Monarch Insurance Company Limited v Issak & another (Civil Appeal E025 of 2024) [2025] KECA 840 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 840 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E025 OF 2024

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

THE MONARCH INSURANCE COMPANY LIMITED ..... APPELLANT

AND

ABDIRAHMAN NURROW ISSAK ..... 1ST RESPONDENT

HASSAN M IBRAHIM ..... 2ND RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nakuru (T. Matheka, J.) delivered on 12th October 2022 in HCCC No. 388 of 2012 Consolidated with HC Misc. App. No. E216 of 2021)

JUDGMENT

1. *The Constitution* guarantees every citizen the right to a hearing.

   Concomitantly, it has a whole chapter establishing the institution of the Judiciary. While every citizen enjoys a constitutional right to be heard in a court of law, the same Constitution recognizes that parties may opt to pursue other alternative forms of dispute resolution mechanisms. In that regard, Article 159 (2) (c) of *the Constitution* urges courts to promote alternative modes of dispute resolution; arbitration included. When parties voluntarily adopt such a mechanism, they should always remember that the principle of non- interference by courts of law remains the guiding star.

2. It is common knowledge that arbitration is one such alternative form of dispute resolution mechanism intended to resolve disputes to their logical conclusion. It continues to be embedded the world over with the effect of avoiding litigation in court. This is what inspired the drafters of the provision of section 10 of the *Arbitration Act* which provides that unless provided by the statute, no court shall intervene in matters governed by the Act.

3. Central to the issue before us is an appeal from the decision of the High Court refusing to set aside an arbitral award. Evidently, the appellant has moved this Court at a second instance within the realms of the courts after the dispute was referred to arbitration. Against that background, this Court is called upon to determine firstly the competency of the appellant's appeal in light of the provisions of the *Arbitration Act* and secondly, whether the grounds espoused by the appellant warranted this Court to disturb the arbitral decision upheld by the High Court.

4. A background abridgment of the facts giving rise to this appeal as captured in the record before us are that the respondents are in the haulier business of transporting petroleum goods. They are the owners of motor vehicles registration numbers KBP 2X7M - Tanker ZD 6XX0 and KBP 3X8X – Tanker ZD 6XX8 respectively used for that purpose. In August 2011, the respondents took out comprehensive insurance policies for their motor vehicles. The policies, referenced 2011.080.010870 and 2011.080.010871, were intended to safeguard the vehicles from insurable risks including fire, theft and accidental damage.

5. During the pendency of the running policies, the two motor vehicles were involved in a fire incident in the region of South Sudan. They were at that time, parked at the customs department yard in Juba on course to transporting fuel. The respondents stated that prior to that exodus, they notified the appellant of their intention to transport fuel to that country. In the resulting circumstances, the appellant advised them to obtain a goods in transit licence from the Kenya Revenue Authority. Upon obliging, the appellant issued the respondents with a COMESA Yellow Card; an insurance policy covering the journey outside Kenya.

6. Following the fire incident, the respondents lodged a claim with the appellant seeking compensation for loss of their trucks, tankers and the fuel that had been transported on the strength of the subsisting comprehensive covers. The appellant however repudiated liability and declined to compensate the respondents on grounds that the insurance policies only covered incidences within the Kenyan geographical spectrum.

7. Aggrieved by the appellant's decision, the respondents jointly filed their plaint dated 5th October 2012 against the appellant in Nakuru HCCC No. 388 of 2012 on grounds that the appellant ought not to have repudiated liability as that amounted to a breach of the insurance policies that were in force. The respondents sought compensation for losses suffered as a result of the fire and resulting damages to their trucks and tankers. Upon receipt of the pleadings, the appellant successfully applied to have the matter referred to arbitration in pursuance of the arbitration agreements embedded in the policies.

8. The arbitral proceedings were heard by an arbitral tribunal comprising of Mr. Arthur K. Igeria, Advocate and Mr. Kisilah Daniel Gor, Advocate with Mr. Collins Namachanja, Advocate being appointed as the umpire. In the final award published on 30th July 2021, the arbitral tribunal found that the respondent's claim was with merit. Accordingly, compensation/indemnity for a sum of Kshs. 10,310,000.00 and Kshs. 10,690,000.00 were awarded to the 1st and 2nd respondents respectively as against the appellant. The appellant was further ordered to pay the costs of the arbitration. Furthermore, interest on the principal sums were awarded at court rates from 10th October 2012.

