



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**MISC. CIVIL APPLICATION NO. 129 OF 2014**

**IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995**

**AND**

**IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE AN ARBITRATION AWARD**

**BETWEEN**

**1. KENYA TEA DEVELOPMENT AGENCY LTD**

**2. KAPKOROS TEA FACTORY LTD**

**3. NYANKOBA TEA FACTORY LTD**

**4. RUKURIRI TEA FACTORY LTD**

**5. GIANCHORE TEA FACTORY LTD**

**6. MOGOGOSIEK TEA FACTORY LTD**

**7. WERU TEA FACTORY LTD**

**8. KAPSET TEA FACTORY**

**LTD.....APPLICANTS/RESPONDENTS**

**-VERSUS-**

**SAVINGS TEA BROKERS LTD .....APPLICANT**

**RULING**

**Leave to appeal in Arbitration disputes**

[1] The Applicant filed a Chamber Summons application dated 24<sup>th</sup> March 2015 under rule 11 of Arbitration Rules, Article 40 of the Constitution and all enabling provisions of laws for leave to appeal against the ruling of this court dated 16<sup>th</sup> March 2015 to the Court of Appeal. The best arguments for applying as contained in the application could be summarized as follows and include:-

- a) That the Applicants contended that the ruling infringed their right to protection of property contrary to Article 40 of the Constitution.
- b) That the unfettered right of appeal in so far as it is controlled and limited by section 35 of the Arbitration Act contravenes Article 2 and 164 of the Constitution.
- c) That the court relied on the decision of *Addis vs. Gramophone* which was overruled by the House of Lord in *Malik vs. Bank of Credit & Commerce (1997) 3 All ER 1*, and that the applicable law is that damage of reputation caused by Breach of contract can be remedied by an award in damages.
- d) That the presumption that parties submitted themselves to arbitration does not mean that they submitted themselves unequivocally to honour an award that can be shown to have been made in manifest error of law. The court acted on manifest error off law.
- e) That as a matter of public policy, matters of general legal import require that parties in arbitration should appeal to the court of appeal in order; 1) to ensure the law is maintained in consonance with the complexities of modern commerce; 2) for the sake of precedent and consistence in application of arbitration law; and 3) to uphold the integrity of arbitral process. The input of the Court of Appeal will add significantly to clarity and certainty of law in this area of tort and contract.
- f) That the intended appeal is on jurisdiction and power of the High Court in setting aside arbitral award which is a fundamental legal issue.
- f) That for such important matter, delay or apprehension of the appeal being a long one should not be used to prevent correction of an error of law.

### **Respondent's Submissions**

[2] The Applicant filed submissions in further elaboration of the above grounds. They submitted that in spite of the submission by the Respondent that no appeal lies in law from a decision of the High Court under Section 35 of the Arbitration Act 1995 following the recent Court of Appeal decision of **Nyutu Agrovot Ltd v. Airtel Network Ltd. (2015) eKLR**, it must be considered that parties to this arbitration contracted to arbitrate according to law. Secondly, public interest is a predominant objective and standard throughout the Arbitration Act 1995. In particular, the process should not offend public interest. The Respondent contends that a legal issue of general public importance has been raised by the decision of the High Court dated 16<sup>th</sup> March, 2015. It requires determination in the Court of Appeal. Thirdly, the constitutional rights of the Respondent under Article 40 have been infringed upon in that its property has been destroyed without it getting prompt and adequate compensation. The scheme and architecture of the Constitution 2010 is to give unimpeded access to justice to all Kenyans. The Arbitration Act is an ordinary statute. To the extent that Section 35 thereof curbs the constitutional right of appeal, such limitation would be contrary to the Supreme law, null and void to the extent of such inconsistency: see Articles 40, 48, 164(3), and 259, Constitution.

[3] In this case, Article 164 conferring the appellate right would be meaningless if it has to be narrowly, and technically construed to deny appeals against Arbitration Act S.35(2) decisions. To have a jurisdiction while curtailing rights (of appeal) certainly is not in consonance with the Constitution's own requirement that it be construed liberally in the promotion of its provisions. Besides, a rigid denial of a right of appeal on a matter of general public importance amounts to judicial lynching of a particular class – namely, disputants in arbitral proceedings. That would be discriminatory and offends the Constitution's Bill of Rights and Fundamental Freedoms. Any limitation of rights, particularly Fundamental Freedoms is subject only to such reasonable limits as are prescribed by law demonstrably justifiable in a free and democratic society. On an

equivalent provision, the Canadian Supreme Court, in *R. vs Oakes* (1986) ISCR 10 laid out a two-fold test to access if limitation of a right was reasonable:-

