



**Erad Supplies & General Contractors Limited v National Cereals and Produce Board & another
(Civil Appeal (Application) 9 of 2012) [2025] KECA 346 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KECA 346 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 9 OF 2012
DK MUSINGA, M NGUGI & GWN MACHARIA, JJA
FEBRUARY 28, 2025**

BETWEEN

ERAD SUPPLIES & GENERAL CONTRACTORS LIMITED APPLICANT

AND

NATIONAL CEREALS AND PRODUCE BOARD 1ST RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION ... 2ND RESPONDENT

(Being an application to strike out the record of appeal filed in Civil Appeal No.9 of 2012 dated 25th January 2012 arising from the ruling and order of the High Court at Nairobi (L. Njagi, J.) dated 28th June 2011 in Miscellaneous Civil Application No. 639 of 2009)

RULING

1. In the application dated 20th April 2015, the applicant, Erad Supplies & General Contractors Limited, seeks orders that the record of appeal by the respondent, the National Cereals and Produce Board filed in Civil Appeal No. 9 of 2012 dated 25th January 2012, be struck out and the appeal dismissed. The applicant further prays that the costs of the application and the appeal be awarded to it.
2. The application is brought under section 10 of the *Arbitration Act*, sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, and rule 42 of the Court of Appeal Rules, 2010 (now rule 44 of the 2022 Rules).
3. The application is supported by an affidavit sworn by Grace Sarapay Wakhungu on 23rd April 2015. It is based on grounds that the record of appeal and the appeal are incompetent as no appeal lies to this Court from a decision of the High Court made under section 35 of the *Arbitration Act*, and there was no agreement made between the parties to the contrary; that the maintenance of the appeal and all applications filed thereunder by the appellant or parties claiming under it is an abuse of the court process and a fraud upon the agreement made between the parties; and that it is proper that the record



of appeal be struck out and the appeal dismissed to prevent a further abuse of the court process by the appellant and or parties claiming under it.

4. In her affidavit in support of the application, Ms. Wakhungu, while reiterating the grounds set out in the application, goes into some details regarding the history of the matter, which we shall set out briefly later in this ruling.
5. The respondent opposes the application through a notice of preliminary objection dated 6th April 2019. In the six grounds of objection contained therein, the respondent argues that the purport of the application and the grounds thereon can only be heard in opposition to, and at the hearing of, the appeal since, under rule 84 (now rule 86) of the Rules of this Court, an application to strike out an appeal on the ground that no appeal lies, among other grounds, cannot be brought after the expiry of thirty days from the date of service of the notice or record of appeal; that the respondent's reliance on the decision in *Nyutu Agrovet Limited -vs- Airtel Networks Limited* [2015] eKLR (hereafter 'the Nyutu Agrovet case') is to demonstrate that no appeal lies and is therefore caught up by rule 84; that the decision in the Nyutu Agrovet case is the subject of appeal to the Supreme Court and was therefore not conclusive on the issue of jurisdiction until the Supreme Court renders a verdict thereon; that this Court may still depart from the said decision; that the applicant has raised the issue of this Court's jurisdiction before and the Court has previously ruled not only that it is properly seized of the matter but also that the ruling and order of the High Court the subject of the present appeal is appealable; and that the present application is therefore *res judicata*.
6. The factual background leading to the appeal and the present application as it emerges from the pleadings before us is fairly straightforward. The appellant and respondent had entered into a contract dated 26th August 2004 for the supply of 40,000 metric tonnes of maize by the applicant to the respondent. The maize was not supplied, the reason for the failure being disputed. The applicant contended that it was unable to supply the maize as the 1st respondent had failed to open a letter of credit in favour of the applicant, contrary to the contract between them. In accordance with the contract between the parties, the dispute was referred to a single arbitrator, with the applicant as the claimant and
7. Upon hearing the parties and considering the evidence, the sole arbitrator rendered his decision in favour of the applicant on 7th July 2009. In the award, the arbitrator found that the 1st respondent had breached the contract between the parties by failing to open a letter of credit in favour of the applicant, and he made an order for payment of damages to the applicant.
8. Aggrieved, the 1st respondent filed an application in the High Court under section 35 of the [Arbitration Act](#), seeking to set aside the arbitrator's award. The application was heard and dismissed in the ruling dated 28th June 2011, the subject of the appeal before this Court. Various applications seeking to stay execution were filed and dismissed, and the arbitrator's award was adopted as an order of the High Court on 17th February 2012. Thereafter, the applicant commenced the execution process, part of which involved garnishee proceedings in which some Kshs. 300 million was attached from the appellant's funds. Orders of stay of execution were, however, issued in favour of the 1st respondent, and it filed
9. At the hearing of the application on 29th January 2024, learned counsel, Mr. Saende, appeared with Mr. Elisha Ongoya and Mr. Kangogo for the applicant. Learned counsel, Mr. Katwa Kigen, appeared for the 1st respondent, while Mr. Murei appeared for the 2nd respondent, the Ethics and Anti- Corruption Commission (EACC).