9. Aggrieved by those findings, the appellant lodged in the Nakuru High Court Miscellaneous Application No. 216 of 2021 seeking to set aside the arbitral award in line with section 35 (2) (b) (ii) of the *Arbitration Act*. Come 5th November 2021, the respondents in Nakuru HCCC No. 388 of 2012 sought to enforce the arbitral award and have it recognized by dint of section 36 of the

Arbitration Act. Parties filed their respective responses and rejoinders. On 24th March 2022, the learned judge (Matheka, J.) consolidated the two matters. She then considered both applications and determined on 12th October 2022 in part as follows:

"

> "61. The respondent takes the position that the arbitrators were supposed to sit with the umpire during the arbitration proceedings and that the umpire was to preside over their meetings. The respondent argues that nowhere in the document filed in court as the arbitral award did the umpire at any time sit with the arbitrators. However, a reading of that clause clearly demonstrates that the umpire's role would fall into place the moment the arbitrators were unable to agree. In this case there is no evidence that the two arbitrators were unable to agree. In fact the document filed as the award indicates a unanimous agreement. Hence the umpire's role was not called into action. This argument fails.
>
> 62. ....
>
> 63. While it is a fact that the arbitrators did cite these yellow cards in their decision, the other fact is that the effect of these cards was pleaded by the applicants and demonstrated in their affidavits. When parties appeared before the arbitrators, it was upon them to demonstrate why these cards were irrelevant. The Arbitrators found that from the totality of the evidence placed before them the respondents were aware of the risk they were covering and it was for risks outside Kenya, and that they were aware of the effect of issuing those cards. How then can they turn now and expect this court to overturn that finding of fact?
>
> 64. It is now settled that a court will not interfere with an arbitral decision in any manner that they amount to it taking an appellant position...
>
> 65. ....
>
> 66. It is the respondent's argument that the arbitrators went out of their reference when they made directions as to costs with respect to the HCC 388 of 2012. Looking at section 32B of the *Arbitration Act* it appears to me that the arbitrators were looking at the costs and expenses of an arbitration, being the legal and other expenses of the parties, which would be different from the fees and expenses of the arbitral tribunal. These would include other legal fees. I would be hesitant to say that they went outside their reference because the whole suit as filed was referred to arbitration...
>
> 68. ....
>
> 69. ....
>
> 70. Section 35 and 36 *Arbitration Act* bear almost the exact grounds for setting aside or for recognition and enforcement. Hence the success of one application means more or less that the other one becomes unsuccessful...
>
> 72. On this issue, I can say here that the analysis of the grounds for allowing the application for recognition an enforcement demonstrates that there are

insufficient grounds for setting aside. The only additional thing I can say here are with respect to the fees for filing the

arbitral award and the contention that the applicant ought to have filed the award in court before filing the application to set aside the award.

73. ....

74. ....

78. Having said that it is my view that I have demonstrated that the application to set aside fails on the grounds on which the application for recognition and enforcement stands..."

10. The appellant is dissatisfied with those findings. It filed its notice of appeal dated 24th January 2023. In its memorandum of appeal dated 21st February 2024, the appellant raised eight grounds disputing the findings of the learned judge. The appellant lamented that the learned judge erred in law and in fact for: - failing to consider the specific terms on the insurance policies and the COMESA Yellow Cards issued; not finding that the tribunal applied extraneous terms not captured in the insurance policies; failing to uphold that the policies did not extend to South Sudan where the loss had occurred and only covered third party risks; failing to find that the arbitral award was contrary to public policy as the arbitral tribunal sought to rewrite the contracts between the parties; failing to find that the award ought to have been set aside under section 35 (2) (b) (ii) of the *Arbitration Act* and refusing to recognize the award under section 37 (1) (b) (ii) of the Act.

11. In view of the foregoing, the appellant prayed that the appeal be allowed by setting aside the decisions dated 12th October 2022 and the order issued on 30th November 2022 in HCCC No. 388 of 2012 consolidated with HC Misc. App. No. E216 of 2021. It further prayed that the final award dated 30th July 2021 be set aside. The appellant also prayed for costs.

12. During the hearing of the appeal on 12th February 2025, both parties were ably represented. Learned counsel Dr. Nyaundi led learned counsel Miss. Bundi for the appellant while learned counsel Mr. Ogola was present for the respondent. Parties relied on their respective written submissions that were orally highlighted.

13. In its written submissions and list of authorities both dated 16th January 2025, the appellant submitted that by dint of clause 9 of the arbitration agreement, the umpire was required to sit with the arbitrators, preside at their meetings and make the award. Flowing from this, since the umpire did none of those, including the execution of the final award, the appellant submitted that the tribunal lacked jurisdiction. For those reasons, the arbitral award was invalid as it was contrary to section 35 (2) (a) (v) of the *Arbitration Act*.