- 1) It must be established that the impugned law has an important objective;
- 2) It should also be shown that the means for achieving this objective –
  - a) Whether the means used to limit a right are rationally related to the intended objective
  - b) The Court assesses whether the limitation impairs as little as possible the right or freedom,
  - c) The limitation must not have a disproportionately severe effect on persons to whom it applies

In the case of *Nyutu*, supra, justification of the refusal of the right to appeal is based on grounds of party autonomy and finality. That is on the assumption that the process (of arbitration) has been conducted according to law. When conducted according to law, it is taken that the findings of fact by the Arbitrator cannot be disturbed by the Court. In our humble submission, where the Court USURPS the powers of the Arbitrator and disturbs facts found by the Arbitrator with the result that it upsets his AWARD, then such conduct by the Court is without jurisdiction. Consequently, an appeal based on such a manifest error of law, from the High Court, would be in the public interest. This has arisen in this case.

#### **Stare Decisis.**

[4] Under the doctrine of precedent, over-ruled decisions are not held to be good law. Ordinarily, an over-ruled decision remains, largely, bad law. Hence, even in arbitration, over-ruled decisions cannot be relied upon to be applied to over-turn an otherwise lawful decision. Hence, when the High Court applied an over-ruled decision (that has been held to be wrong), such a decision contradicts the integrity of the law. In that event, the Court does not apply STARE DECISIS and in this case it resulted in over-turning an arbitrator's proper findings of fact in his application of S.20 (3), Arbitration Act. This is an important legal issue of great public interest. (Matters of public interest/policy have been defined by Ringera J- as he then was in *Christ for All Nations Church vs. Apollo Insurance Co. Ltd.*)

[5] The Applicant also contended that the argument that an appeal from the High Court would go against finality of litigation is untenable because the United Kingdom 1979 Arbitration Act (fairly similar to our 1995 Act) allows such appeals on questions of law on issues of great public importance/interest. This has not stopped London being a renowned international commercial arbitration Centre. An appeal on a legal issue of general public importance cannot curtail efficient, timely conclusion of arbitrations. The Supreme Court in ***Hermanns Phillipns Steyn vs. Giovanni Grecchi-Ruscione (2013) eKLR*** set out the test for determining whether a matter is of general public importance thus:

1. The intending applicant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
2. If the matter raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
3. If the matter has been occasioned by a state of uncertainty in the law arising from contradictory precedents, the court would be required to determine/resolve the uncertainty;

4. The question of law must have arisen in the Courts below, and must have been the subject of judicial decision;
5. The intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which s/he attributes to the matter for which certification is sought.

Also in **Law Society of Kenya vs. Centre for Human Rights & Democracy & 13 others, (2014) e KLR**, it was held by the Supreme Court (overturning the High Court and the Court of Appeal) that pursuant to Article 259 of the Constitution, it was required that the Constitution would be interpreted in a manner that promotes its purposes, values and principles and advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights. According to the Applicant, its goodwill (property), as defined in **IRC Vs. Muller & Co, Margarine Ltd (1900-3) ALL E.R 413** was more than reputation; it was property – “personalty”; It was found by the arbitrator as a fact that this goodwill was destroyed by breach of contract. The Arbitrator found that such breach of contract was not excluded in the contracts. He held the applicants liable. In the result, and pursuant to Malik vs Bank of Credit & Commerce International, Supra, loss of reputation caused by breach of contract was recoverable. On the other hand, the court held that such breach of contract was a tort (and applied the over-ruled decision in *Addis vs Gramophone Co. Ltd*). Therefore, their view is that the High Court did not have jurisdiction to dwell on an issue of fact. See Section 20(3) of the Arbitration Act. The Court did not have jurisdiction to choose the effective remedy for the concurrent breach in contract and tort;S 3(1), Arbitration Act.

[6] The Applicant contended that we do not need to go back to yesteryear when the High Court would not protect and enforce rights’ against encroachment on fundamental rights: see Ghai YP & Mc Auslan JP, **Public Law and Political Change in Kenya**. In **George Mike Wanjohi vs Stephen Kariuki, Application No. 16 of 2014** (Wanjohi Case), the main issue before the Supreme Court was whether the Court of Appeal exceeded its jurisdiction by delving into matters of fact, contrary to the provisions of Section 85 of the Elections Act, 2011. On this, the Supreme Court held that fact based enquiries were outside the scope of the Court of Appeal owing to the need for timely settlement of election disputes under Article 87(1) of the Constitution. See also **Peter G. Munya vs IEBC & Others**, the Supreme Court outlined what the phrase “Matters of Law” only meant with reference to Section 85A of the Elections Act, 2011. It held that Section 85A of the Elections Act was a product of constitutional Scheme requiring electoral disputes to be settled in a timely fashion. It was directed at litigants who were dissatisfied with the judgment of the High Court in an election petition and was meant to limit appeals to the Court of Appeal to matters of law only. The Supreme Court held that the phrase “Matters of law” characterized 3 elements:-

- a) The technical element – which involved the interpretation of a constitutional provision;
- b) The practical element – which involved the application of the Constitution and the law to a set of facts or evidence on record; and
- c) The evidentiary element – which involved the evaluation of the conclusions of a trial court on the basis of the evidence on record.

