



**Maina v Francis & 5 others (Arbitration Cause E034 of 2023  
& Miscellaneous Application E395 of 2023 (Consolidated))  
[2026] KEHC 4888 (KLR) (Commercial and Tax) (19 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4888 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
ARBITRATION CAUSE E034 OF 2023 & MISCELLANEOUS  
APPLICATION E395 OF 2023 (CONSOLIDATED)**

**F GIKONYO, J  
MARCH 19, 2026**

**BETWEEN**

**DR. SAMUEL THENYA MAINA ..... APPLICANT**

**AND**

**BRIAN MARTIN FRANCIS ..... 1<sup>ST</sup> RESPONDENT**

**THE ESTATE OF THE LATE HIRAM NGARUIYA ..... 2<sup>ND</sup> RESPONDENT**

**ISAAC NJOROGI GITOHO ..... 3<sup>RD</sup> RESPONDENT**

**JAMES NJUGUNA GITOHO ..... 4<sup>TH</sup> RESPONDENT**

**KRISCO HOLDINGS LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**MUIBORO ENTERPRISES LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

**Leave to appeal under Arbitration Act**

1. The significant order sought in the notice of motion dated 27.2.2025 is; Leave to appeal to the Court of Appeal under the *Arbitration Act*. The impugned decision consists in the ruling and orders of 31.1.2025 made by P. J. Otieno J under section 35 of the *Arbitration Act*.
2. The application is supported by the grounds set out in the body, the affidavits sworn by the applicant on 27.2.2025 and 27.5.2025.
3. The application is opposed by the respondents through the replying affidavit sworn by the 3<sup>rd</sup> respondent on 18.3.2025.



4. The applicant and the respondents filed written submissions dated 27.5.2025 and 3.7.2025 respectively.
5. Through the impugned ruling, the court allowed the respondents' application dated 9.5.2023 seeking to set aside the award and disallowed the applicant's application dated 22.5.2023 for adoption and recognition of the award. The core finding was that the arbitrator exceeded his mandate by resolving a dispute beyond the scope of the authority donated by the parties. The court therefore directed the parties to commence arbitration proceedings afresh.
6. The applicant's main ground in support of the application is that he has lodged a notice of appeal dated 14.2.2025 against the ruling of 31.1.2025 and that he has good and arguable grounds of appeal and has shown exceptional circumstances for the exercise of the court's discretion to allow him leave to appeal.
7. The applicant argued that the court's directive that the parties commence arbitration proceedings afresh within 30 days of the impugned ruling is contradictory to substantive findings regarding the award and should not stand.
8. The applicant asserted that all that he needs to demonstrate is that the appeal is arguable. He submitted that an unfair determination by the High Court should not be absolutely immune from appellate review. That in determining whether there has been unfairness, the court may consider the substance of the intended appeal.
9. The applicant urged the court to allow his application with costs. He relied on: -
  1. Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch [2019] KESC 11 (KLR)
  2. Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR
  3. Geo Chem Middle East v Kenya Bureau of Standards [2020] eKLR
  4. Wambugu Kariuki & Associates v Invesco Assurance Company Limited [2018] eKLR
10. The respondents' key contention is that an appeal against the High Court's decision under section 35 of the *Arbitration Act* may only lie upon grant of leave in exceptional cases. They also argued that the jurisdiction to grant leave should always be sparingly exercised in the clearest of cases and this matter is not such a case.
11. The respondent submitted that the court lacks jurisdiction to determine an application for leave to appeal a decision under section 35 of the *Arbitration Act*. It asserted that the matter is a preserve of the Court of Appeal.
12. The respondents asserted that the applicant has not met the conditions for grant of leave to appeal as set out by law and the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party)* [supra].
13. The respondents argued that there is no cure, even in appeal, for an arbitral award that goes beyond the scope of arbitral clause, breaches the rule of law and contradicts the governing agreement between the parties.
14. The respondents asserted that the leave sought would only create unnecessary expenses and delay in determination of the dispute between the parties, defeating the key object of arbitration.