10. In highlighting the applicant's submissions dated 30th January 2023, learned counsel, Mr. Saende, submitted that this Court lacks jurisdiction to entertain the appeal as the High Court, in determining the application to set aside the arbitral award which was brought under section 35 of the Arbitration Act, did not step outside the grounds set out in the said section; that any other intervention by this Court is expressly prohibited by section 10 of the Arbitration Act; and that by assuming jurisdiction in this matter, this Court will be infringing on the applicant's right to a fair hearing as set out in Articles 25 and 50 of the Constitution as well as Article 159(2) of the Constitution which seeks to promote resolution of disputes by way of arbitration.
11. The applicant cited the decisions in *Anne Mumbi Hinga v Victoria Nioki Gathara* [2009] eKLR; *Kenya Shell Ltd v. Kobil Petroleum Ltd* (2006) eKLR and *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR I with respect to the limitation of jurisdiction of this Court in arbitration matters, and the need to raise the question of jurisdiction and to have it determined at the earliest opportunity.
12. The applicant further cited the case of *Geochem Middle East v Kenya Bureau of Standards* [2020] eKLR in which the Supreme Court quoted its decision in *Nyutu Agroviet Limited v Airtel Networks Kenya Ltd. & Another SC Petition No. 12 of 2016* [2019] eKLR to submit that the Supreme Court had emphasised that an appeal against a High Court decision on an application under section 35 of the Arbitration Act would only lie when the High Court, in setting aside an arbitration award, has stepped outside the grounds set out in section 35, and thereby made a decision that was so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. Further, that this Court's narrow and circumscribed jurisdiction should also be sparingly exercised, and only in the clearest of cases. The applicant urged us to allow its application and strike out the appeal.
13. The 1st respondent's submissions were highlighted by learned counsel, Mr. Kigen. The 1st respondent indicated that it would, further, be relying on the additional evidence adduced by the 2nd respondent through an affidavit sworn by one Kipsang Sambai and the ruling of this Court dated 16th December 2022 which accepted the additional evidence.
14. The 1st respondent submitted that rule 84 of this Court's Rules requires that an application for striking out should be filed within 30 days' of either the filing of the notice or record of appeal; that the appeal in this case was filed on 27th of January 2012, while the present application was filed 39 months later on 23rd April 2015 as opposed to the one month allowed in the law. The applicant had not sought extension of time to bring the application, nor had it given any explanation for bringing the application 39 months later.
15. The 1st respondent further submitted that in an order of this Court made on 11th July 2014, the Court disallowed an application by the 1st respondent to adduce additional evidence; that in the body of the ruling, however, the Court made a determination that it has jurisdiction to entertain the appeal. Accordingly, in the 1st respondent's view, if an application for striking out the appeal was to lie, it could only be on appeal from the ruling of 11th July 2014, and no appeal had been filed against the said ruling. Its case, therefore, is that its appeal properly lies before this Court;
16. With respect to the applicant's arguments on the limits of this Court's jurisdiction on an appeal from the High Court resulting from a decision under section 35 of the Arbitration Act, it was submitted for the 1st respondent that an appeal should lie before this Court for determination because the documents upon which the arbitrator made the award were forged; that owing to that forgery, the Magistrate's Court made a conviction on 22nd June 2020, finding that those documents were indeed a forgery, and the judgment of the Magistrate's Court has not been set aside to-date.