The court vested itself with a jurisdiction it did not have. The honourable Judge’s find that loss of goodwill was a tortious breach runs contrary to the scheme of the Arbitration Act 1995 under which the Arbitrator is the master of the facts. The integrity of the legal process requires application of the law fairly to all, irrespective of the commencement of the process. Article 21 obliges the State and all institutions to observe, respect, protect, promote and fulfill fundamental rights and freedoms in the Bill of Rights. In **Ruturi & Another vs Minister of Finance & Another, (2002) KLR 61** the Court held that procedural trappings and restrictions could not bar the jurisdiction of the Court, or let justice bleed on the altar of technicalities.

[7] In their further submissions, the Applicant augmented the above submissions and specifically submitted that the jurisdiction of the High Court to set aside an Arbitral award is provided for in Section 35 of the Arbitration Act No. 6 of 1996 and the scope of setting aside such an award is limited to 5 grounds (mainly):-

- i) Did the award go beyond the arbitrator's authority and jurisdiction?
- ii) One of the parties was subject to disability
- iii) The Agreement to go to arbitration is not valid
- iv) The parties had no reasonable notice of the arbitral proceeding dates
- v) Composition of the tribunal was not proper

The High Court held that the claimant (now the applicant) had not pleaded and proved loss of goodwill. The learned Judge erred. The Learned Judge did not consider the fact that in a Section 35(2) application there is no possibility of reviewing the arbitrator's finding of facts more so if the finding is based on agreed issue and evidence tendered in support of the issue (in this case loss of goodwill). The learned Judge did not have before him the proceedings as recorded by the arbitrator and this caused the Judge to conclude that there was no evidence of loss of goodwill or that it was strongly argued before the arbitrator who made unassailable findings of loss of goodwill. The Judge said at page 27 of his Ruling:-

**“I come to the conclusion that goodwill was never contemplated by clause of the contracts as one of the disputes which were to be referred to arbitration. The arbitral agreement used restricted terms and permitted reference to arbitration of any dispute between the parties as to the construction of this agreement or the rights and obligations of the parties..... I must state that more claims for goodwill does not confer jurisdiction on the arbitrator to award goodwill or authority by the arbitration agreement itself”**

This is where the learned Judge went beyond his jurisdiction as the issue of loss of goodwill was an agreed and live issue before the arbitrator. At this stage it has to be borne in mind that the present applicant had specifically pleaded in its claim that:-

**“the respondents' actions amounted to breach of contract in addition to conspiracy to injure it by unlawful means as set out above”**

See page 73 of the application dated 17<sup>th</sup> March, 2014 lodged on 26<sup>th</sup> March 2014. The claim in amended statement of claim by the applicant at paragraph 25 (page 130 of the application reads:

**“25 – The Respondents' actions amounted to breach of contract in addition to conspiracy to injure the claimant by unlawful means as set out above. Subject to discovery, the claimant asserts that it has suffered loss and damages including loss of goodwill and the consequential loss of profits”**

See the case of **Ndegwa Wachira v R. Carinda Ndanjiru (1986-89) EA 577** it was (inter alia) held that:-

**“...a point of jurisdiction can be taken at any stage even on appeal as an order made without jurisdiction is a nullity”**

[8] Setting aside application did not give jurisdiction to the Judge to investigate the evidence in order to make a contrary finding of tort. When the application to set aside the award was based on issues of law the learned Judge travelled outside making findings of fact – that the loss of

goodwill was not caused by breach of contract. This was an obvious miscarriage of justice. As regards whether or not a claim for damages for breach of contract can include a claim for damages for tort perpetrated by the respondents the learned Judge erred in assuming jurisdiction to say that tortious claims of damages are not to be considered whilst a breach of contract is in issue. In his book **“An introduction to the Law of Contract”** 5<sup>th</sup> edition P.S. Atiyah who was formerly a professor of English Law in the University of Oxford opines as follows:-

**“98 – As regards the claim for loss of goodwill, the claimant’s case is that by reason of the Respondents’ actions its business and goodwill was destroyed. It claims loss of goodwill on the basis of the lost net profits for five (5) years. As I understand the Respondents’ they did not dispute the legitimacy of the claim for loss of goodwill. What they contested was the figure computed by the claimant”**

