IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A)

CIVIL APPEAL NO. E009 OF 2023

BETWEEN

MARCO PIROLI.....APPELLANT

AND

MOUNTSBAY REAL ESTATE LIMITED.....RESPONDENT

(An Appeal against the Ruling/Order of the High Court of Kenya at Malindi (S. M. Githinji, J.) delivered on 22nd September 2022)

in

Malindi Misc. Application No. 68 of 2021)

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JUDGMENT OF THE COURT

The dispute culminating in the instant appeal relates to an arbitration between ***Marco Piroli, the Appellant*** and ***Mounts Bay Real Estate Limited, the Respondent*** arising from a sub-lease over Apartment No. 13 *(the Apartment)* constructed on Plot No. 1127 (Original No. 2212) in Watamu, Malindi. The original sub-

lease dated 3rd June 2015 had been granted to Erlie Pier Angelo,

who later transferred and assigned his interest to the Appellant by a registered transfer of lease dated 16th October 2018, following which he became the registered holder of the sub-lease.

The dispute between the parties arose after the Respondent issued a notice dated 26th February 2021 purporting to terminate and revoke the Appellant's sub-lease, and demanding vacant possession of the Apartment. The Appellant maintained that the Respondent had no lawful basis on which to revoke a duly registered sub-lease, and further accused the Respondent of failing to comply with its statutory obligations under the Sectional Properties Act, particularly the incorporation of a management company and allocation of shares to unit owners.

The Appellant then filed a suit against the Respondent, being *Malindi ELC Case No. 48 of 2021* together with an application in which he sought for orders that, pending *inter-partes* hearing and determination of the suit and arbitration proceedings between the parties over the dispute, a temporary order of injunction be issued restraining the Respondent whether by himself or through his servants, agents, employees, assigns or anybody claiming under him, pursuant to his instructions or whatsoever from evicting the

Appellant, re- entering, remaining on, trespassing, continuing to occupy, charging, dealing or

in any way interfering with his quiet possession, enjoyment, use or dealing with the apartment.

The Appellant also commenced arbitration proceedings and appointed an Arbitrator pursuant to the Arbitration clause in the sub lease. In response, the Respondent raised a preliminary objection, arguing that there was no consensus on the appointment of the arbitrator; that the arbitrator was biased; and that the procedure under ***Section 12*** of the ***Arbitration Act*** was not followed. It was also contended that there was no privity of contract between it and the Appellant, as the sub-lease had been transferred irregularly and without consent and that, therefore, the Appellant could not rely on the arbitration agreement. In addition, the Respondent argued that the dispute had not been formally referred to arbitration by a court, and that there existed parallel High Court proceedings involving the same parties and subject matter which, in its view, deprived the arbitral tribunal of jurisdiction.

In a Ruling dated 18th August 2021, the arbitral tribunal considered the preliminary objection and found that the issues raised did not constitute pure points of law capable of

determination at a preliminary stage. The tribunal held that questions relating to the appointment of the arbitrator, alleged bias, and privity of contract were matters of fact requiring evidence, and could not

properly be resolved through a preliminary objection; that the Arbitration Act provides specific mechanisms for challenging the appointment or impartiality of an arbitrator, which the Respondent had failed to invoke. On the issue of privity, the tribunal found that an assignee of a lease acquires the rights of the assignor and is entitled to enforce the arbitration clause contained in the original agreement. The tribunal also determined that the existence of High Court proceedings seeking interim relief did not oust the jurisdiction of the arbitral tribunal. Consequently, the preliminary objection was dismissed with costs to the Appellant, and the arbitration was allowed to proceed to hearing and determination.

Aggrieved, the Respondent lodged a Notice of Motion dated 14th September 2021 vide Malindi Misc. Application No. 68 of 2021 in the High Court in which it sought to set aside the Arbitral Interim Award No. 1 dated 18th August 2021 and published by the sole Arbitrator Mr. Kyalo M. Mbobu on 18th August 2021, and for the arbitral proceedings and the arbitral award by the sole Arbitrator to be declared null and void.

