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)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E620 OF 2022

F SICHALE, F TUIYOTT & FA OCHIENG, JJA

FEBRUARY 28, 2025

BETWEEN

SMB BANK (KENYA) LIMITED ..... APPELLANT

AND

AFRASIA BANK LIMITED ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (W. A. Okwany J.) dated 21st July 2022 and the Decree issued on 12th August 2022 in Misc. Application No. E386 of 2021)

JUDGMENT

1. The events leading to this appeal are straightforward. On 18th March 2016, Afrasia Bank Limited (Afrasia Bank) deposited the sum of US Dollars 7,500,000 with Chase Bank Kenya Limited (Chase Bank) at an interest rate of 2.35% per annum for a period of one month, so to mature and be payable on 18th April 2016. Hardly twenty days later, on 7th April 2016, Chase Bank was placed under receivership and its assets were subsequently acquired by SBM Bank (Kenya) Limited (SBM Bank or the appellant).

2. Prior to the acquisition, Afrasia Bank wrote a demand letter dated 20th April 2016 to Chase Bank (in receivership) and the receiver manager, in his letter of response dated 6th May 2016, confirmed the said liability and that they would re-invest the amount claimed for a period of nine months. About 2½ years later, on 6th February 2019, Afrasia commenced Civil proceedings being HCCC 103 of 2019 Afrasia Bank Limited vs SBM Bank (Kenya) Limited. In that suit Afrasia Bank sought payment of USD.7,500,000 together with interest earned between 18th March 2016 and 17th April 2016 of USD.9,791.67.

3. By way of a consent dated 6th July 2020 the parties, through their respective advocates agreed to refer the dispute to arbitration. The parties appointed Honourable Paul Mwaniki Gachoka (as he now is) as the sole arbitrator and by an award dated 23rd April 2021, the Arbitrator dismissed the claim by the respondent.

4. Aggrieved by the award, Afrasia Bank filed an application dated 21st May 2021 being High Court Miscellaneous Application No. E386 of 2021, Afrasia Bank Kenya Limited vs SBM Bank Kenya Limited, said to be brought under section 35(2)(a) (iv) and b(ii) as well as section 39(1)(b) and (2)(a) and (2)(b) of The *Arbitration Act* (the Act). Afrasia Bank asserts that it was exercising its right to appeal the award as provided by the Arbitration appeal and the ensuing High Court order adopting it.

5. In a judgment dated 21st July 2022, Hon. Lady Justice W. A. Okwany set aside the Arbitration award and entered judgment in favour of Afrasia Bank as sought in the original claim. In reaching that decision she made the following findings, highlighted in the submissions of SBM Bank before us;

> " a) The parties had agreed by consent for an appeal to the High Court on matters of fact and law.
>
> b. The Transfer of Business Act, the *Banking Act* and the *Kenya Deposit Insurance Act* are complimentary, and not inconsistent, as was determined by the Arbitrator within the Award.
>
> b. The Award was contrary to public policy because the Arbitrator did not give effect to Section 3 of the Transfer of Business Act, and accordingly the appellant was liable for all the liabilities of Chase Bank.
>
> b. It was not disputed that the assets and liabilities of Chase Bank were subsequently placed under receivership of the Kenya Deposit Insurance Corporation."

6. In the notice of motion dated 22nd September 2022 filed before this Court in Civil Application No. E327 of 2022, Afrasia Bank raised an objection as to jurisdiction of this Honourable Court to entertain this appeal. In the main, Afrasia Bank contended that we lack jurisdiction, first because section 35 of the Act does not provide a party, who is aggrieved by a decision of the High Court in exercise of the powers conferred by that provision, a right of appeal to the Court of Appeal. Second, SBM Bank has no right of appeal given that no leave was sought or obtained from this Court pursuant to section 39(3) of the Act.

