Isaac's Investment Co Ltd v Archipoint Consulting Architects (Civil Application E797 of 2024) [2025] KECA 1117 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1117 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E797 OF 2024

W KARANJA, K M'INOTI & P NYAMWEYA, JJA

JUNE 20, 2025

BETWEEN

ISAAC'S INVESTMENT CO LTD ..... APPLICANT

AND

ARCHIPOINT CONSULTING ARCHITECTS ..... RESPONDENT

(Application for injunction pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Dr. F. Mugambi, J.) dated 20th September 2024 in HCCC No. 1017 of 2023)

RULING

1. The motion on notice before the Court is dated 24th October 2024 and is taken out by the applicant, Isaac's Investment Co. Ltd. In the application, the applicant seeks an order of injunction to restrain the respondent, Archipoint Consulting Architects, from executing an arbitral award for Kshs 14,633,937.25, pending appeal from the ruling of the High Court of Kenya at Nairobi (Dr. Mugambi, J.) dated 20th September 2024.

2. In the said ruling, the High Court dismissed the applicant's application for stay of execution and setting aside of an earlier order dated 5th February 2024 from the same Court, recognising and adopting an arbitral award as an order of the Court.

3. The background to the application is a dispute that goes back some 12 years to October 2013, when the parties herein submitted a dispute for resolution under the *Arbitration Act* (the Act) to a sole arbitrator, Mr. Haron G. Nyakundi. After a lengthy delay which the respondent attributes to the applicant's dilatoriness in filing its pleadings; non-attendance at scheduled meetings; failure to meet agreed timelines; change of advocates; preliminary objection; application for recusal of the arbitrator; non-payment of requisite moneys and fees; and an application to the High Court to stop the arbitrator

from rendering his award, the arbitrator ultimately rendered his award on 26th August 2019 for Kshs 14,633,937.25 in favour of the respondent.

4. The applicant did not apply within the prescribed time or at all to set aside the award as contemplated by section 35 of the Act.

5. Instead, on 15th June 2022, almost three years after the arbitrator had published the award, the applicant applied to the High Court for stay the arbitral proceedings and an injunction to restrain the arbitrator from publishing his award. Not surprising, that application was dismissed with costs vide a ruling dated 24th August 2023, as having been overtaken by events in that the arbitrator had already published the award.

6. On 30th November 2023 the respondent applied for adoption of the arbitral award as an order of the court. The application was served upon the applicant's counsel on record, who did not file any response to the application. On 5th February 2024, the High Court allowed the application for recognition of the arbitral award.

7. Three days later, on 8th February 2024, the applicant applied for stay of proceedings and the setting aside of the order recognising the arbitral award. The application was made on the basis that the application for recognition of the award was not served upon the applicant and that its advocates had no instructions to receive the same. The applicant also contended that it had filed a constitutional petition in the High Court and therefore the proceedings touching on enforcement of the award ought to be stayed.

8. By a ruling dated 20th September 2024, the High Court dismissed the application, after finding that, although it was good practice to serve a respondent with an application for adoption of an arbitral award, rule 6 of the Arbitration Rules did not mandatorily require such service; that in any event, the applicant was properly served with the application for adoption of the award; and that the applicant had not presented any grounds under section 37 of the Act to oppose adoption of the award.

9. The applicant was aggrieved and lodged an appeal to this Court, followed by the application now before us in which, as earlier stated, it seeks an order of injunction to restrain the respondent from executing the arbitral award, which has already been recognised as an order of the High Court. In support of the application, Mr. Kanjama, SC, for the applicant, relied on the supporting affidavit of Mr. Ali Isaac sworn on 24th October 2024, written submissions dated 17th January 2025 and authorities and supplementary authorities dated 7th and 28th January respectively.

10. Counsel submitted that the applicant filed a notice of appeal on 23rd September 2024 and that the appeal, which is already filed, is arguable and will be rendered nugatory if the Court does not grant the injunction sought. He delved into what constitutes an arguable appeal as explained in various decisions of these Court, among them *Stanley Kang'ethe Kinyanjui v. Tony Ketter* [2013] eKLR, and submitted that the grounds set out in the memorandum of appeal were arguable. Among those grounds were that the applicant was not properly served with the application for adoption of the award, was denied the right to be heard on the application for adoption of the award; and that the respondent was guilty of nondisclosure of material facts, to wit, the fact that the applicant had filed a constitutional application in the High Court.

11. As to whether the appeal would be rendered nugatory, counsel submitted that in the event of execution, the applicant stood to suffer substantial and irreversible loss which would not be adequately compensated by award of damages. It was contended that the sum in the award was substantial and if the respondent executed, the appeal would be a mere academic exercise.

