

**IN THE COURT OF  
APPEAL AT  
NAIROBI**

**(CORAM: GATEMBU, OCHIENG & MUCHELULE, JJ.A.)**

**CIVIL APPEAL NO. 9 OF 2012**

**BETWEEN**

**NATIONAL CEREALS AND PRODUCE BOARD.....APPELLANT**

**AND**

**ERAD SUPPLIES AND  
GENERAL CONTRACTORS LIMITED.....RESPONDENT**

**AND**

**ETHIC & ANTI-CORRUPTION  
COMMISSION.....INTERESTED  
PARTY**

*(Being an appeal from the Ruling and Order of the High Court of  
Kenya at Nairobi (L. Njagi, J.) dated 28<sup>th</sup> June 2011*

*in*

***HC. Misc. Application No. 638 of 2009)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. Before us is an appeal revolving around a dispute between the National Cereals and Produce Board, the appellant, and Erad Supplies and General Contractors Limited, the respondent, with the Ethics & Anti-Corruption Commission, as the interested party, also participating.

2. This appeal emanates from the ruling and order of the High Court (L. Njagi, J.) delivered on 28<sup>th</sup> June 2011, which dismissed the appellant's Chamber Summons application dated 2<sup>nd</sup> October 2009. That application sought to set aside an Arbitral Award dated 7<sup>th</sup> July 2009, made in favour of the respondent. The Arbitral Award was subsequently adopted as a judgment of the High Court on 17<sup>th</sup> February 2012. The appellant now seeks to have this Court reverse the High Court's decision and set aside the said arbitral award.
3. The genesis of this dispute lies in a contract dated 26<sup>th</sup> August 2004, where the respondent was contracted to supply 40,000 metric tons of maize to the appellant to alleviate an acute shortage in Kenya. The respondent asserts that it was unable to supply the maize because the appellant failed to open a Letter of Credit (LC) in its favour, contrary to the contract terms and trade usages. The respondent submitted that the appellant did open LCs for other successful bidders, implying a discriminatory breach. This failure, the respondent argues, constituted a breach of contract.
4. Pursuant to an arbitration clause in the contract, an arbitrator was appointed, and both parties confirmed the arbitrator's jurisdiction on 16<sup>th</sup> and 31<sup>st</sup> October 2007, respectively. On 7<sup>th</sup> July 2009, the Arbitrator published a Final Award, finding that the appellant had breached the contract by failing to open the LC and awarded damages to the respondent.

5. Aggrieved by this award, the appellant applied to the High Court under **Section 35** of the Arbitration Act to set it aside, arguing that the award was contrary to public policy, was induced by fraud, and was beyond the scope of the arbitrator's jurisdiction. This application was dismissed by the High Court on 28<sup>th</sup> June 2011. The respondent then successfully moved the High Court to adopt the arbitral award as a judgment and commenced execution, having already collected Kshs. 300 million out of the Kshs. 560 million awarded, which has since accrued to over Kshs. 1 billion.
6. Separately, the interested party instituted criminal proceedings against the respondent's directors arising from the same transaction. It is this evidence that was produced in the criminal proceedings that the EACC adduced as additional evidence in this civil appeal on 5<sup>th</sup> November 2014, which was admitted by this Court on 16<sup>th</sup> December 2022. The respondent, however, informs the Court that the criminal proceedings culminated in the Court of Appeal's judgment dated 11<sup>th</sup> October 2024 in Criminal Appeal E039 of 2022, which absolved the respondent of any criminal culpability by setting aside the convictions.
7. Key arguments revolve around the Court of Appeal's jurisdiction to hear the case, the validity of the arbitral award under public policy, and the admissibility and weight of the additional evidence presented by the interested party, which

includes claims of forgery and corruption previously  
addressed in related

criminal proceedings that resulted in the respondent's acquittal.