7. In a ruling of 31st March 2023, the Court reserved the jurisdictional question to the hearing of the main appeal after reasoning:

> " 12. We take to mind the fact that the jurisdictional grounds on which the respondent's Motion is founded and the contention that the applicant's Motion and substantive appeal is res judicata are substantially the same as those advanced in opposition to the applicant's Motion. The jurisdictional challenge in the respondent's Motion is one of the main grounds advanced in the appeal. We hasten to observe that determination of the jurisdictional issue raised in the respondent's Motion would be tantamount to determination of the appeal in Civil Appeal No E620 of 2022 at an interlocutory stage. In effect, this Court would prematurely shut its doors on an appellant whose appeal raises substantial issues deserving of the Court's inquiry...."

8. Both sides acknowledge that determining these two jurisdictional questions are our first order of business.

9. SBM Bank contends that as evidenced from the consent, the parties agreed that an appeal shall lie prior to the commencement of the proceedings as provided for under section 39(3)(a) and relies on the Supreme Court decision in Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR and this court's decision in Memphis Limited v Kenya Ports Authority (Civil Application 39 of 2021) [2022] KECA 105 (KLR). SBM Bank argues that in any event, it cannot be gainsaid that the crux of the instant appeal is premised on the fact that the judgment of the High Court was without jurisdiction, as the learned judge purported to review both issues of facts and law arising from the Award dated 21st April 2021. Cited is the case of Kenya Oil Company Limited & Another v Kenya Pipeline Company [2014] eKLR.

10. Reacting to Afrasia Bank's argument that since section 10 of the Act provides that no court can intervene in matters governed by the Act, and section 39(5) provides that an award varied on appeal has the same effect as if it were the Tribunal's award, an appeal would thus be contrary to section 10, SBM Bank contends that the Act expressly provides that the right of appeal as conferred under section 39(3) applies notwithstanding the provisions of sections 10 and 35 and thus in the circumstances, no leave was required as the parties had agreed that an appeal shall lie prior to the commencement of the arbitration proceedings. That even so, the judgment was pursuant to section 35 and therefore an appeal would still be available to address any injustices as section 35 is no bar to an appeal as was found in the Supreme Court decision of Nyutu Agrovet Limited v Airtel Networks Kenya Limited & another [2019] eKLR.

11. In any event, SBM Bank asserts, it cannot be gainsaid that; it did not apply and obtain leave to appeal; and that the issue of jurisdiction does not lie in this case where the reference to arbitration was from the original suit and subject to the provisions of section 75(1)(c) of the *Civil Procedure Act*, as the Judgment and Order made by the High Court was modifying or correcting an award.

12. On whether the High Court had jurisdiction to hear and determine the miscellaneous application to set aside an award under section 35 and an appeal against the award under section 39, SBM Bank submits that the High Court did not have jurisdiction to entertain an appeal and/or an application to set aside on either legal or factual issues. That in addition, the said jurisdiction could not be conferred by the parties through the consent as the jurisdiction on reference to arbitration is required to be conferred by legislation and with respect to the suits filed in the High Court, the jurisdiction emanates from the *Civil Procedure Act*. SBM Bank further argues that instead of Afrasia Bank reverting to the original suit which had been stayed, it decided to prefer fresh proceedings under section 35(2)(a)(iv) and (b)(ii) as well as section 39(1)(b) and (2)(a) and (2)(b) of the *Arbitration Act* whereas an arbitration under the said Act can only be commenced by way of an arbitration agreement under the Act and not by reference from an existing suit. SBM Bank thus contends that an award made pursuant to a reference from a suit in the High Court can only be set aside under the provisions of Order 46 of the Civil Procedure Rules and not section 35 or an appeal under section 39 of the Act and thus parties could not by agreement confer jurisdiction on the High Court to proceed under the provisions of the Act where the correct jurisdiction has already been conferred by an Act of Parliament, being the *Civil Procedure Act*. To buttress this, SBM Bank cites the case of Phoenix of E.A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service [2019] eKLR where the court supported the position that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists.