12. The applicant also submitted that after the High Court dismissed its application to set aside the order adopting the arbitral award on 24th September 2024, the High Court granted it 30 days to appeal and that the applicant timeously filed the appeal on 9th October 2024. According to the applicant, the appeal is properly filed pursuant to the said leave.

13. The respondent opposed the application vide a notice of preliminary objection dated 31st October 2024 and a replying affidavit sworn by Mr. Alfred Mango on the same date. The substance of the preliminary objection is that by dint of sections 10 and 35 of the *Act*, intervention by courts in arbitration proceedings is circumscribed and limited; that further, by dint of sections 36 and 37 of the *Act*, the applicant does not have a right of appeal to this Court; that there was no agreement between the parties under section 39 of the *Act* conferring a right of appeal; and that, in the circumstances, this Court does not have jurisdiction to entertain the appeal and the application.

14. On the merits of the application, the respondent submitted that to the extent that the applicant did not apply to set aside the arbitral award under section 35 of the *Act*, there was no arguable appeal for consideration by the Court. It was contended that in arbitral proceedings, a right of appeal to this Court arises from a decision of the High Court made pursuant to section 35 of the *Act* and that the applicant has to apply to this Court for leave to appeal because this Court's jurisdiction in such instances, is limited and circumscribed.

15. The respondent relied on the decision of the Supreme Court in *Nyutu Agrovet Ltd. v. Airtel Networks Kenya Ltd.* [2019] eKLR and submitted that the Supreme Court concluded that section 10 of the *Arbitration Act* is not unconstitutional and therefore, the applicant's allegations that the arbitral proceedings violated its constitutional right to access justice is a settled issue, which is not arguable.

16. On whether the appeal will be rendered nugatory, the respondent submitted that an appeal which is not arguable cannot be rendered nugatory.

17. We have carefully considered this application. It is common ground that that the applicant is seeking an injunction under rule 5(2) (b) of the *rules* of this Court to restrain execution of a decree arising from arbitral proceedings. The respondent has raised a preliminary objection regarding this Court's jurisdiction to entertain the application and we are obligated to determine the objection first, and only delve into the merits of the application once we are satisfied that the Court has jurisdiction and that the objection has no merit.

18. It cannot be gainsaid that there is no automatic right of appeal to this Court from a decision of the High Court under section 35 of the Act (setting aside an arbitral award) and section 36 (recognition and enforcement of an arbitral award). Further, parties to an arbitration cannot invoke section 39 of the *Act* to appeal to this Court, unless they have, prior to the making of the arbitral award, recognised and agreed to such a right of appeal in the arbitral agreement. It is common ground in this application that, firstly, the applicant did not and still has not made any application to set aside the arbitral award under section 35 of the *Act*, and secondly, that the parties did not enter into any agreement to prefer an appeal to this Court under section 39 of the *Act*.

19. In *Nyutu Agrovet Ltd v. Airtel Networks Ltd.* [2019] eKLR (Nyutu) and *Synergy Industrial Credit Ltd v. Cape Holdings Ltd* [2019] eKLR (Synergy), the Supreme Court recognised a limited, circumscribed and exceptional jurisdiction vested in this Court to hear and determine appeals arising under section 35 of the *Act* where a manifest injustice has occurred. That jurisdiction is invoked in the clearest of cases

for purposes of averting a palpable injustice. In Nyutu, the Supreme Court addressed that exceptional jurisdiction as follows:

> "(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 & another v ALC & others* [201] SGCA 18] that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself...
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> (74) 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...
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> (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.
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> (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." (Emphasis added).

20. Subsequently in *Geochem Middle East v. Kenya Bureau of Standards* [2020] eKLR, the Supreme Court expounded on the circumscribed jurisdiction of this Court as follows:

> "...We must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of courts has been greatly diminished notwithstanding the narrow window created by sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary." (Emphasis added).

21. Whether or not an appeal to this Court falls within the parameters set by the Supreme Court in Nyutu and Synergy is determined by this Court and not by the High Court. The appellant must seek the leave of this Court and demonstrate that indeed the appeal satisfies the Nyutu and Synergy parameters.

In County Government of *Kitui v. Power Pump Technical Co. Ltd*. [2024] KECA 1501 (KLR), this Court held as follows:

> "The decisions of the Supreme Court are sufficiently clear that whether a particular case falls within the limited and circumscribed jurisdiction is to be decided by this Court. The Supreme Court expressly stated that it is for this Court to determine in limine whether the threshold for admitting the appeal has been met and if the appeal ought to be heard at all...Indeed, when the Supreme Court determined Nyutu and Synergy, it remitted the matters back to this Court to determine whether the two appeals satisfied the limited and circumscribed jurisdiction...If that be the case, the question of the High Court granting leave to a party to invoke the limited and circumscribed jurisdiction of this Court as identified by the Supreme Court, does not arise." (Emphasis added.)