8. The application to set aside the award was brought under **Section 35 (2) (a) (iv)** and **2 (b) (ii)** of the Arbitration Act 1995 and **Rules 4(2) and 7** of the Arbitration Rules, 1995. The appellant also prayed for further orders and that the costs of the arbitration and the application be borne by the respondent.
9. The appellant's case was that the award was against public policy; exceeded the arbitrator's jurisdiction; and involved elements of fraud and impropriety. The appellant submitted that the arbitration dealt with a dispute not contemplated by the parties, specifically awarding USD 1,146,000 for alleged storage charges to a company called Chelsea Freight, which was not a party to the contract between the appellant and the respondent, and had no privity of contract with either. The appellant argued that Chelsea Freight was registered for 'air transport' and engaged in financial intermediation, insurance, real estate, and business services, but it was not involved in maize supply.
10. The appellant pointed out that the award was characterized as "smacking of mischief, corruption, and pure theft of public funds". This was so because the respondent allegedly had no maize to deliver. A purported contract with Ropack cc. International showed no delivery within the contractual terms.

Research revealed that Ropack International and Chelsea Freight were engaged in businesses other than supplying maize.

11. The appellant submitted that the respondent imported maize at USD 221 per metric ton and sold it to the appellant at USD 229 per metric ton, meaning a potential earning of USD 8 per metric ton. However, the Arbitrator awarded the respondent USD 49 per metric ton of maize, which it deemed to be pure fraud.
12. The appellant further submitted that the award obliged the Kenyan taxpayer to pay a whopping USD 3,106,000 (approximately Kshs. 260,904,000) to an obscure company with no business or financial standing, especially when the respondent had no maize.
13. The appellant was of the view that the award suggested that the appellant was to issue a letter of credit to the respondent to acquire maize without the respondent's financial input, thereby allowing the respondent to earn a huge profit at the expense of the Kenyan taxpayer, making the award unenforceable and against public policy.
14. The appellant submitted that public policy requires fairness in adjudication, but the Arbitrator was allegedly biased and did not consider the appellant's case. The appellant was of the view that the award was bizarre and a clear aberration of well-known principles of law, thereby necessitating the court's

intervention due to the circumvention of public policy.

15. The appellant alleged that the Arbitrator admitted to being approached by the respondent's directors and agents to rule in their favour. Furthermore, the respondent's witness, Grace Sarapay Wakhungu, allegedly approached the appellant's witness, William Kipyegon Korir, to give evidence in the respondent's favour, which the appellant claims spelt mischief and constitutes a serious offence. The appellant submitted that the Arbitrator himself raised concerns about being directly approached by Captain Waluke and another individual, expressing displeasure, but was advised by Mr. Saende not to intervene.
16. The appellant further submitted that the Arbitrator exceeded his jurisdiction by awarding interest on costs at 12% per annum, which is the exclusive preserve of a taxing officer.
17. The court's primary task was to determine if the arbitral award should be set aside based on the grounds provided in **Section 35(2)(a)(iv)** and **2(b)(ii)** of the Arbitration Act, which allows an award to be set aside if it deals with a dispute not contemplated or falling outside the terms of reference, or if it is in conflict with the public policy of Kenya. The learned Judge emphasized that the court would not re-evaluate the evidence presented during the arbitration itself.
18. The learned Judge noted that the concept of public policy of Kenya was acknowledged as a broad concept incapable of a precise definition. The jurisprudence indicates it is not yet

exhaustively defined. He proceeded to hold that an award is inconsistent with public policy if it is inconsistent with the Constitution, or contrary to the national interest of Kenya, or contrary to justice and morality.

19. Drawing from the case of **Christ for All Nations vs Apollo Insurance Co Ltd [2002] 2 EA 366**, the learned Judge held that the concept has two main categories: The first category includes inconsistencies with national defense and security, good diplomatic relations, and economic prosperity of Kenya; while the second category, which is not exhaustive, includes cases where the award was induced by corruption or fraud or was founded on a contract contrary to public morals.
20. Also drawing from **Glencore Grain Ltd vs TSS Grey Millers Ltd**, in which it was observed that:

***“An arbitral award will be against the public policy of Kenya ... if it is immoral or illegal or it would violate in a clearly unacceptable manner basic principles and/or moral principles or values in the Kenyan society.”***

21. The learned Judge held that the term illegal in this context is broader than merely against the law and includes void contracts or contractual acts or awards that offend justice. Corruption and fraud were explicitly highlighted as behaviors that put an award in conflict with public policy.
22. Consequently, the court dismissed the application to set aside the arbitral award. However, the court noted that while

the

Arbitrator had no basis for awarding 12% interest on costs and had no jurisdiction to tax costs (this part being severable), the appellant's overall allegations did not rise to the level where the court would be entitled to set aside the entire award.