The application was founded on the sworn affidavit of

Rugerro Sciomeri, a director of the Respondent company, where he deponed that he was aware of the Appellant's alleged sub-lease in respect of the Apartment and which,

according to him, had been transferred irregularly and unlawfully by Erlie Pier Angelo, the former sub-lessee. He largely reiterated the facts as set out by the Appellant, save to add that the transfer was effected without the knowledge, participation or consent of the Respondent, who was the registered lessor, and was in contravention of clause 2:17 of the sub-lease; that it was the sole manager of all common areas within Mounts Bay Residence where the Appellant was a sub-lessee, and that the Appellant had on several occasions interfered with the management and operations of the Respondent, and had incited other condominium owners to do the same. According to the Respondent, this conduct prompted the issuance of a warning letter to the Appellant, which he had ignored, leading to a notice of termination of the purported sub-lease. He also deponed that the subject matter of the dispute, namely the sub-lease over the Apartment, was not capable of arbitration between the parties since there was no privity of contract between them.

Upon considering the application, affidavits, and submissions by the parties, the High Court, in a Ruling dated 24th May 2022, identified three central issues for determination: whether the

Notice of Motion was defective in form; whether the application was statute-barred; and whether the High Court had jurisdiction to set aside the interim arbitral award.

On the question of form, the court acknowledged the Respondent's argument that applications for setting aside arbitral awards ought to be brought by way of originating summons under the Arbitration Rules, 1997. However, the court held that this objection was purely procedural and did not go to the substance of the dispute. Invoking ***Article 159(2) (d)*** of ***the Constitution***, the court emphasized that justice should be administered without undue regard to procedural technicalities, and found that no prejudice had been occasioned to the respondent by the mode of filing. Consequently, the court declined to strike out the application on the basis of form.

Regarding limitation, the court examined the competing provisions of ***Sections 17*** and ***35*** of the ***Arbitration Act*** and found that ***Section 17*** dealt with challenges to an arbitral tribunal's ruling on jurisdiction, whereas the application before it sought to set aside an interim arbitral award. The court therefore held that ***Section 35(3)*** of the ***Arbitration Act*** was the applicable provision. Since the interim arbitral award was published on 18th August 2021 and the application was filed on 20th September 2021, the court found that it had been lodged

within the statutory three-month period and was not time-barred.

On the issue of jurisdiction, the court held that an application to set aside an arbitral award under ***Section 35*** of ***the Arbitration Act*** invoked the court’s

original, and not appellate, jurisdiction. The court reiterated the settled principle that it could not interrogate the merits of an arbitral award or substitute its own view for that of the arbitrator. It further reaffirmed that courts are generally slow to interfere with arbitral awards, save in the limited circumstances set out in the Act, including where public policy considerations arise.

However, the court observed that there was a substantive dispute between the parties pending before the *Environment and Land Court in Malindi ELC Case No. 48 of 2021* touching on the same subject matter, namely the Apartment, and that issues relating to leases and privity of contract squarely fell within the jurisdiction of the Environment and Land Court, in view of those pending proceedings. Given the circumstances, the learned Judge considered it prudent to allow the application, set aside the Interim Arbitral Award No. 1 dated 18th August 2021, and stay the arbitral proceedings pending hearing and determination of *Malindi ELC Case No. 48 of 2021.* The court made no order as to costs.

Aggrieved, the Appellant, by way of a Notice of Motion dated 7th June 2022, sought review and orders to set aside the Ruling of the High Court. The application was premised on the grounds that

the court had committed an apparent error on the face of the record by setting aside the Interim Arbitral

Award and staying the arbitration proceedings solely on the ground that there was a pending suit between the parties in the Environment and Land Court. According to the Appellant, the existence of a pending suit was not one of the grounds provided under ***Section 35(2)*** of the ***Arbitration Act*** for setting aside an arbitral award, and that the Arbitration Act did not contemplate or permit a stay of arbitral proceedings pending the determination of an Environment and Land Court suit; that, further, ***Section 10*** of the ***Arbitration Act*** expressly limited court intervention in arbitral matters. The Appellant maintained that the Environment and Land Court case was merely a nominal suit filed under ***Section 7*** of the ***Arbitration Act*** for interim preservation orders and not a substantive suit capable of justifying the impugned orders. On that basis, they asserted that the court's earlier orders were *ultra vires*, erroneous on the face of the record, and ought to be reviewed and set aside.

The application was supported by an affidavit sworn by Muhuyu Mwaniki, counsel for the Appellant, who deponed that the main and only ground upon which the court granted the orders of 24th May 2022 was the existence of a pending matter between the

parties in *Malindi ELC Case No. 48 of 2021,* which constituted an apparent mistake and error on the face of the record. In particular, he deponed that a pending suit between the parties is not a ground

provided for under ***Section 35(2)*** of the ***Arbitration Act*** for setting aside an arbitral award. He further stated that an order staying arbitral proceedings pending hearing and determination of an Environment and Land Court suit or any other suit is not a relief contemplated or provided for under the Arbitration Act.