22. From the above pronouncements, it is obvious that the application before us suffers from some fundamental flaws. The first is that the applicant has not obtained any leave to invoke the *Nyutu* and *Synergy* jurisdiction. In its submissions, the applicant claims to have obtained from the High Court leave to appeal. That assertion is seriously contested by the respondent in its replying affidavit.

23. We have looked at the record and find that the assertion that the applicant obtained leave from the High Court is only made in its submissions. In the application and the supporting affidavit, the applicant only claims that it obtained a 30-day stay of execution from the High Court. For reason best known to itself, the applicant has not included in its Record of Appeal certified copies of the proceedings as is required or as would be expected for purposes of settling the question whether or not the applicant applied for and obtained leave from the High Court.

24. But even if the applicant applied and obtained such leave from the High Court, that would not make any difference because, as held in *County Government of Kitui v. Power Pump Technical Co. Ltd.* (*supra*), that leave must be obtained from this Court and not from the High Court. Indeed, that was also clarified by the Supreme Court in *Geochem Middle East v. Kenya Bureau of Standards* (*supra*) where it was held that:

> " 51. ...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..."

25. In *Kampala International University v. Housing Finance Co. Ltd.* [2024] KESC 11 (KLR), the Supreme Court reiterated that an intended appellant challenging a decision of the High Court under section 35 of the Act must first seek and obtain leave from this Court before filing the appeal.

26. If it is accepted, as it must, that to come on appeal to this Court in the circumstances of the present application the applicant must first obtain leave of the Court, and that the applicant has not sought, let alone obtained such leave, we cannot see how this Court can grant a relief under rule 5(2) (b) to protect an appeal which the applicant's has no standing or right to bring before the Court. In our view, this application is utterly misconceived.

27. The second fatal flaw is that the applicant did not apply in the High Court to set aside the arbitral award. In *Vio Tech Ltd v. Upperhill Chambers & Another* [2024] KECA 1496 (KLR), one of the issues in the application was whether a party who had not challenged an arbitral award under section 35 could

seek leave in this Court to appeal under the Nyutu and Synergy jurisdiction. In answer the question in the negative, the Court held thus:

> "...in the circumstances of the application before us, the applicant did not challenge or apply to set aside the arbitral award under section 35 of the *Arbitration Act*. We accordingly agree with the respondents that having not made any application under section 35 of the *Arbitration Act* to set aside the arbitral award, the applicant cannot invoke the limited and circumscribed jurisdiction recognised by the Supreme Court in Nyutu and Synergy."

28. In *Kampala International University v. Housing Finance Co. Ltd* (supra), the Supreme Court once again, reiterated that the only instance when an appeal could lie from the High Court to this Court on a determination made under section 35 of the *Act* was when the High Court, in setting aside an arbitral award had stepped outside the grounds set out in the 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. Without having applied to set aside the arbitral award, there is no decision of the High Court under section 35 of the Act, that can be appealed to this Court.

29. In urging the application the applicant made heavy weather of the fact that it has a pending constitutional petition in the High Court in which it is challenging the arbitral award. In Nyutu, the Supreme Court settled the question whether sections 10 and 35 of the *Act* were unconstitutional limitations of the right to access justice guaranteed by Articles 48, 50(1) and 164(3) of the *Constitution*. In rejecting the argument, the Court held:

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> (40) Nyutu has in the above context submitted that denial of a right to appeal fetters on the right to access justice. While we appreciate that unhindered access to courts is one of the key components of access to justice, we do not think that statutory limitations on appeals necessarily infringe on that right. Each case must be evaluated on its own circumstances. That is why even where a right of appeal exists, depending on the circumstances of the case, Courts may still exercise their discretion by refusing to assume jurisdiction...Nyutu's claim of denial of a right to access justice solely rests on its desire to prefer a further appeal which matter is the fulcrum of the present appeal. In the circumstances, we do not find a proper basis for finding that there is denial of access to justice and thus we reject the plea to declare Sections 10 and 35 of the *Arbitration Act* unconstitutional."

30. The point has been made over and over again in many of our judicial pronouncements that arbitration as a dispute resolution mechanism is recognised and underpinned by the *Constitution*; that the *Arbitration Act* and the Rules made thereunder are a complete and comprehensive code on the conduct of arbitral proceedings; that intervention by the courts in arbitral proceedings is strictly limited to the instances provided by Act; and we may add, that the courts will not entertain collateral attacks on arbitral proceedings under the guise of raising tenuous or frivolous constitutional questions, which have already been settled by the Supreme Court.

31. Taking into account the all the above flaws manifest in the applicant's application, we are satisfied that there is no proper application before the Court pursuant to which it can validly grant the reliefs and remedies sought by the applicant. This application has absolutely no merit and the same is hereby struck out with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.