15. The respondents submitted that the grounds raised, which they termed false and misleading, do not fall within sections 35 and 39 of the *Arbitration Act*. That the grounds upon which leave is sought is neither germane to the arbitral award nor to the ruling sought to be appealed against.
16. The respondents urged the court to dismiss the application with costs. They relied on: -
  1. Talewa Road Contractors Limited v Kenya National Highway Authority [2019] eKLR
  2. Micro-House Technologies Limited v Co-operative College of Kenya [2017] eKLR
  3. Rubis Energy Kenya PLC (Formerly Kenol Kobil Limited) v Downstream Energy Limited; KCB Bank Kenya Limited & 5 others (Garnishee) (Miscellaneous Application Arbitration E078 of 2022) [2024] KEHC (KLR) (Commercial and Tax) (24 May 2024) (Ruling)
  4. County Government of Meru v Leopard Rock Mico Limited (Civil Application E013 of 2023) [2023] KECA 1401 (KLR) (24 November 2023) (Ruling)
  5. Bomas of Kenya Limited v Standard Investment Bank Limited (Civil Application E456 of 2021) [2023] KECA 544 (KLR) (12 May 2023) (Ruling)
  6. Savings Tea Brokers Limited v Kenya Tea Development Agency & 7 others (Civil Application 46 of 2018) [2022] KECA 892 (KLR) (28 April 2022) (Ruling)
  7. Baseline Architects Limited v National Hospital Insurance Fund (Civil Application 178 of 2017) [2022] KECA 1321 (KLR) (2 December 2022) (Ruling)

## Analysis and Determination

### Jurisdiction

17. From the arguments presented, the question in plain sight is: whether this court has the jurisdiction to grant leave to appeal to the Court of Appeal against a decision by this court made under section 35 of the *Arbitration Act*.
18. Jurisdiction is sine qua non any adjudication by a court of the matter before it. Thus, jurisdiction must be determined in limine. Kenya Bureau of Standards v Geo Chem Middle East (Application 33 of 2020) [2021] KESC 60 (KLR) (17 March 2021) (Ruling), Owners of Motor Vessel Lillian S versus Caltex Oil (Kenya) Ltd (1989) KLR 1, Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others, Sup Appl. 2 of 2011, [2012] e KLR
19. Appeal under section 35 and 39 of the *Arbitration Act* becomes relevant and under focus here. The Court of Appeal had occasion to deal with the question of jurisdiction under the two sections. SMB Bank (Kenya) Limited v Afrasia Bank Limited (Civil Appeal E620 of 2022) [2025] KECA 386 (KLR) (28 February 2025) (Judgment) Neutral citation: [2025] KECA 386 (KLR) Of appeal under s.39 of the *Arbitration Act*
20. In the said decision, the Court of Appeal held that ‘such leave should not be sought before the trial court because even in not too dissimilar circumstances under section 39(3)(b), the leave of appeal to this Court is to be granted by this Court.’ And the test, ‘it is this Court which must satisfy itself that a matter involves a point of law of general importance, the determination of which will affect the rights of one or more of the parties.’
21. From the above, it is the Court of Appeal which has the jurisdiction to determine whether to grant leave to appeal where the parties have agreed to appeal a question of law arising from an arbitral award.



22. In the case before me, there was no agreement by the parties that an appeal or second appeal may be made by any party to this court or the Court of Appeal on any question of law arising out of the award, as the case may be, as permitted in section 39 of the Arbitration Act.

**Of appeal under s.35 of the Arbitration Act**

23. The decisional law has established that an appeal may lie to the Court of Appeal on a High Court's decision made pursuant to section 35 of the Arbitration Act. Nyutu case [supra] and the Synergy case [supra]

24. The applicant has applied for leave to appeal to the Court of Appeal against the court's ruling setting aside the award made under section 35 of the Arbitration Act.

25. Precedents have settled that such 'leave would have to be sought from and granted by the Court of Appeal before an intending appellant files the appeal.' Nyutu Agrovet case (supra), County Government of Kitui v Power Pump Technical Company Limited [2024] KECA 1501 (KLR), SBM case [supra]

26. Thus, in my considered view, the Court of Appeal has the jurisdiction to determine the quest for leave to appeal a High Court's decision made pursuant to section 35 of the Arbitration Act. The findings and interpretations provided by the courts of sections 35 and 39 of the Arbitration Act, should be understood within the doctrine of non-interference or limited intervention by courts in arbitration which has been; undergirded in the Constitution (Art.10) which limits the duty and mandate of the judiciary to 'promote' Alternative Justice Systems- i.e. respect (let it be), protect (do no harm and defend) and transform (make it better for purpose)- and expressed in section 10 of the Arbitration Act, thus: - 'Except as provided in this Act, no court shall intervene in matters governed by this Act.' Perfectly aligned to the Constitution through construction in accordance with section 7 of the Provisional and Transitional Provisions of the Sixth Schedule of the Constitution.

**Conclusion**

27. The upshot is that, the notice of motion dated 27.2.2025 dated is dismissed. No orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19<sup>TH</sup> DAY OF MARCH, 2026**

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**F. GIKONYO M**

**JUDGE**

In the presence of: -

Mirie for Respondents

Mutua for Miller for Applicant

CA- Ivan/Aggrey