23. The court acknowledged that if the case had been an appeal, it might have gone into the merits, but in this application, the court's role was confined to the parameters for setting aside an award.

24. Being dissatisfied with the ruling of the court, the appellant lodged the present appeal, in which it raised the following grounds of appeal:

- a) *The learned Judge did not properly comprehend the application presented before him.*
- b) *The learned Judge failed to revisit the evidence that was before the arbitrator, which he was required to do to appreciate that the award made by the Arbitrator involved public funds.*
- c) *The learned Judge failed to appreciate the case law presented to him, leading to a wrong conclusion.*
- d) *The award presented clear evidence of mischief, corruption, and pure theft of funds, which the learned Judge ignored or glossed over.*
- e) *The learned Judge was aware or should have been aware that the arbitral award was a clear aberration of well-known principles of law, making the matter one of public policy that entitled the appellant to*

*have the award set aside in its entirety.*

- f) The learned Judge erred by holding that the award for the sum of USD 1,146,000 for storage charges was proper, when the said award was completely remote to the Contract of Sale of Maize between the appellant and the respondent.*
- g) The learned Judge erred by not ruling that he was entitled, as a matter of public policy, to scrutinize the evidence where allegations of impropriety and unfair use of public funds were involved.*
- h) The learned Judge failed to properly scrutinize and appreciate the case, leading to the inescapable conclusion that the respondent received an unworthy arbitral award.*
- i) The learned Judge took over one year to deliver the ruling appealed against, which had the effect of rendering the appellant's application totally prejudiced and its legitimacy completely lost.*

25. When the appeal came up for hearing on 1<sup>st</sup> April 2025, Mr. Katwa, learned counsel, appeared for the appellant; Mr. Ongoya, Mr. Saende, and Mr. Kangogo, learned counsel, appeared for the respondent; and Mr. Ben Murei, learned counsel, appeared for the interested party. Counsel relied on their respective written submissions, which they orally highlighted.

26. Mr. Katwa submitted that although the learned Judge stated that he could not look at the evidence used in the arbitral proceedings, the application was anchored on **Section 35** of the Arbitration Act, making it inevitable and necessary for the court

to have looked at that evidence and proceedings to apply **Section 35** properly.

27. Counsel reiterated that the respondent was challenging the arbitral award because it was contrary to public policy and went beyond the terms of the arbitral contract.
28. The appellant submitted that the Arbitrator was wrong to contend that the letter of credit, upon which the award was based, should have been issued by the appellant, claiming that failure to do so would amount to discrimination. The appellant argued that the contract did not provide for a letter of credit, and the law of discrimination did not apply in this context. He noted that the Arbitrator admitted that the contract did not require it, but proceeded based on other parties receiving letters of credit.
29. The appellant pointed out that the documents upon which the claim was based were forgeries. The appellant submitted that it was demonstrated that the purported supplier of maize from South Africa (Chelsea Freight) did not deal with maize and did not issue the letter claiming that maize had been sourced, stored, and was due to be shipped to Kenya.
30. The appellant further submitted that there were advances made to the arbitrator himself and the appellant's then-advocate (the late Mr. Nyawara) by the respondent, attempting to induce them and witnesses to take favorable positions.

31. To buttress its submissions, the appellant relied on the case of **Nyutu Agrovet Limited vs Airtel**, in asserting that its case fits squarely within the Supreme Court's holding, arguing that the face of the proceeding shows unfairness and misconduct. The appellant submitted that interference by the court is necessary to protect the integrity of the judicial process.
32. The appellant pointed out that the economic value of the award, Kshs. 560 million in 2007, was now over Kshs. 1 billion. It was its view that allowing the payment would amount to wastage of public resources, given that no maize was delivered, and that Kshs. 300 million had already been collected by the respondents out of the Kshs. 560 million awarded.
33. The appellant concluded that the High Court should have looked at the proceedings and set aside the award.
34. Supporting the appeal, Mr. Murei relied on the additional evidence dated 5<sup>th</sup> November 2014 and submissions dated 31<sup>st</sup> January 2023. Counsel referred to the affidavit by Kipsang Sambai in submitting that a critical piece of evidence used in the arbitration was an invoice purportedly by Chelsea Freight of South Africa, claiming \$1,146,000 for maize storage from 21<sup>st</sup> September 2004 to 22<sup>nd</sup> January 2005 (123 days), an amount equivalent to over 100 million Kenyan Shillings.
35. Counsel further referred to the appellant's statement (page 183 of Record of Appeal), which claimed \$1.1 million plus