It was further deponed that ***Section 10*** of the ***Arbitration Act*** expressly limits court intervention in arbitral matters to only those instances expressly provided for under the Act, and that the orders issued by the court were *ultra vires* the jurisdiction of the court as circumscribed by the Arbitration Act. The deponent further stated that *Malindi ELC Case No. 48 of 2021*, which formed the basis of the impugned orders, was merely a nominal suit filed under ***Section 7*** of the ***Arbitration Act*** for preservation and interim protective orders pending arbitration, and not a substantive suit capable of justifying the setting aside of an arbitral award or the stay of arbitral proceedings; that the foregoing reasons constituted sufficient grounds to warrant a review of the court's orders, emphasizing that the alleged errors were plain, self-evident on the face of the record, and related directly to the applicable law under ***Sections 10*** and ***35*** of the

Arbitration Act; that the application for review had been brought without unreasonable delay, and that no prejudice would be suffered by the Respondent

were the application to be allowed, since no final arbitral award could be published while the arbitration proceedings remained stayed.

If anything, it was deponed, the Appellant stood to suffer great prejudice and delay because the arbitration proceedings had substantially progressed as the Appellant had already testified and closed his case; that the Respondent's case was awaiting hearing on 9th June 2022, a date taken by consent of the parties; and that, unless the application was urgently heard and interim relief granted, there was a real likelihood of miscarriage of justice and irreparable prejudice, as the continued stay of the arbitration proceedings would leave the dispute in limbo. He concluded by deponing that the application had been made promptly, was in the interests of justice, and that it ought to be allowed.

Upon considering the application for review, in a Ruling dated 22nd September 2022, the High Court identified the sole issue for determination as whether there existed an error apparent on the face of the record to justify review of the ruling delivered on 24th May 2022 under ***Order 45 Rule 1*** of the ***Civil***

Procedure Rules. Addressing the contention that the ruling of 24th May 2022 was erroneous because it relied on the existence of a pending Environment and Land Court suit, the learned Judge found that the argument essentially challenged the court's interpretation and application of ***Sections 10*** and ***35*** of the ***Arbitration Act***,

which allegation amounted to a misapplication or erroneous exposition of the law, and constituted a proper ground of appeal, but not a basis for review; and that the alleged errors identified by the Appellant were not plain or obvious, but required detailed legal reasoning that took the matter outside the narrow confines of review jurisdiction. The learned Judge also rejected the suggestion that the court had acted *ultra vires* or without jurisdiction in the earlier ruling; and that, once it had exercised its judicial discretion and rendered a decision, it could not revisit the merits of that decision under the guise of review.

On the prayer for stay of execution, the court observed that the Appellant had not substantively addressed or prosecuted that prayer in submissions. The court therefore treated it as abandoned and declined to grant it. Consequently, the application dated 7th June 2022 was dismissed in its entirety.

Aggrieved with the ruling, the Appellant filed an appeal to this Court against the ruling on the grounds that: the High Court misdirected itself in arriving at an erroneous decision that there was no apparent error and mistake on the face of the record in the Ruling setting aside an arbitral award on grounds not provided

for in ***Section 35(2)*** of the ***Arbitration Act, 1995*** and in dismissing the Appellant's application for review; in finding that the Appellant's application for review of the High Court's ruling sought for an interpretation of the law and

did not demonstrate an apparent error and mistake on the face of the record; in failing to find that the reasons given for setting aside the Arbitral Award were *ultra vires* ***Sections 10*** and ***32(5)*** of the ***Arbitration Act***; in failing to find that the ruling of the High Court staying arbitration proceedings between the parties pending hearing and determination of a nominal suit in *Malindi ELC Case No. 48 of 2021* was *ultra vires* the jurisdiction of the Court and ***Section 10*** of the ***Arbitration Act;*** in finding that the Appellant had not placed sufficient material to justify review of the ruling; in disregarding the Appellant's submissions and affording more weight to the Respondent's pleadings and submissions; and in failing to find that the impugned decision was contrary to the Arbitration Act, and a wrongful exercise of discretion.