[9] The Applicants submitted further that, it has to be borne in mind that in the case of **Kenya Shell Ltd v Kobil Petroleum Ltd (2006) 2 EA 132** Omolo and O’Kubasu JJA (with a dissent from Onyango-Otieno JA) granted special leave to appeal to Kenya Shell Ltd upon the basis that the Court of Appeal should hear the application to set aside an award on merits. It is unfortunate that the drafters of the Arbitration Act 1996 (Section 39(3)(a) and (b) placed the word ‘AND’ so as to make conjunctive the provision in Section 39(3)(a)&(b). This sub-section as worded suggests that an appeal to the Court of Appeal can lie IF (1) the parties have agreed to appeal and (2) if the High Court grants leave to appeal, or failing leave by the High Court, the Court of Appeal grants special leave to appeal. The use of the word AND (above) in our respectful submission goes against the principles of justice. The intending appellant is at the mercy of the other party to consent to appealing. Section 39(3)(a) as read with 39(3)(b) is unconstitutional as it curtails the right of an intending appellant to so appeal. The decision of the Learned Judge (with respect) is such that it needs the input of the Court of Appeal. The Learned Judge relied heavily on the case of **Addis v Gramophone Co. (1908-1910) ALL E R 1** in which case Lord Atkinson said:-

**“In many other cases of breach of contract there may be circumstances of malice, fraud, defamation or violence which could sustain an action of tort as an alternative remedy for breach of contract. If one should select the former mode of redress he may, no doubt recover exemplary damages or what are sometimes called “vindictive” damages; but if he chooses to see redress in the form of action for breach of contract, he lets in all consequences of that form of action”.**

The Applicant continued to argue that the Judge having almost wholly followed what Lord Atkinson said seriously misdirected himself (erred) in not considering that the legal world has, since 1910, moved further. The Learned Judge erred by not considering at all, the decision of the House of Lords in the case of **MALIK v Bank of Credit & Commerce International (1997) 3 ALL ER 1**. The House overruled the ratio decidendi (so far as applicable) of the Addis case holding that the loss of reputation caused by breach of contract was recoverable. The Court of Appeal will have to consider the case of Malik. As pointed out by Atiyah claims for such losses as are foreseeable whether in contract or tort are claimable. The Judge did not consider the case of **Kihuni v Gakunga (1986) KLR 572** where it was held that where the parties had agreed on issues to be canvassed before the Arbitrator the arbitrator was bound to consider the same. In this case, as I have pointed out, the issue of “loss of goodwill” was canvassed at length before the Arbitrator, as regards quantum. It appears that the learned Judge did not appreciate the words of Asquith JA in the **Victoria Laundry (Windsor) Ltd v Newman Industries (1949) 1 ALL ER 1997**. It is also obvious that the Judge did not consider properly Section 3(1) of the Arbitration Act which empowers an arbitrator to consider all disputes whether contractual or not. It also appears that the learned Judge did not consider what that eminent jurist Goff L J said in the case of Henderson v Merret Syndicates Ltd (1994) ALL E R 506. He said:-

**“The common law is not antipathic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or contractual remedy”.**

The Judge erred in coming to the conclusion that the Arbitrator exceeded his jurisdiction WHEN the issue of ‘loss of goodwill’ was one of the agreed issues. Having agreed to such an issue and having fully participated in challenging the quantum of “loss of earnings” the respondent was estopped from coming to court raising the issue of jurisdiction. The learned Judge did not direct his mind to the fact that the issue of ‘loss of goodwill’ was very much part of agreed issues as pointed out

### **Respondents’ Submissions**

[10] The Respondents filed submissions and Grounds of Opposition dated 27.3.15. they relied on the 5-Judge Bench decision of the **Court of Appeal in Nyutu Agrovet Limited v Airtel Networks Limited [2015]** in its entirety. According to them, the all-important issue for determination in this application is whether in the absence of an express provision of a right of appeal in an arbitration agreement a party to arbitral proceedings has a right of appeal to the Court of Appeal from a decision of the High Court given under Section 35 of the Arbitration Act, 1995, (hereinafter “the Act”) and in the face the recent 5-Judge Bench decision of the **Court of Appeal in Nyutu Agrovet Limited v Airtel Networks Limited [2015]**. According to the said case, no appeal lies in law from a decision of the High Court under Section 35 of the Arbitration Act 1995. Despite the decision, they have applied for obtain leave of this Honourable Court to appeal to the Court of Appeal.