\$1.9

million for loss of profit, totaling \$3.1 million based on that invoice.

36. Counsel further pointed out that investigations in South Africa revealed that the directors of Chelsea Freight Limited (EACC 7A and B) denied dealing with the respondent in maize or warehousing, and stated that they had not stored any maize for anybody. He was of the view that this meant that the claim for storage charges (\$1.146 million) did not arise, as there was no maize sourced or stored, and therefore, the claim for loss of profit also did not arise.
37. Counsel noted that the respondent had not challenged this additional evidence on its merits. He submitted that allowing the award to stand would perpetuate injustice and economic loss to the appellant and the public.
38. Opposing the appeal, the respondent relied on the list of authorities dated 30<sup>th</sup> January 2014; supplementary list dated 26<sup>th</sup> March 2025; and submissions dated 31<sup>st</sup> March 2025.
39. The respondent submitted that the appellant had not fitted itself within the four corners of the leading Supreme Court authorities (*Geochem, Middle East v Kenya Bureau of Standards* and *Nyutu Agrovat v Airtel*). The respondent pointed out that the Supreme Court jurisprudence states that an appeal may lie from the High Court to the Court of Appeal on a determination under **Section 35** only where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in

that section and made a grave and manifestly wrong decision. However, in this case, there is no High Court decision setting aside the arbitration award, as was stated by the High Court.

40. The respondent further submitted that the Supreme Court intended to limit the Court of Appeal's jurisdiction to situations of "discordance" (where the arbitrator's decision and High Court's decision differ, e.g., High Court setting aside an award) and prohibit jurisdiction where there is "concurrence" between the arbitrator's award and the High Court's decision. Mr. Ongoya argued that appeals can be limited from concurrent findings, and this is not a novelty. Therefore, the jurisdiction of the Court is improperly moved.
41. The respondent submitted that in the event jurisdiction is assumed, it is common ground that a contract existed between the appellant and respondent. The respondent further submitted that it is common ground that there was a contractual obligation on the part of the appellant to open a letter of credit for the respondent, yet the appellant had not explained its refusal to open the letter of credit. The respondent pointed out that the refusal by the appellant to open the letter of credit amounted to breach of contract.
42. The respondent submitted that there was an arbitration clause in the contract, which it pursued and was awarded damages as remedies for the said breach of contract. The respondent urged that this Court should not convert itself into another arbitrator to engage with factual disputes.

43. As regards the additional evidence adduced by the interested party, the respondent submitted that the said evidence was mounted as a collateral attack by prosecuting the respondent and its directors criminally. The respondent was of the view that the criminal path came a cropper as the decisions of the magistrate's court and High Court were set aside by Criminal Appeal Number E039 of 2022, meaning that the so-called additional evidence failed to prove the allegations through the criminal channel.
44. The respondent referred to the additional evidence; Exhibit 7A and 7B, witness statements, which its alleged shows credibility issues, as the two witness statements running into multiple pages are word for word, comma for comma, full stop for full stop identical except for the names of the witnesses.
45. The respondent questioned how additional evidence adduced at the Court of Appeal stage could be challenged. However, the respondent pointed out that the evidence was challenged in the criminal process, leading to the acquittal of the respondent and its directors.
46. The respondent submitted that while this Court had allowed the admission of this additional evidence, that admissibility and weight are different. The respondent urged the court to look at the evidence but find it less than believable and attach little weight to it due to its lack of credibility.

