University of Nairobi v Songa Ogoda & Associates (Civil Appeal (Application) 240 of 2020) [2026] KECA 258 (KLR) (13 February 2026) (Ruling)

Neutral citation: [2026] KECA 258 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 240 OF 2020

K M'INOTI, P NYAMWEYA & GV ODUNGA, JJA

FEBRUARY 13, 2026

BETWEEN

UNIVERSITY OF NAIROBI ..... APPLICANT

AND

SONGA OGODA & ASSOCIATES ..... RESPONDENT

(Application for leave to appeal to the Court of Appeal against the ruling and order of the High Court of Kenya (Tuiyott, J.) dated 20th July, 2020 and for stay of further proceedings in HC Misc C. No. E089 of 2019 and E024 of 2019)

RULING

1. Before the Court is a motion on notice dated 6th August 2022 taken out by the applicant, University of Nairobi. The applicant prays for leave to appeal to this Court from the ruling and order of the High Court of Kenya at Nairobi (Tuiyott, J. as he then was), dated 20th July 2020. The applicant also prays for an order of stay of further proceedings in the High Court pending the hearing and determination of its intended appeal.

2. The application for leave to appeal is necessitated by the fact that the intended appeal arises from a decision of the High Court in proceedings for setting aside an award under the *Arbitration Act* (the Act) in respect of which there is no right of appeal, except with leave of this Court as explained by the Supreme Court in Nyutu Agrovet Ltd v. Airtel Networks Kenya Ltd & 2 Others [2019] eKLR (Nyutu) and Synergy Industrial Credit Ltd v. Cape Holdings Ltd [2019] eKLR (Synergy).

3. The brief background to the application is that on 24th November 2017 an arbitral tribunal made an award in favour of the respondent, Songa Ogoda & Associates, against the applicant for Kshs. 193,867,327.22. On 8th April 2019, the applicant filed an application in the High Court under sections 7 and 35 of the Act seeking two prayers, namely stay of enforcement of the arbitral award and an order setting aside the award. The prayer for setting aside of the arbitral award was based on the contention

that the applicant's constitutional right to a fair hearing was violated and that the award was contrary to section 35 of the Act. It was the applicant's averment that it only became aware of the arbitral award on 22nd January 2019 when it was served with the respondent's application for enforcement of the award.

4. The respondent raised a two-prolonged preliminary objection to the application, founded on jurisdiction. First, it was contended that the jurisdiction of the High Court to intervene in arbitral proceedings was limited to interim measures before or during the arbitral proceedings and not after the making of a final award, and second, that the High Court did not have jurisdiction to entertain the application to set aside the arbitral award because it was filed out of the time prescribed by the Act.

5. The High Court agreed with the respondent and found that under section 7 of the Act, its jurisdiction to intervene in arbitral proceedings is limited to pending rather than concluded proceedings. Secondly, that the arbitral award was deemed to have been published when the tribunal notified the parties that the award was ready for collection upon payment of its fees. In this case, the notification was on 24th November 2017 and therefore, the application to set aside the award was made outside the period of 3 months from the date of receipt of the award allowed by section 35(3) of the Act. Accordingly, the court struck out the applicant's application with costs.

6. The applicant is now before us seeking leave to appeal to this Court. The basis for seeking leave, as explained in the supporting affidavit sworn on 6th August 2020 by Prof. Kiama Stephen Gitahi, the further affidavit sworn on 31st March 2021 by Frederick Collins Omondi, the written submissions dated 11th November 2020, and the oral submissions made by the applicant's learned counsel, Mr. Ngatia, SC, is that there is need for this Court to clarify when an arbitral award is received.

7. The applicant contends that the High Court was plainly wrong by holding that an award is received when the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees. Instead, it is contended that an award is received when the parties actually receive it. Going by the High Court's interpretation, the award was received on 24th November 2017 and therefore the applicant's application to set aside the award, which was made on 8th April 2019 was outside the three months provided by the Act. However, going by the applicant's argument, the award was received on 22nd January 2019 and therefore the application to set aside was made within three months from the date of receipt of the award.

8. The crisp issue that the applicant wishes the Court to determine is:

> "Whether a withheld award can be deemed to have been received by a party within the meaning of section 35 of the *Arbitration Act*; and whether, receipt of the award is not necessary as held by the High Court."

9. The applicant relied on a ruling by this Court in a similar matter arising from the same arbitral award as the instant application, namely, University of Nairobi v. Multiscope Consulting Engineers, Civil Application No. 129 of 2020. In that ruling dated 7th August 2020, the Court granted the applicant leave to appeal, together with an order of stay of further proceedings in the High Court on condition that it deposits half of the arbitral award sum in a joint interest-earning account.

10. Relying on Nyutu and Synergy, the applicant submitted that the present application satisfies the criteria for grant of leave to appeal because the decision of the High Court is not only unfair and unjust, but it has left the applicant with no legal avenue to redress the injustice.