13. On whether the learned judge had jurisdiction to review both matters of fact and law, SBM Bank submits that the findings of the learned judge in the judgment were indeed substantially predicated on her findings of facts when such an appeal by dint of section 39(1) of the Act could only be limited to matters of law and even the parties could not by consent confer jurisdiction on the High Court by extending the right of appeal to matters of fact. SBM Bank further argues that the courts have expressed

displeasure in parties invoking different jurisdictions of the Court in an omnibus application and have held that such applications are incurably defective and ripe for striking out (Feisal Mohamed Ali Alias Feisal Shahbal v Republic [2015] eKLR). That therefore the jurisdiction of the court under sections 35 and 39 of the Act are exercisable independently and the intervention under section 35 is permitted under statute whereas that under section 39 is by consent of the parties and only in relation to questions of law.

14. In response, Afrasia Bank submits that it is not in dispute that pursuant to the Arbitration Agreement dated 6th July, 2020 recorded by way of consent order in the High Court on 6th July, 2020, the dispute was referred to arbitration and the court in acknowledging the reference to arbitration as final, issued an order that the file before it under Commercial Suit No. 103 of 2019 be closed and any recourse following conclusion of the Arbitration proceedings would lie to the High Court or the Court of Appeal as the case may be. That in addition, the consent order reserved the right of either party to appeal to the High Court on a question of law and/or fact but did not reserve the right for any party to appeal to this court. Afrasia Bank argues that the judgment which SBM Bank now seeks to set aside, arises from arbitration proceedings in line with section 39(5) which treats an arbitration award that has been varied on appeal as having the effect as if it were the award of the Tribunal. Afrasia Bank further contends that the court having closed the file in finality given the reference to arbitration, the doctrine of lex specialis derogate legi generali applies which connotes that the law governing specific subject matter overrides a law which only governs general matters. Cited is the case of Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR and Nancy Nyamira v Archer Dramond Morgan Limited [2012] eKLR which held that the primary legislation in arbitration proceedings is the *Arbitration Act*. Afrasia Bank further submits that the consent order adopted by the court was to the effect that either party could appeal to the High Court on a point of law and/or fact and none of the parties applied to set aside the said order which still remains binding on the parties.

15. Afrasia Bank further posits that the application filed by it before the High Court was brought under grounds raised in respect to sections 35 and 39 of the *Arbitration Act* thus the court was rightfully clothed with the jurisdiction to determine the application and in any event, courts abhor technicalities in the dispensation of justice as this Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR emphasized.

16. This is a second appeal in which our remit is to review matters of law only.

17. Borne out by the proceedings before the High Court in which the dispute commenced, those before the Arbitration Tribunal and those in the setting aside Summons, the parties treated the agreement, subsequently adopted as a consent of court on 6th July 2020, as an arbitral agreement in the meaning of section 3(1) expounded by section 4 of the *Arbitration Act*. Section 3(1) reads:

> "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not"

18. While section 4 on the form of an arbitration agreement reads:

> "4. Form of arbitration agreement
>
> 1. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> 2. An arbitration agreement shall be in writing.

3. An arbitration agreement is in writing if it is contained in—

   a. a document signed by the parties;

   b. an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

   c. an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

4. The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

19. The jurisdiction issue is therefore addressed and determined within the ambit of the provisions of the *Arbitration Act*.

20. In bringing the setting aside proceedings, Afrasia Bank invoked the provisions of section 35 as well as section 39 of the *Arbitration Act*. Never mind the argument by SBM Bank that it is impermissible to bring an omnibus application that combines section 35 and section 39 jurisdictions. What is clear to us is that the impugned judgment determined the application on arguments founded on either both or at least one of the jurisdictions.

21. Let us start with the presumption that the trial court's findings were made wholly or partially under consideration of section 35. On the jurisprudence in Nyutu and Synergy there is no right of appeal to this Court from such a decision, save in exceptional circumstances where it is demonstrated that the High Court has stepped outside the grounds set out in the said decision and thereby made a decision so grave, so manifestly wrong, and which has completely closed the door of justice to either of the parties. It is expected that such unusual circumstances will be few and far between. Nyutu and Synergy lay down the rule that this Court's limited and circumscribed jurisdiction to hear and entertain a section 35 appeal is only triggered once leave is sought and granted to an aggrieved party. The forum before which leave ought to be sought and granted is a matter we are invited to determine by the parties here.