When the appeal came up for hearing on a virtual platform, learned counsel ***Mr. Litoro*** appeared for the Appellant while learned counsel ***Ms. Oloo,*** holding brief for Mr. Kilonzo, appeared for the Respondent.

In their written submissions, counsel for the Appellant submitted that the only ground relied upon by the High Court in

setting aside the interim arbitral award and staying the arbitration was the existence of a pending suit in *Malindi ELC Case No. 48 of 2021*, a ground which was neither pleaded nor provided for under ***Section 35(2)*** of the ***Arbitration Act;*** that, on this basis alone, this Court

was entitled to interfere with the trial court's decision. It was further submitted that the High Court ignored binding arbitration jurisprudence establishing that the Arbitration Act is a complete code, and that courts are prohibited from importing extraneous grounds into ***Section 35*** of the Act. Counsel relied on the case of ***Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] KECA 466 (KLR)***; and the Supreme Court decision in ***Nyutu Agrovet Limited vs Airtel Networks Kenya Limited & another [2019] KESC 11 (KLR)*** for the proposition that an appeal lies where the High Court sets aside an arbitral award outside the prescribed statutory grounds, thereby denying the parties justice.

It was further submitted that the learned Judge acted without jurisdiction in staying arbitral proceedings contrary to ***Section 10*** of the ***Arbitration Act*** and, in doing so, usurped both the jurisdiction of the arbitral tribunal and that of the Environment and Land Court. Counsel relied on the case of ***Phoenix of E.A. Assurance Company Ltd vs S.M. Thiga t/a Newspaper Service [2019] eKLR; Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd***

& 2 others [2012] eKLR; and ***I&M Bank Limited vs Gigi Treatment Industries Ltd & another [2024] KEHC 7065 (KLR)*** to underscore that jurisdiction is conferred by statute or the Constitution, and cannot be assumed or expanded by judicial discretion.

On the question of review, counsel submitted that the court was in error when it relied on a ground neither pleaded nor argued by the parties, which error was self-evident on the face of the record and did not require elaborate argument; that the High Court travelled beyond the pleadings and submissions of the parties contrary to settled law that courts are bound by the cases presented before them. Counsel concluded that the impugned Ruling and orders were a wrongful exercise of judicial discretion and a clear misdirection in law.

In their written submissions, counsel for the Respondent submitted that the appeal is devoid of merit and ought to be dismissed. It was contended that the High Court properly exercised its discretion in dismissing the Appellant's application for review; that the Appellant's grievances were, in substance, grounds of appeal rather than seeking review of the orders; that, having rendered a decision, the court was *functus officio* and therefore correctly declined to sit on appeal over its own decision. Counsel asserted that the principles governing appellate interference with a trial court's exercise of discretion are settled. Reliance was placed on the case of ***Mrao vs First American***

Bank of Kenya Ltd &

2 Others [2003] KLR for the proposition that interference with an exercise of

discretion is only justified where the trial court misdirected itself in law,

misapprehended the facts, took into account irrelevant considerations, failed to consider relevant matters, or where the decision is plainly wrong.

On the issue of review, counsel submitted that an error apparent on the face of the record must be plain, obvious, and self-evident, and must not require a long-drawn out process of reasoning. Reliance was placed on the case of ***Republic vs Advocates Disciplinary Tribunal ex parte Apollo Mboya [2019] eKLR*** for the proposition that a misinterpretation of the law is ordinarily a ground for appeal, not review; and the case of ***National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR*** for the proposition that review is only available to correct a self- evident error and not to re-examine a matter on which the court has already determined; and that, where a party alleges misapplication or misconstruction of the law, the proper remedy lies in an appeal. Finally, on the prayer for stay of execution, counsel submitted that the Appellant failed to meet the statutory threshold under ***Order 42 Rule 6*** of the ***Civil Procedure Rules,*** having neither demonstrated substantial loss nor offered security; and that,

therefore, the High Court was correct in dismissing the application in its entirety.

This is a first appeal from the decision of the High Court in its original jurisdiction. This Court's mandate as a first appellate court is as stipulated explicitly in ***Rule 31(1)*** of the ***Court of Appeal Rules,*** namely; to re-appraise, re-

evaluate and re-analyze the record, consider it in light of the rival submissions and draw its own conclusions thereon and give reasons either way. See ***Nation Media Group Limited & 2 others vs Gulf Energy Limited (Civil Appeal 503 of 2019) [2023] KECA 1268 (KLR).*** It is trite law that this Court will only depart from an exercise of discretion of the trial Judge if the decision reached was not based on evidence on record, or where the court is shown to have acted on the wrong principles of law, or where its discretion was exercised injudiciously. See ***Mbogo & Another vs Shah [1968] EA 93.***

Before determining the merits of the appeal, it is necessary for the Court to address the fate and legal effect of the consent allegedly entered into by the parties during case conferencing.