17. Further, that the claim relates to a sum of Kshs. 560 million on the basis of breach of contract against the fact that no maize was delivered; and that the question that will be before the Court is whether tax payers' money amounting to Kshs. 560 million, which at the time of execution was as high as Kshs. one billion, should be paid out when no delivery was made, and where the claim was based on forged documents.
18. It was further submitted that the arbitral award was tainted by corruption; that an approach was made to the arbitrator, the 1st respondent's counsel, and to the 1st respondent's witnesses. Counsel cited the Supreme Court decision in Nyutu Agrovet to submit that the criteria to use in determining whether or not an appeal lies under section 35 of the Arbitration Act is whether there was unfairness or misconduct in the decision-making process; and that there was unfairness and misconduct in the process before the arbitrator due to the corruption. The 1st respondent noted that the applicant's case was based on the decision of this Court in Nyutu Agrovet, the reasoning in which had since been adjusted by the Supreme Court on appeal.
19. For the 2nd respondent, learned counsel, Mr. Murei, relied on the affidavit of Kipsang Sambai, attached to the 2nd respondent's (then interested party's) application dated 5th November 2014 seeking to adduce additional evidence, which was allowed by the Court on 16th December 2022, and submissions dated 31st January 2023 on the main appeal, in which, he submitted, the issue of jurisdiction is addressed. We observe that these submissions were not before the Court at the hearing hereof.
20. The 2nd respondent's case echoes, in material respects, that advanced for the 1st respondent: that the present application is incompetent in light of rule 86 of this Court's Rules; that the appeal had been filed in January or February 2012 while the application was filed over three years later; that the application, premised on this Court's decision in Nyutu Agrovet, had been overtaken by events in view of the Supreme Court decision on appeal in that case.
21. The 2nd respondent submitted that this Court would have to hear the appeal to determine whether there are sufficient reasons, as identified by the Supreme Court in its decision in the Nyutu Agrovet case, for it to assume jurisdiction; and that the Court will find that there are sufficient grounds to assume jurisdiction based on the unique facts of the case, particularly those contained in the additional evidence in the affidavit of Kipsang Sambai.
22. In submissions in reply, Mr. Saende argued that the application was not brought under rule 84 of this Court's Rules, but was premised on the issue of jurisdiction, which could be raised at any point in the proceedings; and when it arises, the Court has to stop and address it.
23. We have considered the application, the responses thereto and the submissions of the parties. This is an appeal that has been before the Court for thirteen years, and we have been asked to strike it out on an application filed ten years ago. As set out in the grounds on which the application is based and submitted by the respondents, the foundation of the application is the decision of this Court in the Nyutu Agrovet case dated 6th March 2015. The said decision, as submitted by the applicant, was to the effect that there was no right of appeal to this Court from a decision of the High Court exercising jurisdiction under section 35 of the Arbitration Act, unless the court had stepped outside the provisions of the said section in setting aside an award. This decision, as submitted by the respondents, had been varied and expounded upon on appeal by the Supreme Court.
24. It is to be noted, further, that in the period that this application was pending, this Court had considered and expressed itself on the question of its jurisdiction to hear the appeal.



25. We have considered and noted that in the ruling dated 11th June 2014 in which the Court declined to allow the 1st respondent to adduce additional evidence, it did address its mind to the question whether the 1st respondent's appeal was properly before it. As submitted by the 1st respondent and not disputed by the applicant, its response to this question was in the affirmative. This Court also, in the ruling dated 16th December 2022, admitted the 2nd respondent as a party to the appeal, and permitted it to adduce additional evidence in the appeal, which is now ready for hearing. It seems to us that the boat for striking out the appeal has long sailed.
26. If, however, there was any doubt on this point, the provisions of rule 86 of the 2022 Rules of this Court (rule 84 of the 2010 Rules) would lay to rest such doubt. Rule 86 vests power in this Court to strike out a notice of appeal or an appeal on the ground that 'no appeal lies.' The proviso to the rule states that:
- Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be. (Emphasis added.)
27. It was argued for the applicant that its application was brought, not under rule 86 (or 84 of the 2010 Rules), but on the issue of jurisdiction. This argument, however, is not sustainable. Ultimately, an application for striking out an appeal before this Court must comply with rule 86. The present application, having been brought three years and three months after the appeal was filed, fails to meet the mandatory provisions of the then rule 84, now rule 86, of this Court's Rules.
28. We therefore find and hold that the application dated 20th April 2015 is without merit, and it is hereby dismissed.
29. Given the age of the appeal and the chequered history of the matter, we direct that the appeal be listed for hearing on priority basis, if not in the current term, in the new term of the Court.
30. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