22. It is common ground that other than the leave sought orally before the trial court on 21st July, 2022, and granted peremptorily, no other leave has been sought and granted to SMB Bank for the bringing of an appeal under section 35.

23. In the scheme of Nyutu and Synergy a court ought to interrogate the substance of the intended appeal to see whether it deserves to be admitted into the limited and circumscribed jurisdiction. This is made clear in a later decision of the apex court in Geo Chem Middle East v Kenya Bureau of Standards (Petition 47 of 2019) [2020] KESC 1 (KLR) (18 December 2020) (Judgment);

   51. The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the *Arbitration Act* and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or refusing to grant leave to appeal in such matters. After our pronouncements in Nyutu

and Synergy, it is not possible that the Court of Appeal can grant leave to appeal from a Section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.

52. In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court."

24. The grant of such leave should not be casual or in the words of the Supreme Court, "general". Neither should it be automatic or peremptory. It is serious business in which the Court must satisfy itself that the impugned decision strays outside the considerations set out in section 35 as to make it hardly recognizable as a section 35 matter and is thus so grave an error, so manifestly wrong and which completely closes the door of justice to either of the parties. The Court must assure itself that it is one of those rare occasions that it must allow a dispute to persist beyond the finality otherwise contemplated by the provisions by Section 35.

25. We have no doubt that the peremptory leave granted, upon an oral application, without a rendition of reasons by the trial court hopelessly falls short of the test set by Nyutu and Synergy. Yet that is not the most serious handicap.

26. On the reading of Nyutu, the forum to seek the leave is before the Court of Appeal. This was reiterated by the Supreme Court in Kampala International University v Housing Finance Company Limited (Petition 34 (E035) of 2022) [2024] KESC 11 (KLR) (12 April 2024) (Judgment).

"57. The question as to whether an appeal lies as of right to the Court of Appeal against a decision of the High Court decision under section 35 of the *Arbitration Act* was settled with finality by this court in the Nyutu Agrovet case (supra). The court stated;

> 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."

58. The court went on to state that leave would have to be sought from and granted by the Court of Appeal before an intending appellant files the appeal."

27. This Court (M'Inoti, Tuiyott & Ochieng, JJ.A) had occasion to weigh in on the matter in County Government of Kitui v Power Pump Technical Company Limited [2024] KECA 1501 (KLR) where it observed:

> " The terminology of leave to appeal instead of admission of an appeal accords well with the Rules of this Court. Rule 41 provides for two types of leave to appeal. One, which is granted by a superior court below, and one which is granted only by this Court. The limited and circumscribed jurisdiction recognised in Nyutu and Synergy would fall within the second category, namely appeals which lie to this Court only with leave of this Court. In short, we are persuaded that an application like the one before us ought to be framed as an application for leave to appeal under the limited and circumscribed jurisdiction, rather than an application for admission of the appeal."

28. And it should not be surprising 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. There, 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.

29. It is therefore beyond peradventure that the leave granted by the High Court is a nullity.

30. That leaves us in a position where no leave has been sought to bring an appeal before this Court on matters touching on the section 35 application.

31. Section 39 of the *Arbitration Act* reads;

> " 39. Questions of law arising in domestic arbitration
>
> 1. Where in the case of a domestic arbitration, the parties have agreed that—
>
> a. an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
>
> b. an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.
>
> 2. On an application or appeal being made to it under subsection (1) the High Court shall—
>
> a. determine the question of law arising;
>
> b. confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

3. Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—

   a. if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or

   b. the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).

4. An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.

5. When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned."

32. In the arbitral agreement the parties reserved for themselves a right to challenge the award on matters of law or of fact. For now, we are not concerned about the controversy whether, because of the wording of section 39 which only provides for an appeal in matters of law, an appeal on matters of fact is legally feasible under those provisions.