The Respondent contended that a consent existed between the parties, which constrained or affected the court's power to entertain or grant the relief sought and, on that basis, the Appellant was bound by the terms of the consent and was precluded from seeking a review of the impugned orders, or challenging the ruling of the High Court.

The Appellant, on the other hand, maintained that the alleged consent had no legal effect as it had neither been recorded nor adopted or endorsed as an order of the court; that a consent will only acquire binding force once it is

formally adopted by the court; and that, until such adoption, it remained a private arrangement between the parties incapable of limiting the court's jurisdiction or fettering its discretion. Consequently, the Appellant argued that the High Court could not rely on, nor be constrained by, an unadopted consent in determining the application before it.

The law on consents is settled. In the case of ***Non-Governmental Organizations Coordination Board vs EG & 5 others (Petition (Application) No. 16 of 2019) [2023] KESC 102 (KLR),*** the Supreme Court held that:

> ***"Adoption of a consent by a court was a process, in the course of which a court discharged the duty of evaluating the clarity of the consent placed before it by parties and giving directions on the manner of adoption… Thus, a consent by parties became an order of the court only when it had been formally adopted by the court. The consent had not been formally adopted by the court as an order and therefore served no useful purpose in the proceedings."***

Applying these principles to the present case, it is clear that the alleged consent, not having been recorded or adopted as an order of the court, had no binding legal effect. It could neither

fetter the Court’s jurisdiction nor preclude the Appellant from pursuing the application or the appeal before this Court. Any reliance placed on such an unadopted consent was therefore misplaced. Accordingly, the alleged consent served no juridical purpose in the proceedings

and does not bar this Court from fully determining the issues placed before it on their merits.

Guided by the foregoing principles, and having considered the grounds and Record of appeal, and the rival submissions by counsel, the main issue for determination is whether the High Court correctly exercised its discretion in holding that the Appellant had not demonstrated an error apparent on the face of the record so as to warrant review of the ruling and orders made on 24th May 2022.

Order 45 Rule 1(1) of the ***Civil Procedure Rules*** provides:

> "***Any person considering himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of***

judgment to the court which passed the decree or made the order without unreasonable delay.”

In effect, a court’s jurisdiction to review its own decision under ***Order 45 Rule 1*** of the ***Civil Procedure Rules*** will be allowed: i) where there is the discovery

of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge; or ii) could not be produced by him at the time when the decree was passed or the order made; or iii) on account of some mistake or error apparent on the face of the record; or iv) for any other sufficient reason.

In the case of ***Sanitam Services (E.A.) Limited vs Rentokil (K) Limited & another [2019] eKLR,*** this Court reiterated that:

> ***"Jurisdiction to review a judgment or order of a court is donated by Section 80 of the Civil Procedure Act and Order 45 Civil Procedure Rules… a person who fits within those categories may apply for a review of judgment… and this should be done without unreasonable delay."***

In the present matter, the Appellant's application for review was not generalized or speculative. It was anchored on a specific, narrow, and clearly articulated contention that, in the Ruling delivered on 24th May 2022, the High Court set aside an interim arbitral award and stayed arbitral proceedings solely on account of the existence of a pending suit before the Environment and Land Court. According to the Appellant, this ground was neither provided for under ***Section 35(2)*** of the ***Arbitration Act,*** nor

permissible in view of the express limitation imposed by ***Section 10*** of the same Act; that this constituted a patent jurisdictional error apparent on the face of the record going to the very

competence of the trial court to intervene in arbitral proceedings on grounds not sanctioned by statute. The argument was not that the Court reached a wrong conclusion after weighing competing interpretations, but rather that it exercised jurisdiction where none existed in law.

