policy and that it made a determination on an issue not before it or the tribunal.

18. A look at the impugned ruling will show that, the issue of jurisdiction was properly dealt with by the Court. The Court not only cited and considered the arbitral agreement in the contract, but found as a fact that by raising a counter-claim within the proceedings, the applicant could not turn around and raise a challenge on jurisdiction.

19. As regards issues of public policy, those were effectively dealt with in the ruling. Further, there was no determination of issues not before Court or the tribunal. The portion of the ruling referred to by the applicant was in respect of the applicant's allegation that the award was

against public policy. The Court was quoting past decisions on what public policy is about.

20. In the circumstances, I find that the applicant did not demonstrate that there had been procedural failures by this Court to warrant an appeal to the Court of Appeal. The applicant did not bring itself within the parameters set out in the **Nyutu Case.**

21. In the circumstances, I find the application dated 10/6/2020 to be without merit and dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021

A. MABEYA, FCIArb

JUDGE