[11] Lady Justice Karanja J. A best captures the background and import of the Nyutu decision in Kenyan jurisprudence as follows:

**As per Lady Justice Karanja J.A,**

**“...This brings me to the notice of motion at hand. This notice of motion is not just about Nyutu Agrovet (Respondent) and Airtel Networks Kenya Ltd (Applicant). It is not a simple application arising from their contractual obligations per se. Rather; it raises an issue that transcends the contractual agreement creating the cause of action before the High Court and the appeal to this Court. It is not an everyday motion for striking out an appeal under Rule 84 of this Court’s Rules.**

**The fact that it has been heard by a bench of five Judges underscores its importance. Its outcome will impact on how arbitration as an important alternative mechanism of dispute settlement is conducted in this nation. It would impact on both national and international trade in this country and chart the way forward, and also settle the contentious issue of the right of appeal to this Court from an arbitral award.**

**I say so because arbitration, as a commercial dispute settlement mechanism, is gaining popularity by the day in this country. The reason for this will come out later on as I delve into the gist of the application. In order to put this matter in its proper perspective, it is necessary for me to retrace the origin and evolution of arbitration in this country up to its current state before I can address the poignant issue as to whether a right of appeal lies to this Court in respect of a decision of the High Court made pursuant to Section 35 of the Act..... (all emphasis mine)**

As per Musinga J. Ain the same vein:-

**“...Having summarized the arguments advanced by counsel in this appeal, it is evident that there has been no judicial concurrence as to whether the Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court given under section 35 of the Act. There has been divergent views on the issue and it was deemed necessary that a five judge bench be constituted to consider whether this Court has jurisdiction to hear such appeals. The timeless words of Nyarangi, J.A. in OWNERS OF MOTOR VESSEL LILLIAN „S? v CALTEX OIL (KENYA) LTD**

**[1989] KLR 1, are apt:**

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.***

[12] The Judges of the Court of Appeal sets the stage for what is indeed a landmark decision anchored on both the Arbitration Act and the international standards espoused by the UNICITRAL model which we have adopted as a nation. The Respondent/Applicant submits that despite the principle of *stare decisis* that dictates that the **5-Judge Bench decision of the Court of Appeal in Nyutu Agroviet Limited v Airtel Networks Limited [2015] eKLR** is binding this Honourable Court, the Applicant feels this Honourable Court has jurisdiction to grant him leave to appeal to the Court of Appeal. To rebut this submission the Respondent revisited the circumstances of the Nyutu matter whose facts are tailor made for the present matter before the Court and possesses salient similarities as follows:-

- a.) The Nyutu matter involved an appeal from the decision of the High Court under Section 35 of the Arbitration Act.
- b.) The High Court decision by Justice Kimondo had set aside an award of the Arbitrator for having exceeded the scope of the reference.
- c.) Nyutu being aggrieved by the decision, orally applied for leave to appeal before Justice Kimondo which application was opposed on the basis that there is no right of appeal under Section 35 of the Arbitration Act.
- d.) In overruling Counsel for Airtel, the Learned Judge granted Nyutu leave to appeal by holding....

***“It is always good practice to allow such a party however good or poor his journey to the appellate Court may look, to ventilate his rights. It will be a matter for the appellate court to determine whether the journey was a false start.”***

Lady Justice Karanja J.A however had this to say about the leave granted by the High Court:-

**In my view however, the learned Judge should have been more decisive on this. A referee cannot see a false start at the starting blocks and still allow a party to race to the end only for the party to be told that he ought to have been disqualified the moment he stepped off the blocks!**

[13] The Respondents humbly urged this Honourable Court to nip in the bud and at this very stage, the false start that is the Applicants application for leave to appeal from a High Court decision under Section 35 of the Arbitration Act. The Applicant has raised several grounds that it feel warrants it to obtain leave to appeal to the Court of Appeal but suffice it to say; none of the grounds include a provision of law. It is now trite that the right to appeal is expressly granted by law and not by implication. And that a party must show which law donates the right of appeal intended to be exercised. While the Applicant concedes the existence of the 5 Judge Bench decision in Nyutu which held that Section 35 does not grant the right of appeal, the Applicant has still not demonstrated any other statutory provision that accords it such a right, or an exception to the rule that could afford it audience before the Court of Appeal. To buttress this submission, they relied on Lady Justice Karanja’s holding in the Nyutu case where the Judge of the Court of Appeal expresses herself thus:-

**.....I hold the view that no right of appeal is provided for in arbitral awards save for**

**matters pegged on Section 39 of the Act. I am convinced that a right of appeal is conferred by statute and cannot be inferred. On this point, I am in agreement with Omollo, JA in his decision in the Kenya Shell case (supra) where he stated;**

***“I agree with Onyango Otieno J.A that the right of appeal to this Court can only be conferred by statute and cannot be implied or inferred. That is now old hat.”***

**See also Attorney General-vs-Shah (No.4) (1971) E.A 50, and Nova Chemicals Ltd vs\_Alcon International Ltd, High Court Misc. Application No. 1124 of 2002 , and this Court’s recent decision in Kakuta Maimai Hamisi –vs- Peris Peris Tobiko & Others Civil Appeal No. 154 of 2013, where it was held;**

