County Government of Kisumu v Coretec Systems & Solutions Ltd (Commercial Arbitration Cause E001 of 2023) [2025] KEHC 15091 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15091 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

COMMERCIAL ARBITRATION CAUSE E001 OF 2023

JM OMIDO, J

OCTOBER 9, 2025

BETWEEN

COUNTY GOVERNMENT OF KISUMU ..... APPLICANT

AND

CORETEC SYSTEMS & SOLUTIONS LTD ..... RESPONDENT

RULING

1. The matter before the Court is an oral application by the Respondent seeking leave to appeal the ruling of this court delivered on 25th September, 2025.

2. The Respondent urges that in the impugned ruling, this court proceeded to grant orders that were not sought in the notice of motion on which the ruling was predicated, and therefore went outside the scope of the application, effectively exceeding its jurisdiction in issuing the orders that were ultimately made on the application.

3. It is the Respondent's position that the ruling of this court and the orders that ensued therefrom were not just unprocedural but also occasioned immense injustice to the Respondent. That that being the case, the Respondent now seeks the leave of this court to prefer an appeal from the said ruling and orders.

4. The Respondent relied on the following authorities:

    a. Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR.

    b. Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch [2019] KESC 11 (KLR).

    c. Anne Mumbi Hinga v Victoria Njoki Gathara [2009] KECA 466 (KLR).

5. On its part, while opposing the application for leave to appeal, the Applicant proffers the position that the intended appeal is premature as the Respondent retains the avenue of proceeding with the applications for setting aside and enforcement of the arbitral award.

6. It is further urged by the Applicant that the issues raised in respect of the impugned ruling as warranting the attention of the appellate court, (including the application of Article 165(3)(a) of *the Constitution*) are not pure points of law and that the application for leave should therefore fail.

7. The Applicant placed reliance on the following authorities:

   a. Geo Chem Middle East v Kenya Bureau of Standards [2020] KESC 1 (KLR).

   b. Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch [2019] KESC 11 (KLR).

   c. Kenya Shell Limited v Kobil Petroleum Limited [2006] KECA 389 (KLR).

8. A question that calls for an answer is whether this court has jurisdiction to grant leave to appeal against its own decision made in the exercise of its jurisdiction under the present arbitration proceedings.

9. The answer to this question is in my view to be found in the authority of the Court of Appeal decision of Synergy Industrial Credit Ltd v Cape Holdings Ltd [2020] eKLR, in which the court emphatically held that an intended Appellant had the onerous duty to demonstrate that in arriving at its decision, the High Court erred and that the resulting shortcomings amounted to grounds that are appealable before the Court of Appeal.

10. Similarly, in the case of Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd & Another [2019] eKLR, the Supreme Court held that an appeal can lie to the Court of Appeal from a High Court decision only where it is clear that the High Court has misinterpreted or misapplied the law and/or that the matter in question raises a point of law of general public importance. The court rendered itself as follows:

> "72. 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."

11. The court went on to observe as follows:

> "77. 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."

12. The court proceeded to state as follows in paragraph 81:

> " 81. We have answered the question whether there is a right of appeal from the High Court to the Court of Appeal under section 35 of the *Arbitration Act* but have delimited the circumstances under which the right can be exercised. We have also determined that the Court of Appeal ought to determine in limine, whether the threshold for admitting Nyutu's appeal has been met and if the appeal before it ought to be heard at all."–

13. The Supreme Court in Nyutu thus held that an appeal can only lie from the decision of the High Court to the Court of Appeal, in arbitration proceedings, where the High Court has made a decision that is so grave and wrong that as a result, there has been injustice to the parties and that the Court of Appeal should only assume jurisdiction in the clearest of cases.

14. Noting that this court cannot assess itself as to whether the decision it made was so grave and manifestly wrong as to cause injustice to the parties, so as to grant leave to appeal, my view is that the grant of leave falls within the jurisdiction of the Court of Appeal.

15. In "Arbitration Reform – A Perspective from Kenya, a commentary" by Clyde & Co., the authors have addressed the issue as to which court grants leave in arbitration proceedings as follows:

> " In a recent decision in SBM Bank (Kenya) Limited v Afrasia Bank Limited [2025] KECA 386 (KLR), the Court of Appeal held that there is no automatic right of appeal from a High Court decision under Section 39 of the Act unless parties expressly reserved this right in the arbitration agreement. In the absence of such express reservation, an appellant must first seek leave of the Court of Appeal to lodge their appeal on grounds that it raises points of law of general importance. This clarification by the Court of Appeal gives parties to an arbitration the opportunity to mutually agree whether or not they would require further recourse to the High Court or Court of Appeal after delivery of the arbitral award."

16 It is then my view that the court that is clothed with jurisdiction to grant leave to appeal is the Court of Appeal and not this court, the reason being that this court, having made a decision, cannot be the same court to be called upon to determine whether or not there are grounds warranting an appeal from its own decision. It is therefore my persuasion that this Court lacks jurisdiction to grant leave to appeal a decision rendered by itself under the *Arbitration Act*.

17. Consequently, the Respondent's request for leave to appeal is hereby declined. The Respondent is at liberty to seek the requisite leave from the Court of Appeal. This file to be mentioned on 23rd October, 2025 for further orders.

DELIVERED, DATED & SIGNED THIS 9TH DAY OF OCTOBER, 2025.

JOE M. OMIDO

JUDGE

This ruling has been published on the CTS and sent to the following parties' email addresses: