IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MUSINGA (P), TUIYOTT & NYAMWEYA, JJ.A.)

CIVIL APPLICATION NO. NAI. E725 OF 2024 BETWEEN

SAFARICOM LIMITED.....APPLICANT

AND

MILLICENT ABIERO.....1ST RESPONDENT
JUSTUS OBUYA ..... 2ND RESPONDENT

(Being an application for leave to appeal from the ruling and order of the High Court of Kenya at Milimani (Mabeya, J.) dated 6th December 2024

in

HC Comm. Arb. No. E057 of 2024)
****

RULING OF THE COURT

[1] The window of appeal to this Court against a decision of the High Court determining a setting aside application under **section 35** of **the Arbitration Act** (**the Act**) is a narrow one.

[2] Explaining this restricted jurisdiction, the Supreme Court in ***Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited;***

Chartered Institute of Arbitrators – Kenya Branch (Petition

12 of 2016) [2019] KESC 11 (KLR) famously said:

"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."

[3] In not a dissimilar fashion, the apex court reiterated its earlier holding in the following words in ***Synergy Industrial Credit Limited v Cape Holdings Limited [2019] KESC 12 (KLR):***

"(83) What therefore is the proper interpretation of Section 35 with regard to the right of appeal to the Court of Appeal? We have reviewed the decision emanating from our Courts on this issue. We have found that this issue has not attained consensus. We have also analysed cases and laws from selected jurisdictions. In some jurisdictions, decisions from a High Court on setting aside are appealable to the Court of Appeal and even to the Supreme Court on limited circumstances. In others, appeals are generally allowed but only with leave. We do not have in our laws such a procedure for leave. The UNCITRAL Model Law on which our law is based does not necessarily bar further appeals. Taking all these matters into consideration, we are of the view that, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. It must be noted that Section 35 was enacted prior to the promulgation of the Constitution 2010 and therefore Article 164(3)(a) and by dint of Section 7 of Schedule

Six, to the Constitution, the said Section must be "construed with the alterations, adaptations, qualifications and

exceptions necessary to bring it into conformity with the Constitution."

(84) Generally therefore, once parties agree to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. Once an award is issued, an aggrieved party can only approach the High Court for setting aside the award, only on the specified grounds. And hence, the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would lead to a miscarriage of justice. Therefore, even in promoting the core tenet of arbitration which is a quicker and efficient way of settling commercial disputes, that should not be at the expense of real and substantive justice. In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in Inco Europe Ltd & others (supra) hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances."

[4] In a notice of motion dated 19th December 2024, Safaricom Limited (***"Safaricom"***) seeks to persuade us that it has met this heightened threshold to warrant permission to appeal from the ruling and order made by Mabeya, J. on 6th December 2024.

[5] The impugned ruling dismissed an application by Safaricom seeking to set aside an Arbitration Award published on 3rd June 2024 and allowed its enforcement. In a statement of claim dated 3rd July 2023, filed before the Arbitral Tribunal, the respondents (***Millicent Abiero and Justus Obuya***) claimed

that the 2nd

respondent was a registered user of Safaricom's Mpesa Global platform and had used the platform to make a payment of Kshs. 16,585.00 on behalf of the 1st respondent for VISA processing to the United Kingdom on 2nd March 2023. It was further claimed that a second transaction was made to the UK Home Office, which was reflected, resulting in the 2nd respondent asking for a refund of the amount on the respondents' behalf. It was averred that instead of refunding the amount in the second transaction, Safaricom charged back the amounts in the first transaction which resulted in delay in processing of the 1st respondent's VISA.

[6] The delay in obtaining the VISA resulted in breach of a contract on the part of the 1st respondent with a third party as she could not travel to the UK. As a consequence, there was a loss of expected remuneration of Sterling Pounds 3,136,000.

[7] Holding in favour of the respondents, the Arbitrator made an Award as follows:

a) 3,163,000 Sterling Pounds (approximately Kshs. 517 million to the 1st respondent;

b) Kshs.16,469.44 to the 2nd respondent;

c) Interest on the special damages at the rate of 12% per annum; and

d) ***Costs of the claim awarded to respondents***.

[8] In the course of the proceedings before the Arbitral Tribunal, Safaricom raised two jurisdictional challenges. In the first (the first challenge), made pursuant to the provisions of section17 of the Act, Safaricom asserted the absence of an arbitral clause in the operative agreement between the parties. In a decision made on 3rd October, 2023, the Arbitral Tribunal dismissed the challenge. Through a second challenge (the second challenge) dated 15th January,2024, Safaricom challenged the locus standi of the 1st respondent under the arbitral principle of party autonomy.

[9] The Arbitral Tribunal addressed the second challenge in the final award published on 3rd June 2024. Aggrieved with the award, Safaricom filed an application under section 35 seeking to set it aside.

[10] In dismissing Safaricom's setting aside application, the High Court held that issues of jurisdiction had been conclusively determined by the arbitrator at the preliminary stage when it found the Mpesa Global Pay Terms and Conditions to be applicable, and that Safaricom's failure to challenge that ruling

within 30 days under section 17(6) barred it from reopening the issue at the setting-aside stage. On the scope of the reference, the Court found that the claims advanced arose from and were contemplated by the Mpesa Global Pay Terms and Conditions, which expressly permitted arbitration, and that the alleged losses were directly connected to the applicant's contractual obligations. On public policy, the Court reiterated that the ground is narrow and does not permit a review of the merits of an award, finding that Safaricom had not demonstrated any inconsistency with the Constitution, written law, national interest, or justice and morality, and was in effect inviting the Court to sit on appeal, which section 35 of the Arbitration Act deprecates.

[11] Safaricom impugns the decision of the High Court on the grounds, *inter alia,* that it was so manifestly wrong and completely closes the door of justice to them because: it upheld a huge award to a third party who was not a party to the Arbitration Agreement; it turned the principle of party autonomy on its head; it was made in total disregard of decisions of the High Court as to what constitutes a valid or legal Arbitration Award; it upheld an arbitration award which

deals with disputes not contemplated by

the parties and not falling within the terms of reference to Arbitration within the meaning under section 3 of the Arbitration Act; and it improperly refused to deal with a jurisdictional issue raised using the excuse that the challenge should have been raised earlier.

[12] The respondents oppose the motion. They assert that after making a first challenge to the Arbitral Tribunal's jurisdiction, Safaricom mounted a second challenge dated 15th January 2024 on the basis that the 1st respondent lacked *locus standi* and the Arbitral Tribunal's jurisdiction to deal with the 1st respondent's claim, asserting the absence of the arbitral agreement between her and Safaricom. The Tribunal rendered its decision on 3rd June 2024, holding that the challenge lacked merit and dismissed it.

[13] The respondents contend that under section 17(6) of the Arbitration Act, the High Court is vested with jurisdiction to determine a challenge to the arbitral tribunal's competence only where an aggrieved party moves the court within thirty days of the impugned ruling, and that any determination by the High Court on that issue is final and not subject to appeal. They assert that Safaricom elected not to invoke that

procedure within the

prescribed period and instead sought to mount the jurisdictional challenge after about ninety days through an application under section 35, framed as a public policy ground.

[14] Extensively quoting passages from the impugned decision of the High Court, the respondents assert that the court reached a correct decision after considering the decision of the Arbitrator on the issue and that the Arbitrator did not ignore any decision of Kenyan courts setting out applicable public policy in respect to the dispute, and neither did he apply foreign decisions that were inconsistent to public policy.

[15] Further, it is asserted that the arbitrator did not violate section 3

(1)of the Judicature Act as alleged. It is argued that the Arbitrator extensively and in a well-researched decision addressed the issues raised in the second challenge to jurisdiction. To the issue whether a non-signatory can be a party to an arbitration dispute, the arbitrator answered it in the affirmative holding that an arbitration agreement is extended to non-signatory parties on the basis of traditional contractual principles and doctrines such as agency, novation, assignment, operation of law, and merger and succession. The tribunal also

held that a non-signatory can be a

party to an arbitration dispute on account of the principle of agency. Regarding the third issue, the tribunal held that the 1st and 2nd respondents had a principal-agent relationship. In this regard, it was averred that that the 1st respondent appointed the 2nd respondent to lodge a UK VISA application, including enrolling into the applicant's MPESA GlobalPay platform to make payment for the said VISA application fees and that this uncontroverted evidence clearly demonstrated a principal-agent relationship. Further, as an eighth issue, the Tribunal held that the 1st respondent, as the principal, could sue Safaricom on the material contractual disputes. The Tribunal also concluded that there were other reasons why the 1st respondent's dispute ought to be resolved in arbitration.

[16] The respondents further assert that nothing on the Arbitration Clause limits the type of disputes "*arising out of or in connection with [the] Agreement*" that could be referred to arbitration. Therefore, the finding of the Arbitrator and the High Court to this end cannot be faulted and cannot be the subject of an intended appeal.

[17] We have read the submissions filed on behalf of the parties and the useful highlights made by learned senior counsel, **Mr. Karori** for Safaricom and learned counsel, **Mr. Akach** for the respondents.

[18] From the address of Mr. Karori, SC, we understand the mainstay of the applicant's plea for permission to have been narrowed down to and anchored on the contention that section 3 of the Arbitration Act, defines an Arbitration Agreement, and absent one between parties to the dispute, an arbitrator would have no jurisdiction to deal with the matter that is being arbitrated upon. In this regard, while Safaricom acknowledges that it had such an agreement with the 2nd respondent, it firmly asserts that it had none with the 1st respondent.