47. The respondent pointed out that the standard of proof in criminal cases is beyond reasonable doubt, while in civil cases it is on a balance of probability. The respondent then questioned whether the additional evidence, given its apparent lack of credibility, passes even the lower civil standard. The respondent further pointed out that this evidence was not presented before the arbitrator for cross-examination and was not fully presented or cross-examined in the criminal case.
48. The respondent submitted that the award of over Kshs. 1 billion, cannot in itself confer jurisdiction on the court. Jurisdiction is conferred by the grounds known to law for challenging and the framework of *Geochem* and *Nyutu*.
49. The respondent urged the court to disallow the appeal and condemn the appellants and interested party to pay costs.
50. In a rejoinder, the appellant submitted that **Section 35** of the Arbitration Act provides for challenging an award, which can either be adopted or declined. The appellant contended that limiting jurisdiction only to cases where an award was disallowed, set aside, is an artificial introduction not intended by the statute or the Supreme Court.
51. The appellant referred to paragraph 69 of the *Nyutu Agrovet* case, which states that a challenge is legitimate when it requires determination of unfairness or misconduct in the process to protect the integrity of the proceedings and to prevent injustice. The appellant submitted that court's

attention should be on the substance and process, not just the finding.

52. The appellant asserted that even under the respondent's criterion of concurrence, there was no concurrence by the Superior Court, as the court merely declined to look at the evidence and allowed the award to proceed, without substantive concurrence.
53. The appellant submitted that criminal proceedings were not part of these proceedings, and if weight is to be attached to them, the court would need to look at the criminal determination, which it does not have.
54. The appellant emphasized that the Court of Appeal decision on the criminal case did not determine that the documents were not forgeries, and that the appellant's contention that the documents were forgeries therefore stands unchallenged due to the lack of response by the respondent on this specific point.
55. The appellant prayed that the court find that it has made a case deserving of reversal of the Superior Court's decision not to allow adoption of the arbitral award. The respondent further clarified that it was open to the Court of Appeal to make that determination or send it back to the Superior Court to decide if the application to set aside the arbitral award had merit.
56. This is a first appeal and it is our duty to re-analyze and re-

assess the evidence on record and reach our own  
independent

conclusions in the matter. It was put more appropriately in **Selle vs Associated Motor Boat Co., [1968] E A 123**, thus:

***“An appeal to this court from a trial by the High Court is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)”.***

57. Upon careful review of the record, submissions, additional evidence, authorities cited, and the applicable law, the following issues fall for determination: whether this Court has jurisdiction to entertain an appeal arising from a High Court decision under **Section 35** of the Arbitration Act; whether the arbitral award was contrary to the public policy of Kenya and thus liable to be set aside under **Section 35(2)(b)(ii)**; whether the arbitrator exceeded the scope of reference under **Section 35(2)(a)(iv)**; and whether the additional evidence admitted by this Court affects the enforceability of the award.

58. The question of jurisdiction is paramount and must be determined first. The legal framework for judicial intervention in arbitration is strictly circumscribed by the Arbitration Act, 1995. **Section 10** of the Arbitration Act explicitly states that:

**“Except as provided in this Act, no court shall intervene in matters governed by this Act.”**

59. This underscores a public policy in Kenya emphasizing the finality of arbitral awards and limiting access to courts.

60. The respondent argues that the appellant has not fitted itself within the four corners set out in various Supreme Court decisions to warrant an appeal from the High Court to the Court of Appeal under **Section 35** of the Arbitration Act. In **S. K. Macharia & another vs Kenya Commercial Bank limited & 2 others [2012] eKLR**, the Court held that:

***“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its***

***authority to prescribe the jurisdiction of such a court or tribunal by statute law.”***  
**[Para. 68]**

61. It is common ground that the appeal herein originated from the fact that the appellant was aggrieved by the refusal of the High Court to exercise jurisdiction and interfere with the arbitral award. In declining to upset the arbitral award, the learned Judge believed that the High Court lacked jurisdiction to do so, hence did not delve into the merits of the evidence adduced during the arbitration proceedings. The learned Judge noted that the court's role was confined to the parameters for setting aside an award.

62. Therefore, the issue before us is whether the High Court properly addressed itself in failing to delve into the merits of the application and disallowing the appellant's application on the grounds that the application did not fall under **Section 35** of the Arbitration Act.