14. Going into the substance of the appeal, the appellant submitted that the arbitral tribunal erroneously applied extraneous terms that were not covered in the insurance policies or the third-party COMESA Yellow Cards. It opined that for this reason, the award ought not to have been recognized and enforced on the strength of section 37 (1) (a) (iv) of the *Arbitration Act*. It pitted out the insurance policy only limited compensation to risks occurring in the Kenyan geographical arena. In addition, the COMESA Yellow Cards only covered third party risks. In any event, South Sudan was not a country under the COMESA umbrella. In light of this, the appellant submitted that the respondents were not entitled to compensation.

15. The appellant then submitted that the arbitral award ought to be set aside as it was contrary to public policy; in line with section 35 (2) (b) (ii) of the *Arbitration Act*, as it offended accepted conceptions

of justice. It accused the arbitral tribunal of rewriting the contracts between the parties when it found that it was liable to compensate the respondents.

16. Finally, on the award on costs and interest, the appellant lamented that in directing the costs of the arbitration to be taxed at the High Court of Kenya, if not agreeable between the parties, the arbitral tribunal was in breach of section 32B (1) of the *Arbitration Act*. It further argued that the award on interest did not fall within the terms of reference to arbitration and was therefore ordered against public policy.

17. When questioned by the bench on whether the appellant obtained leave to appeal before this Court, learned counsel for the appellant responded in the negative but implored this Court to inoculate the oxygen principles and find that the appeal was merited and accordingly be allowed.

18. The respondents filed their joint written submissions dated 26th July 2024. They also filed their case digest and list of authorities of even date. They further supplemented their submissions on 7th February 2025. In opposing the appeal, the respondents submitted that by dint of the law, the appellant's appeal had not furnished proper grounds to warrant the setting aside of the award as established in section 35 (2) of the *Arbitration Act*. A fortiori, the threshold had been met for recognition and enforcement of the award as set out in section 36 of the Act. Furthermore, they submitted that on the basis of the pronouncements of the Supreme Court, nothing had been demonstrated as to show that there were constitutional breaches in the findings of the learned judge as to warrant this Court to interfere with her findings. In any event, and crucially, the appellant failed to obtain leave to appeal to this Court.

19. Turning into the merits of the appeal, the respondents argued that the specific terms of the applicable insurance policies and the COMESA Yellow Cards were matters of fact determined by the arbitrators. Consequently, a court of law could not interfere with those findings of fact. They further submitted that the tribunal did not apply extraneous matters when interpreting the meaning and tenor of the insurance policies and the COMESA Yellow Cards.

20. On whether the award was contrary to public policy, the respondents submitted that the insurance policies provided avenues for relief upon the happening of a risk. In this case, the respondents suffered insurable risk and were entitled to compensation. They submitted that the learned judge properly upheld the findings of the arbitral tribunal as anything held contrary was inimical to the principles of natural justice. They urged this court to find that the award was not contrary to public policy.

21. The respondents submitted that the findings of the learned judge were proper and ought not to be disturbed. They emphasized that this Court was not clothed with the requisite jurisdiction to ventilate the appellant's appeal. For those reasons, they urged this Court to dismiss the appeal with costs.

22. This appeal seeks to set aside the decision of the High Court in refusing to set aside the arbitral award under section 35 of the *Arbitration Act*. Thus, before going into the merits or otherwise of the appeal, we must firstly establish whether we have the vested jurisdiction to hear and determine this appeal. Our quest to answer this pertinent question lies in the recent jurisprudence set out in our Apex Court. It has pronounced itself accordingly and settled the issue as to when this Court can sit on appeal against the decision of the High Court under section 35 of the *Arbitration Act* in the case of Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators- Kenya Branch [2019] KESC 11 (KLR). The Court ruminated itself as follows:

> "71. We have in that context found that the *Arbitration Act* and the UNCITRAL Model Law do not expressly bar further appeals to the court of Appeal. We take the further view that from our analysis of the law and, the dictates of *the Constitution* 2010, section 35 should be interpreted in a way that promotes its

purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under section 35 of the Act for Orders of setting aside of the award. And hence the purpose of section 35 is to ensure that courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.

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 and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no court intervention' principle.

73. The Interested Party has in the above context suggested various guiding principles which the court should take into consideration before granting leave to appeal. In that regard, they urge that limited appeals should be allowed with the leave of the court where:

    a. The determination of the question will substantially affect the rights of one or more of the parties;

    b. The question is one of general public importance or the decision of the High Court is at least open to serious doubt;

    c. A substantial miscarriage of justice may have occurred or may occur unless the appeal is heard; and

    d. The decision of the High Court on the question is manifestly wrong.