11. Lastly, the applicant urged the Court not to make an order for stay of further proceedings conditional upon monetary deposit because the applicant is a public educational institution that relies on capitation from the Exchequer. The applicant relied on Lemanken Aramat v Harun Maitamei

Lemepeka [2014] eKLR; Ethics & Anti-Corruption Commission v Peter Mangiti & 17 Others [2017] eKLR; and Teachers Service Commission v. Benson Kuria Mwangi [2020] eKLR in support of the submission that it was not in public interest in the circumstances of this case, to impose a condition for deposit of money.

12. The respondent opposed the application vide a replying affidavit sworn by Celestinus Lusweti Wose on 22nd January 2021; a supplementary affidavit sworn by Ligunya Stephen Biko on 8th July 2021; written submissions dated 22nd January 2021; and oral submissions by its learned counsel, Mr. Wakwaya. The substance of the response was that the application did not satisfy the narrow and circumscribed jurisdiction recognised in Nyutu and Synergy and that the intended appeal did not disclose any arguable point. It was further contended that the application fell outside Nyutu and Synergy because the applicant's application for setting aside the arbitral award was struck out in limine, without being heard and determined on merits.

13. The respondent submitted that the High Court correctly interpreted the law because after being notified that the arbitral award was ready for collection, the applicant ignored the notification and declined to pay its share of the arbitration fees, forcing the respondent to pay single-handedly. It was contended that upon notification on 24th November 2017, the applicant was aware that the award was ready and available and cannot claim not to have received it until 22nd January 2019.

14. The respondent cited a number of authorities in support of the submission that publication, delivery and receipt of an arbitral award is completed once the parties are notified that the award is ready for collection and that the three months allowed by the Act for setting aside the award is computed from the date of notification. Those authorities included Anne Mumbi Hinga v. Victoria Njoki Gathara [2009] eKLR, Bulk Transport Corporation v. Sissy Steamship Co. Ltd. [1979] 2 Lloyd's Law Report 289, Mahican Investments Ltd & 3 Others v. Giovanni Gaida & 80 others [2005] eKLR, and Kenyatta International Convention Center v. Greenstar Systems [2018] eKLR. It was also contended that the High Court had no jurisdiction to extend the times set by the Act.

15. As regards stay of further proceedings, the respondent pointed that on 14th October 2020 the High Court stayed further proceedings pending the hearing and determination of this application. It was contended that the respondent continues to suffer grave prejudice because of the delay in payment of its fees, which has taken a rather long time and undermined the principle of finality in arbitration proceedings.

16. We have carefully considered this application. As submitted by both parties, the Nyutu and Synergy jurisdiction is exceptional, narrow, circumscribed and to be exercised sparingly and only in the clearest of cases, to avoid undermining the principle of finality in arbitration.

17. In Nyutu, the Supreme Court expressed itself as follows on that jurisdiction:

> "(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 & another v ALC & others [201] SGCA 18] that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself...

(74) As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention." (Emphasis added).

18. The Supreme Court then concluded 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.

(78) In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice."

19. Subsequently the Supreme Court explained as follows in Geochem Middle East v. Kenya Bureau of Standards [2020] eKLR:

"...We must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of courts has been greatly diminished notwithstanding the narrow window created by sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary." (Emphasis added).

20. We take note of the fact that on 7th August 2020 in University of Nairobi v. Multiscope Consulting Engineers (supra), this Court granted the applicant in that application leave to appeal so that it can canvass the very issue that the applicant wishes the Court to address. The Court delivered itself thus:

"(17) ...It is common ground that the applicant's motion to set aside the arbitral award was not heard on merit but was struck out on the ground that it was filed out of time contrary to section 35(3) of the *Arbitration Act*. This means that the substantive issues raised in the motion were not addressed or determined.

(18) An issue has been raised by the applicant regarding the interpretation of section 35(3) and this is a jurisprudential issue that ought to be addressed. The striking out of the applicant's motion has also resulted in the applicant being shut out from the seat of justice, and there is an issue whether the learned Judge of the High Court properly directed himself in striking out the applicant's motion or whether the learned judge made a decision that is so manifestly wrong and which has completely closed the door of justice to the applicant. We find that these are exceptional circumstances and it is appropriate that leave to

appeal to this Court be granted so that these pertinent issues are fully ventilated and addressed by the Court."

21. As we have already noted this application and the one determined by the above ruling arose from similar circumstances and the same arbitral award. We have not been able to determine whether the applicant's appeal in University of Nairobi v. Multiscope Consulting Engineers has been heard and determined by this Court to enable us say with confidence that the issue that the applicant intends to raise has been resolved by this Court.

22. In these circumstances, the best course that commends itself to us is to grant leave to the applicant to appeal. That will avoid conflicting decisions by this Court arising from the same arbitral award and in similar circumstances, and to enable the Court pronounce itself once and for all on the issues that the applicant wishes to raise.

23. As regards the prayer for stay of further proceedings in the High Court, we note that the High Court itself has stayed further proceedings until the hearing and determination of this application. All that we shall do is stay further proceedings until the hearing and determination of the intended appeal, to avoid making the same nugatory.

24. Ultimately, we allow the motion dated 6th August 2022 and grant the applicant leave to appeal and specially to canvass the issues isolated in paragraph 8 hereof. As for costs, we direct that the costs of this application shall abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2026.

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.