63. **Section 35** provides that:

**“(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).**

**(2) An arbitral award may be set aside by the High Court only if—**

**(a) the party making the application furnishes proof —**

**(i) that a party to the arbitration agreement was under some incapacity; or**

**(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**

**(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**

**(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or**

**(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or**

**(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;**

**(b) the High Court finds that—**

**(i) the subject-matter of the dispute  
is not capable of settlement**

by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

64. It is clear from the adduced additional evidence that the appellant’s claim fell within the scope of **Section 35(2)(a)(iv)** of the Act. However, the learned Judge in his determination relied on **Section 35(2)(b)(ii)** of the Act, suggesting that the claim before the court was that the award was in conflict with the public policy of Kenya.

65. The question that then begs to be answered is whether the High Court stepped outside the limited grounds under **Section 35** of the Act. The jurisdiction of this Court under **Section 35** of the Arbitration Act has been clarified in a

series of decisions by the

Supreme Court. In **Nyutu Agrovet Limited vs Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch** [2019] KESC 11 (KLR), the Supreme Court held that:

***“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.”***

66. In **Geo Chem Middle East vs Kenya Bureau of Standards** [2020] KESC 1 (KLR), the Supreme Court reiterated that:

***“In the above context, it is our considered view that, the leave, whether rightly or wrongly granted (an issue to which we shall return) could only have empowered the Court of Appeal to determine whether the High Court ought to have interrogated the arbitral award or not. If it were to determine that the High Court had wrongly declined jurisdiction to so do, the proper and indeed only course of action open to the Court of Appeal, was to remit the matter back to the High Court with directions that the latter, hears the substantive application for setting aside the arbitral award on its merits.***

***Instead, the Court of Appeal stepped into the shoes of the High Court and proceeded to determine a matter that had not been***

***substantively decided by the latter. In so doing, the Appellate Court usurped the jurisdiction of the High Court, as it was not open to it, to take over an arbitration dispute and determine it on its merits when the High Court had not done so. As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the “mistaken” belief that it lacks jurisdiction to do so, the Court has to remit that matter to the lower Court directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order, would a substantive appeal lie to the Appellate Court. 48. In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court’s pronouncement on the same, was rendered in excess of jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.”***

67. The respondent’s argument, that the High Court’s concurrence with the arbitral tribunal forecloses appellate jurisdiction, is, in our view, a misapprehension of these authorities. The concern is not merely whether the High Court agreed with the arbitrator, but whether the High Court failed to address serious concerns raised before it, including allegations of fraud, corruption, and public loss.

68. It is trite that where a High Court fails to engage with credible allegations that go to the integrity of the arbitral process, such omission invites scrutiny by this Court.
69. We are therefore satisfied that this appeal meets the threshold of exceptional circumstances envisaged under *Nyutu* and *Geochem*, and that this Court has jurisdiction to entertain the appeal.
70. Be that as it may, under **Section 35(2)(b)(ii)** of the Arbitration Act, an arbitral award may be set aside by the High Court only if the court finds that the award is in conflict with the public policy of Kenya. Public policy is a broad concept incapable of a precise definition. In **Christ for All Nations vs Apollo Insurance Co Ltd (supra)**, Ringera J. (as he then was) stated that:

***“An award is in conflict with public policy if it was induced by fraud or corruption, or if it violates Kenya’s justice system, morality, or constitutional values.”***

71. In the instant appeal, the appellant and the interested party raised serious allegations of fraud, pure theft of public funds, and impropriety, including forged documents and lack of maize delivery. The interested party adduced additional evidence, notably correspondence from Chelsea Freight, the alleged storage provider, categorically denying that it ever stored or handled maize for the respondent. Furthermore, the documents

upon which the storage and profit claims were founded were, at a minimum, unauthenticated.