33. The position taken by SBM Bank is that leave to appeal the section 39 application to this Court was not necessary because the parties had, prior to the commencement of the arbitral proceedings, agreed that leave shall lie. We were asked to read the two decisions cited to us by SBM Bank namely, Synergy and Memphis Limited as reiterating that position.

34. The response by Afrasia Bank is simply that as the agreement was to grant the parties a right of appeal to the High Court, statute required SBM Bank to seek and obtain leave to appeal further to the Court of Appeal.

35. Let us breakdown the provisions of section 39 touching on appeals. Under sub-section (1)(b), an appeal by any party may be made to the High Court on any question of law arising out of the award only where parties have agreed. Regarding a further, and therefore a second appeal, to the Court of Appeal, sub-section 3 provides, without unequivocation, that the same will lie if parties have agreed to it prior to delivery of the arbitral award or upon leave being granted by this Court after satisfying itself that a point of law of general importance is involved, the determination of which will substantially affect the right of one or more of the parties.

36. To be emphasised, and this resolves the contestation, is that the agreement to appeal referred to in sub-section 3(a) is an agreement by parties that an appeal shall lie to the Court of Appeal against the decision to the High Court. Simply put, an agreement to appeal to the High Court is not an automatic right to prefer a second appeal to this Court. An agreement that parties have a right to appeal to the High Court on any question of law is not a right to a further appeal to the Court of Appeal. The right to a second appeal to this Court must be expressly reserved by the agreement of the parties.

37. The design of section 39 in respect to appeals accords with the principle of finality in arbitration. When parties submit a dispute to arbitration then, the expectation is that the decision rendered by the arbitration tribunal will be binding and conclusive, subject only to limited grounds of challenge specifically set out in the *Arbitration Act*. This ensures a definitive and final conclusion to a dispute. Where, however, the parties elect, through the mechanism of section 39, that they can challenge the award on questions of law by way of an appeal before the courts then the extent of challenge must be well defined to safeguard the arbitration from becoming open ended and losing the flavour of finality. This must be the reason why a right to a second appeal to this Court, which invariably postpones the definitive conclusion of a dispute, must be expressly agreed upon by the parties just as they agree upon the right to a first appeal to the High Court.

38. And we do not read the decision in Synergy and Memphis Limited saying anything to the contrary. Take for example Memphis Limited. This Court after discussing how section 39 of the Act becomes operative, it observes, in respect of second appeal to this Court, thus;

> " Once the High Court has made a determination on such application or appeal, an appeal to this Court can only lie "if the parties have so agreed" prior to the delivery of the arbitral award, or this Court gives leave in accordance with Section 39(3)(b) of the Act. As this Court stated in Kenyatta International Conference Centre vs. Greenstar Systems Limited, C.A. No. 262 of 2018 [2019] eKLR, Section 39(3)(a) of the Act is not applicable where "there was no agreement by the parties on the right of appeal...".

39. Indeed, the decision supports the proposition that the jurisdiction of this Court is triggered by an agreement by the parties to the second appeal to this Court or leave granted by the Court in accordance with Section 39(3)(b).

40. So, again, we must decline the invitation to entertain an appeal from the decision of the High Court on a section 39 application for want of an agreement or leave.

41. SBM Bank has placed insurmountable hurdles on its path and this marks the end of the road for this matter, at least for now. We observe however that the substance of the appeal is far from idle and invites an answer to the critical question whether the provisions of the Transfer of Business Act apply to the disposal and transfer of assets and liabilities from a Bank in receivership to another Bank conducted or implemented pursuant to the provisions of the Kenya Deposit Insurance Corporation (KDIC) Act.

42. While we have our thoughts on the controversy and would have been happy to render them, we do not know which path this matter will take after our decision declining to entertain this appeal on account of want of jurisdiction and we must therefore be careful not to say anything on the merit of the appeal lest it becomes a source of pain and embarrassment on further proceedings that may ensue.

43. Ultimately we strike out this appeal with costs to the respondent.

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

F. SICHALE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.