***“It is enough to say that the right of appeal must be statute or other law based and so viewed there is nothing doctrinally wrong or violative of the Constitution from such right to be circumscribed in ways that render certain decisions of courts below non appealable” .***

[14] According to the Respondents, the Applicant has raised the following issues as grounds why it should be granted leave to appeal from the decision of the High Court under Section 35 of the Arbitration Act among them, **general public importance**. The Applicant has attempted to anchor its application by contending that a legal issue of general public importance has been raised by the decision of the High Court of 16<sup>th</sup> March which requires determination in the Court of Appeal and that its constitutional rights under Article 40 of the Constitution have been infringed. It was the Respondents humble submission that the setting aside of an Arbitrator’s award for exceeding the scope of the reference is hardly a novel concept in Kenyan jurisprudence and authorities are replete on the issue. Indeed parties had no dearth of authorities to refer this Honourable Court to whilst arguing the application for setting aside the award. The Applicant’s grievance with the setting aside of the award of goodwill is hardly of general public importance is of the narrowest interests in the greater scheme of things bearing in mind that the Court of Appeal has already decreed that it has no jurisdiction to hear an appeal stemming from a High Court decision under Section 35 of the Act.

[15] On the issue of the alleged infringement of the applicants constitutional rights by the restriction to appeal, the Respondents urged that the Nyutu case also settled the issue by the express recognition of arbitration as an alternative dispute resolution mechanism by the Constitution of Kenya and the clear legislative intent on finality of arbitral awards as manifested in the provisions of the Arbitration Act, as well as the rationale behind the finality of arbitration awards. In the Respondents’ humble submission; there is nothing illegal or unconstitutional about the limitation of judicial intervention in matters that are subject to arbitration. The restriction is itself a corner stone of the arbitration process and cannot be argued to be an impediment to access of justice where arbitration is itself voluntary. When parties expressly exclude court intervention in their arbitration agreement, then they should honour it and embrace the consequences. They cannot turn round and claim that the very law they have freely chosen to govern their business is unconstitutional. That is what the Applicant is trying to do here.

[16] The Respondents posit that the contention by the Applicant that it has a right to appeal and that it only requires leave of this Honourable Court is debunked by Justice Mwera’s Ruling in the Nyutu Case where the Judge of the Court of Appeal holds:-

***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. The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this Court. To me, even if jurisdiction and the right of appeal may be referred to side by side or in the same breath, the two terms do not mean one and the same thing. It is***

not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law then that court has no business to entertain the matter (see *Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1*. 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. The right must precede leave.

And talking of this right to appeal with particular reference to proceedings under the Arbitration Act, *Ringera, J.* as he then was, in the *Nova Chemicals case* (above) considered whether an appeal lay to this Court from an order made by the High Court under *section 37(2)* of the Act to furnish security. The judge said:

*"And in the context of the Arbitration Act section 10 thereof it is explicit that except as provided in that Act, no Court shall intervene in matters governed by the Act."*

He continued:

*"The point of departure must be the recognition that the right of appeal, with or without leave, must be conferred by statute and the same is never to be implied."*

Similarly, I hold the view that *section 35* of the Act, the subject herein, falls in the same category. To appeal on a decision made thereunder by the High Court does not create of itself the right to appeal to this Court.

And what the *Prof. Lawrence Gumbe case* (above) says of political parties who had filed a matter before a committee for arbitration mandated to settle their disputes finally, is specific and clear as to what that means:

*"The Court is prevented by section 10 of the Act --- from interfering in the arbitral process in any other manner except as set out in the Act and by extension the rules made under the Act."* [Nyamu, J.]

The learned judge then remarked when leave was sought to appeal his decision to this Court:

*"I hold and rule that on the finding touching on Arbitration, there is no right of appeal to the Court of Appeal except in cases cited or circumstances cited in section 39 of the Arbitration Act."*

[17] The Respondent concluded by stating that the Nyutu case in its entirety is brilliant and with crystal clear reasoning, thus, the Applicant's application is without merit and should be dismissed with costs. The Notice of Appeal dated 27<sup>th</sup> March 2015 and filed on even date having been filed prematurely and without the leave now sought, is for striking out and we urge the Honourable Court to so find.