72. However, it must be noted that these allegations of fraud and corruption were also the subject of criminal proceedings. The respondent submitted that these criminal proceedings culminated in the acquittal of its directors by the Court of Appeal in Criminal Appeal Number E039 of 2022. While the standard of proof in criminal cases is beyond a reasonable doubt compared to the balance of probabilities in civil cases, the fact of an acquittal following a challenge to the evidence, including the word-for-word statements, is a material consideration.
73. Public policy is firmly rooted in the Constitution, especially **Article 10**, which provides for national values and principles of governance (integrity, accountability, transparency); and Article 201 on the principles of public finance (responsible use of public funds).
74. To enforce an award based on alleged forged documentation; claims for undelivered maize; benefit to a non-party to the contract; and an inflated claim for loss of profit arising from a transaction not performed, would not only violate public policy but also offend the economic interest and morality of the State.
75. The High Court, in its ruling, acknowledged the serious allegations but concluded that they did not rise to the level

where the court would be entitled to set aside the entire award.

This implies that, despite the claims, the High Court did not find sufficient proof as required by **Section 35(2)(a)** that the award was demonstrably induced by corruption or fraud that would make its enforcement wholly offensive to Kenyan public policy. The High Court also noted that it would not re-evaluate the evidence as if it were an appeal, but rather confine itself to the parameters for setting aside an award.

76. In the circumstances, we find that the High Court erred in treating the public policy exception narrowly and failing to interrogate the allegations with the seriousness they deserved, but also note that without the additional evidence adduced before this Court, the High Court was not in a position to pronounce itself on the issue as there was no substantive evidence upon which the court would have founded its determination.
77. Under **Section 35(2)(a)(iv)** of the Act, an arbitral award may be set aside by the High Court only if the award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration. The arbitrator awarded USD 1,146,000 for alleged storage charges to Chelsea Freight, a company not privy to the contract between the parties. Although there was no contract between the appellant and Chelsea Freight, and there was no evidence presented to support a legally binding storage arrangement, the role of a court reviewing an arbitral award under Section 35 is not to conduct a fresh hearing or re-evaluate the merits of the

evidence presented during arbitration. The court's role is strictly limited to the grounds enumerated in Section 35, such as whether the award dealt with matters outside the scope of reference or was in conflict with public policy. The High Court explicitly stated it would not re-evaluate the evidence.

78. This, to our minds, is a clear breach of the principle of privity of contract, and amounts to an arbitrator dealing with a dispute not contemplated by the parties, a classic case of *ultra petita*. Similarly, awarding interest on costs at 12% per annum is a jurisdictional overreach.
79. The High Court severed the finding on interest from the rest of the award. In our view, where the main claims are tainted by fraud and the balance of the award derives from those claims, the award is fatally compromised and cannot be severed.
80. Pursuant to **Rule 29** of the Court of Appeal Rules, this Court allowed admission of additional evidence, including affidavits and documentary proof from Chelsea Freight. While the respondent has questioned the credibility of the evidence, including similarities in witness statements, it did not substantively rebut the central claim that the documents used to obtain the award were forgeries and that no maize was stored.
- 81.** The acquittal of the respondent's directors in criminal proceedings is not conclusive in civil proceedings, where the standard is on a balance of probabilities. In **Kuria Kiarie &**

**2**

**others vs Sammy Magera [2018] KECA 467 (KLR)**, this Court held that:

***“As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-***

***“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”***

82. We are satisfied that the additional evidence, which alleged that the award was procured through misrepresentation and was not enforceable in law, raised material and substantive issues that require interrogation.
83. It follows, therefore, that we make no conclusive pronouncements at this stage on whether the award was procured through misrepresentation, based on false documents, or whether the arbitrator exceeded his jurisdiction, as these matters are yet to be determined by the

High Court.

84. Accordingly, we issue the following final orders:

- a) The appeal is hereby allowed.**
- b) The Ruling and Order of the High Court dated 28<sup>th</sup> June 2011 is set aside in its entirety.**
- c) The matter is remitted back to the High Court for the court to substantively determine the application on its merits, including consideration of the additional evidence adduced.**
- d) The costs of this appeal shall be borne by the respondent.**

85. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this judgment is delivered in accordance with **Rule 34(4)** of the Court of Appeal Rules.

Orders accordingly.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of November, 2025.**

**S. GATEMBU KAIRU, C.Arb, FCIArb**

.....  
**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original.*

**Signed**

**DEPUTY REGISTRAR**