So, what constitutes an error apparent on the face of the record? In the case of ***Nyamogo and Nyamogo Advocates vs Kago*** ***[2001] 1 EA 173,*** this Court described the nature of an error on the face of the record thus:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively… Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out… Mere error or wrong view is certainly no ground for review although it may be for an appeal."***

Sir Dinshah Fardunj Mulla, in the textbook ***Mulla, The Code of Civil Procedure, 18th Edition*** at ***page 3665*** states:

> ***"An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record… A re-appraisal of the evidence on the record for finding out the***

error would amount to an exercise of appellate jurisdiction, which is not permissible by the statute."

In the case of ***Mary Wambui Njuguna vs. William Ole Nabala & 9 others* [2018] eKLR**, this Court emphasized:

> ***"When a court is sitting on review, it is not sitting on appeal of its own decision… the alleged errors must be apparent on the face of the record without inviting any interrogation or protracted arguments thereon."***

In the same vein, the Supreme Court of Uganda in the case of ***Edison Kanyabwera vs Pastori Tumwebaze, Supreme Court Civil Appeal No. 6 of 2004,***

held:

> ***"In order that an error may be a ground for review, it must be one apparent on the face of the record… an evident error which does not require any extraneous matter to show its incorrectness… The error may be one of fact but it is not limited to matters of fact and includes also error of law."***

The above cited authorities are clear that, an error apparent on the face of the record must be one that is plain, obvious, and self-evident, such that it can be discerned without engaging in elaborate reasoning, legal analysis, or competing interpretations of the law. Where establishing the alleged error requires a detailed examination of statutory provisions, an evaluation of the court's reasoning, or a determination of whether the court correctly applied the law to the facts, the matter properly lies on appeal and not review.

The Appellant’s application for review specified that -

“There is an apparent mistake and error on the face of the record in the said ruling and Orders of this Court given on 24/05/2022 in that:

(e) A pending suit in a Court involving the same parties is not a ground provided for or set out in section 35(2) of the Arbitration Act for setting aside an arbitral award.

(f) An order for stay of arbitration proceedings pending the hearing and determination of a suit in the Environment and Land Court or any suit is not a relief provided for or set out in the Arbitration Act.

(g) Section 10 of the Arbitration Act provides that this Court cannot intervene in matters under the Arbitration Act except as otherwise provided by the said Act; hence the above orders and the grounds thereof are not permitted interventions by the Court in arbitration matters.

(h) The orders are thus ultra vires the jurisdiction of the Court as set out in the Arbitration Act.

The said ELC Suit No. 48 of 2021 is a nominal suit for preservation orders pending the hearing and determination of arbitration proceedings under section 7 of the Arbitration Act and not a substantive suit."

It is clear from the above excerpts that the Applicant's contestation with the Ruling was that the learned Judge was wrong in setting aside an Interim Arbitral Award and staying arbitral proceedings on account of a pending suit before the Environment and Land Court, contrary to ***Sections 10*** and ***35(2)***

of the ***Arbitration Act***. The determination of whether such intervention was permissible requires a substantive legal analysis of when a court is mandated, under the Arbitration Act, to intervene in arbitral proceedings, and whether the orders issued fell within the court's statutory mandate. Such exercise would necessarily

involve keen interpretation and reasoning. It was not a matter that "*stared one in the face",* so to speak.

More particularly, it was observed by the Supreme Court of India in the case of ***Aribam Tuleshwar Sharma vs. Ariban Pishak Sharma [1979] 45CC 389, 1979(11) UJ 300 SC*** that:

> ***"The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."***

The fact that ***Section 35(2)*** of the ***Arbitration Act*** does not express a pending court suit as a ground for setting aside an arbitral award does not, of itself, render the court's decision an apparent error on the face of the record. At most, it raises an

arguable question as to whether the court misdirected itself in law or exceeded its jurisdiction. Such a question is quintessentially appellate in nature and ought therefore to have been resolved on appeal where the correctness of the court's reasoning can be fully interrogated, rather than in a review application.

In conclusion, the Appellant has failed to demonstrate the existence of an error apparent on the face of the record so as to warrant the exercise of the review jurisdiction under ***Order 45 Rule 1*** of the ***Civil Procedure Rules,*** having failed to meet the strict and narrow threshold required to invoke the court's review jurisdiction and, for this reason, we have no basis on which to interfere with the High Court's decision dated 24th May 2022.

In sum, the appeal lacks merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Mombasa this 11th day of May, 2026.

A. K. MURGOR

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..... JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

signed

I certify that this is the true copy of the original

G. W. NGENYE-MACHARIA ……. JUDGE OF APPEAL

DEPUTY REGISTRAR