## **DETERMINATION**

[18] I will render myself with decisiveness on this application in line with the observation and wise counsel in the decision by Lady Justice Karanja J.A when she stated that:-

**In my view however, the learned Judge should have been more decisive on this. A referee cannot see a false start at the starting blocks and still allow a party to race to**

**the end only for the party to be told that he ought to have been disqualified the moment he stepped off the blocks!**

[19] I deliberately reproduced the submissions by the parties in extenso. The way the Applicant has presented its arguments is as if it was arguing the intended appeal herein. The approach adopted may place the court in a position where it will either be sitting on appeal over its decision or justifying the decision. Nonetheless, the court will say enough to determine the application. There are some inclinations in the Applicant's submissions which will need immediate correction. First of all, the Applicant cited selective parts of and abridged paragraph 30 of my decision and continued to draw own inferences therefrom. This is what they cited as my decision:-

**“I come to the conclusion that goodwill was never contemplated by clause of the contracts as one of the disputes which were to be referred to arbitration. The arbitral agreement used restricted terms and permitted reference to arbitration of any dispute between the parties as to the construction of this agreement or the rights and obligations of the parties..... I must state that more claims for goodwill does not confer jurisdiction on the arbitrator to award goodwill or authority by the arbitration agreement itself”**

I will reproduce the full text of the said paragraph below for clarity and as a base of my decision on this request for leave:-

[20] I have set out the arbitration clause herein. I have also set out the relevant part of the award granting damages on goodwill. I have carefully analyzed the two and applying the test of reasonably foreseeable consequences in the case of *Reckitt & Coleman Products VS Borden Inc. & Others* (1990) All ER 873, I come to the conclusion that goodwill was never contemplated by clause 9 of the contracts as one of the disputes which were to be referred to arbitration. The arbitral agreement used restricted terms and permitted reference to arbitration of *any dispute between the parties as to the construction of this Agreement or the rights and obligations of the parties hereunder including the question whether any breach or non-observance by any of the parties of any of the terms of this Agreement is such as would justify arbitration proceedings for rescission by the other party*. I must state that mere pleading for goodwill or the fact that parties submitted on the claim for goodwill does not confer jurisdiction on the arbitrator to award goodwill unless with the unequivocal consent of the parties or authority by the arbitration agreement itself. On this see the case of *Food Corporation of India Vs Surendra & Mahendra Transport Company* [2003] RD S.C. 54 (India 5 February 2003), that:-

*“...in order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen in whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction”*

With tremendous respect to the learned arbitrator, he granted the award for loss of goodwill completely outside the scope of the reference to arbitration and the arbitration agreement, and thereby, exceeded his scope of authority. Looking at the kind of submission the parties made, it became an issue also on whether a person with jurisdiction could be said to exceed his authority. It is Mr. Onyancha who posed the question. Mr. Oraro S.C. replied that the excess of authority was only in respect of the goodwill for it was never contemplated by the arbitration agreement. I agree with Mr. Oraro S.C. The arbitrator had jurisdiction and authority over the reference; that is, all matters within the scope or falling within the reference and the arbitration agreement. But, he had no jurisdiction or authority over matters not falling within the scope of the reference and arbitration clause. As soon as the

arbitrator steps outside the margins set by the arbitration clause, he had gone out of the boundaries of his realm, and he is said in law to have acted without jurisdiction on the matters falling outside the scope of the reference. Any award on the particular matters complained of, in so far as it is severable from the other items, is to be set aside. See the famous Indian case of *Associated Engineering Co. vs. Govt. of Andhra Pradesh and ANR* (1992) AIR 232, where the Supreme Court of India asserted the supremacy of an arbitration agreement as follows:

*"The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract, if he has travelled outside the bounds of the contract, he has acted without jurisdiction"*

And the words of Kimondo J in the case of *Airtel Networks Kenya Limited vs Nyutu Agrovet Limited* [2011]eKLR that:

*"In my considered opinion once the arbitrator embarked on assessment of general damages for the tort of negligence and set up a contract period to run to the year 2013 and to employ the arithmetic and multipliers above, he expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the margins of contract into the world of tort and damages for negligence. .... The Arbitration clause in the distributorship agreement had limited the dispute to those arising out of or relating to this agreement and breach thereof.....while it is true that in the course of breach of contract a tort may arise, I am prepared to hold that in this case it may well have been completely outside the contemplation of the parties. Having then meandered outside his boundaries, it is then safe to say that the Arbitrator exceeded his jurisdiction ...."*

Accordingly, the part of the award that relate to goodwill in the sum of Kshs. 106, 912,822/= can be separated from the other relief granted. And as the said award of goodwill in the sum of Kshs. 106, 912,822/= is the only part of the arbitral award which contains decisions on matters not referred to arbitration or not contemplated by the arbitral agreement, it is hereby set aside. The other items granted by the arbitrator are upheld as is. The final award herein is accordingly as ordered. It is so ordered. Each party shall bear own costs of the application in view of the decision of the court.