[19] A second limb of the contention by Safaricom is that it raised the issue of party autonomy as a second jurisdictional question that was dealt with by the Arbitral Tribunal, which chose to deal with in the final award. For that reason, the first opportunity for Safaricom to challenge that decision was in an application under section 35 of the Act. Upon doing so, the Judge conflating the issue before him with the first jurisdictional challenge, failed to

deal with the specific question whether or not there was an arbitration agreement between Safaricom and the 1st respondent, and in so doing fell into grave error.

[20] On his part, learned counsel Mr. Akach argued that Safaricom, in its section 35 application, raised the second jurisdictional challenge as an issue of public policy. He asserted that the learned Judge was alive to the existence of two jurisdictional challenges and did not conflate them. Counsel sought to point out portions in the ruling where the superior court dealt with the contestations regarding the second challenge and where, counsel asserts, the High Court addressed it fully. It was argued, for the respondents, that the arbitrator, having dealt at length and eventually deciding the party autonomy issue, the High Court reviewed the decision and concluded that the award did not contravene public policy as advanced by Safaricom.

[21] It was submitted, further, that while Safaricom may not be content with the decision of the Judge, the Judge did not go beyond the four corners of section 35, and that the impugned decision was not erroneous.

[22] The application before us is for permission to appeal against the decision of the High Court declining to set aside the decision of an Arbitral Tribunal under section 35 of the Act, which reads:

> ***"35. (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."

[23] The principles governing opening of the narrow door to an appeal, as enunciated in ***Nyutu Agrovet Limited v Airtel Networks Limited*** and ***Synergy Industrial Credit Limited v Cape Holdings Limited***, applies with equal force whether the High Court sets aside an arbitral award or declines to do

so. So that where the High Court declines to set aside, permission to appeal

will only be granted where the High Court makes a grave and manifestly wrong decision on an application which is predicated squarely on the limited grounds set in section 35 with the consequence that it has "***completely closed the door of justice"*** to the applicant.

[24] We do not have the application for setting aside before us, but we glean the following from the ruling of the High Court. The second jurisdictional issue regarding party autonomy was determined in the final award. In our view, the applicant could seek the High Court's intervention on that matter as long as it was within the four corners of the grounds set out in section 35 of the Act. The second jurisdictional issue having been determined in the final award, the applicant could not be constrained to take up the challenge under section 17. That said, having elected to raise the matter within the framework of section 35, Safaricom bore the burden of demonstrating that the complaint properly met the statutory thresholds set out therein.

[25] A second observation is that, before the High Court, Safaricom took out the party autonomy question as a public policy issue and on this we have no difficulty agreeing with the

respondents.

[26] It is also clear to us that the learned Judge was alive to the fact that the second jurisdictional question was distinct from the first. This is what the Judge said:

> ***"28. The applicant raised the issue of public policy where it was contended that the award offends public policy of Kenya. The applicant's position that the claim was filed by the 1st respondent who was not a party to the arbitration agreement and thus it introduced a stranger to the agreement. The applicant further faulted the arbitrator for finding that there was an agency relationship and also the fact that the arbitrator placed reliance to the Mpesa GlobalPay terms and conditions."***

[27] This is then how the learned Judge determined the question:

> ***"32. In light of the above principles, the ground of public policy for setting aside an arbitral award is only applicable when there is clear evidence that the award contradicts the Constitution or any written law, is detrimental to the national interest of Kenya, or is in direct opposition to principles of justice, or is manifestly arbitrary and unfair. An applicant relying on this ground must specify the public policy relied on and the parts of the award that is contrary to that public policy.***
>
> ***33. Upon reviewing the arguments presented by the applicant regarding public policy, it is evident that the applicant is merely contesting the correctness of the arbitral award. I should point out here that, when parties voluntarily choose arbitration as the method of dispute resolution, they must be prepared to accept and be bound by the outcome of that arbitration."***

[28] Something has to be said about the grievance by Safaricom that the Judge did not, in fact, determine the substantive

issue that

was placed before him. We take a view that it was not enough for the learned Judge to simply state that Safaricom had not specified the public policy relied on and the parts of the award that were contrary to public policy. The contention by Safaricom, as even set out by the learned Judge in rehashing the arguments by the parties, bore no ambiguity. It raised the issue that the claim filed by the 1st respondent would not be maintained in the arbitration proceedings because she was not party to the arbitration agreement and that it was against public policy to allow her claim, given the statutory strictures of who is a party to an arbitration agreement. Whatever the answer the learned Judge would have eventually reached to this question, the learned judge should have analysed the arguments raised before drawing a conclusion that the award was not an affront to public policy. While it is not the time to determine the merit of the appeal, the superficial manner in which the High Court dealt with the issue amounted to the High Court failing to consider whether the award was a true candidate for setting aside within the grounds in section 35 and as a consequence determined the application outside the ambit of section 35.

[29] Ultimately, the application is merited and we do hereby grant the applicant leave to appeal against the ruling and order by Mabeya,

J. of 6th December 2024 in NRB HCCOMMARB. No. E57 of 2024.

The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 19th day of December, 2025.

D. K. MUSINGA, (PRESIDENT)

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

F. TUIYOTT

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.