74. Whereas the above proposals are clearly progressive and well thought out, if adopted as they are, they may considerably broaden the scope of the exercise of the limited jurisdiction under consideration. 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. Thus, we do not think as suggested by the Interested Party that an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underling dynamics. To that extent we reject that proposal.

75. With regard to the first proposal, the issue of 'substantially affecting one or more of the parties', we think that it is not a proposal that should stand on its own. Generally, a court decision has the ultimate effect of affecting the parties and hence even though the 'substantial' element is important, it should be tied to something more-other than just 'affecting the parties'. In that context and going back to the submissions by the parties, we recall that the Interested Party had raised an important observation to the effect that arbitral awards are now being set aside because they allegedly do not comply with constitutional principles. As urged by the Interested Party, when that happens, the High Court becomes the first and final court of determining that issue. We are on our part persuaded by the argument that where an award is set aside on constitutional grounds, then that should be one of the exceptional grounds in which an appeal should be preferred against a decision made under section 35 because section 35 is clear as to the issues for which proof is required before setting aside of an arbitral award. That section provides in the relevant part ...

76. Reading each of the above provisions, alleged breaches of *the Constitution* cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of *the Constitution* are properly governed by articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the *Arbitration Act*.

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. The High Court and the court of Appeal particularly have that onerous yet simple task. A leave mechanism as suggested by Kimondo J. and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end. We would expect the Legislature to heed this warning within its mandate."

23. Gathered from the above binding authority, the jurisdiction of this Court to hear an appeal from the High Court arising from a decision under section 35 of the *Arbitration Act* is exceptionally limited and an appeal only lies in the clearest of cases. To rehash, this Court's jurisdiction is only injected when it is clearly and ably demonstrated that the High Court acted outside its mandate provided in section 35 and such action, or lack thereof, was so manifestly grave, as to occasion a miscarriage of justice. It

has to be so glaringly apparent that the High Court was wrong as to warrant an intervention by this Court to cure the unfairness.

24. It is further important to point out that in invoking the jurisdiction of this Court, leave must be sought and obtained to appeal against the decision of the High Court under section 35 of the *Arbitration Act*. So that a party must procure leave and demonstrate that the Court of Appeal's jurisdiction ought to be invoked. We restate that position in law by relying on the decision of the Supreme Court in Synergy Industrial Credit Limited vs. Cape Holdings Limited [2019] KESC 12 (KLR) that held:

> " Having analysed the law in the identified jurisdictions, we find that there is generally no express right of appeal against the decision of the High Court in setting aside or affirming an award. Leave to appeal would, however, only be granted in very limited circumstances. In that regard therefore, courts have held that leave to appeal may be granted where there is unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process. In addition, leave would be granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue, leave would also be granted. A higher court would also assume jurisdiction in order to bring clarity to the law where there are conflicting decisions on an issue. In all these instances, care must be taken not to delve into the merits of an arbitral award because that is not the purview of courts."

25. In this case, it is imperative to note that the appellant neither applied nor sought leave to appeal against the decision of the High Court. This was a grave omission on the part of the appellant and is not a technicality since it goes to the root of jurisdiction. We need not reiterate that jurisdiction is everything and without it a court cannot do anything and must down its tools. The court only assumes jurisdiction in such an appeal after the question of leave has been considered substantially and this cannot be done at this stage as the appellant invited us to do. At the risk of repetition, we retaliate that the question of leave is a jurisdictional one and the oxygen principle cannot save a party who fails to obtain such leave. A party seeking leave ought to file an application for leave, setting out the exceptional circumstances that warrant granting of leave to appeal. The court seized of the issue will consider all the facts and make a determination whether to grant or refuse the leave. (See Nyutu Agrovet Limited vs. Airtel Networks Kenya Ltd [2024] KECA 523 (KLR)).

26. Ultimately, we come to the inescapable conclusion that the appeal is incompetent. No leave to appeal was sought. This is not a technicality that can be succored by the provisions of *the Constitution* or the oxygen principles. The appeal is a non-starter and its incompetency is incurably defective. Having held so, it is not necessary to consider the merit or otherwise of the appeal.

27. It is for the above reasons that we do not hesitate to find that the present appeal herein lacks merit. It must suffer its fate. It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY 2025.

M. WARSAME

JUDGE OF APPEAL

J. MATIVO

JUDGE OF APPEAL

M. GACHOKA C.ARB, FCIARB.