[21] The above was the ruling delivered by the court. It is clear that the above decision was based on section 35 of the Arbitration Act and the arbitration agreement that the ***arbitral award contains decisions on matters not referred to arbitration or not contemplated by the arbitral agreement.*** The test, *ratio decidendi* of the decision and the cases relied upon are prominently affixed in the said paragraph 30. Therefore, contrary to the submissions by the Applicant this court did not rely or base its decision on the decision in the case of ***Addis v. Gramophone Co. (1908-1910) AllER 1.*** The court simply observed the opinion by Lord Atkinson. There is no crisis on precedent as claimed. In any event at paragraph 28 of the decision the court was acutely clear that goodwill as a tort may arise in the course of breach of contract and is awardable but in exceptional circumstances. The court did not state anywhere in the ruling that goodwill is not awardable in arbitration or that an arbitrator cannot award goodwill or other tortious wrongs as was claimed by the Applicant.

[22] Again, the Applicant urged that the court decided on facts- which are a preserve for the arbitrator. The court clearly held that it cannot dwell on fact as the arbitrator is the master of facts. Goodwill is a matter of fact and law. The court did not delve into factual situation of the matter or evidence in support or otherwise of claim for goodwill. The decision above was based on the law, i.e. section 35 of the arbitration Act. Matters of section 35 especially; whether the ***arbitral award contains decisions on matters not referred to arbitration or not contemplated by the arbitral***

**agreement** are not novel or nascent matters which would require the input of the Court of Appeal as a matter of public policy. With tremendous respect to counsel for the Applicants, the submissions herein are imbued with embellishments which are captivating and may lure a person into thinking that a matter of public importance has arisen. Consider this submission by the Applicant in view of the above decision of the court:-

**When the application to set aside the award was based on issues of law the learned Judge travelled outside making findings of fact – that the loss of goodwill was not caused by breach of contract. This was an obvious miscarriage of justice.**

But, courts of law are experienced at unraveling such “rugged-edge” cases; that is why it is a court of law.

[23] More was submitted that section 35 of the Arbitration Act is inconsistent with the Constitution in so far as it limits the right of appeal. Every section of the law enjoys rebuttable presumption that it is constitutional and whoever alleges it is unconstitutional bears the onus of proving the unconstitutionality thereof. The Court of Appeal in the Nyutu case settled these arguments when it pronounced itself that there is nothing unconstitutional with provisions of law which make some matters non-appealable. I reproduce the decision by Lady Justice Karanja in the Nyutu case where the Judge of the Court of Appeal expressed herself thus:-

**.....I hold the view that no right of appeal is provided for in arbitral awards save for matters pegged on Section 39 of the Act. I am convinced that a right of appeal is conferred by statute and cannot be inferred. On this point, I am in agreement with Omollo, JA in his decision in the Kenya Shell case (supra) where he stated;**

***“I agree with Onyango Otieno J.A that the right of appeal to this Court can only be conferred by statute and cannot be implied or inferred. That is now old hat.”***

**See also Attorney General-vs-Shah (No.4) (1971) E.A 50, and Nova Chemicals Ltd vs Alcon International Ltd, High Court Misc. Application No. 1124 of 2002 , and this Court’s recent decision in Kakuta Maimai Hamisi –vs- Peris Peris Tobiko & Others Civil Appeal No. 154 of 2013, where it was held;**

***“It is enough to say that the right of appeal must be statute or other law based and so viewed there is nothing doctrinally wrong or violative of the Constitution from such right to be circumscribed in ways that render certain decisions of courts below non appealable” .***

Section 35 is tailored within the arbitration and model UNICITRAL law which Kenya has adopted. The section is not unconstitutional. Appeal channels are provided under section 39 of the Arbitration Act which parties to arbitration should utilize rather than attack section 35 of the Arbitration Act. This submission by the Respondent makes perfect rationale for section 35 of the Arbitration Act thus:-

**The restriction is itself a corner stone of the arbitration process and cannot be argued to be an impediment to access of justice where arbitration is itself voluntary. When parties expressly exclude court intervention in their arbitration agreement, then they should honour it and embrace the consequences. They cannot turn round and claim that the very law they have freely chosen to govern their business is unconstitutional.**

Thus, claims of infringement of right to property contrary to Article 40 of the Constitution do not sway hold as the Nyutu case expressly re-stated the recognition of arbitration as an alternative dispute resolution mechanism by the Constitution of Kenya in article 159 and section 35 of the arbitration Act is merely permitted provision and clear legislative intent on finality of arbitral awards. The legislative objective is clear and is acceptable within civilized society on matters of arbitration. It does not create a restriction that is unreasonable or excessive of the principle of

proportionality or Article 24 of the Constitution. In totality, I find that this case is not one which falls under section 39 of the Arbitration Act. This application is a false start. Leave is not merited. I decline to grant leave. The upshot is that the application is dismissed with costs. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 13<sup>th</sup> day of July 2015.**

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**F. GIKONYO**

**JUDGE**