



Oilfields Engineering & Supplies Ltd v Zakhem International Construction Ltd; Ecobank Kenya Ltd & 3 others (Interested Parties) (Civil Appeal (Application) E504 of 2024) [2025] KECA 1362 (KLR) (25 July 2025) (Ruling)

Neutral citation: [2025] KECA 1362 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E504 OF 2024
PO KIAGE, J MOHAMMED & WK KORIR, JJA
JULY 25, 2025**

BETWEEN

OILFIELDS ENGINEERING & SUPPLIES LTD APPLICANT

AND

ZAKHEM INTERNATIONAL CONSTRUCTION LTD RESPONDENT

AND

ECOBANK KENYA LTD INTERESTED PARTY

ECOBANK NIGERIA LTD INTERESTED PARTY

AZICORN KENYA LIMITED INTERESTED PARTY

LJA ASSOCIATES LLP INTERESTED PARTY

(An application under rule 86(a) & (b) of the Court of Appeal Rules 2022 to strike out the Notice of Appeal dated 3rd October 2024 in HCC Arb No. E042 of 2021 As Consolidated with HCC Arb No. E036 of 2021)

RULING

1. Before us for determination is a motion on notice dated 4th October 2024 by which the applicant, Oilfields Engineering and Supplies Ltd (“Oilfields”), makes one substantive prayer;

“That this court be pleased to issue an order to strike out the respondent’s Notice of Appeal dated 3rd October 2024 filed in HCARB No. E042 of 2021, Consolidated with 036 of 2021, Zakhem International Construction Limited v Oilfields Engineering and Supplies Limited & Others.”



2. The grounds on which that plea is founded appear on the face of the motion as follows;
 - “1. The court lacks jurisdiction to entertain appeals arising from interlocutory applications emanating from proceedings under section 35 and 36 of *Arbitration Act*, 1995.
 2. No leave has been sought to institute the appeal, which does not in any case, fall under the purview of section 39 of the *Arbitration Act*, 1995 to trigger this court’s jurisdiction.
 3. This court has circumscribed circumstances under which the right of appeal can be exercised.
 4. The appeal is inimical to pending proceedings before the High Court under section 35 and 36 of the *Arbitration Act*, 1996.
 5. It is against policy to entertain the notice of appeal.”
3. Those grounds are further amplified in the supporting affidavit of John Huba Waka, a director of Oilfields, that is stated as sworn on 4th October 2024. The main thrust of that affidavit, and which is central to what we must determine in the application before us, is that this Court lacks the requisite jurisdiction to entertain the appeal signified by the notice of appeal filed by Zakhem International Construction Limited (‘Zakhem’), dated 3rd October 2024.
4. That notice of appeal was provoked by the order of the High Court at Milimani Law Courts, made by P. J. Otieno, J., as follows;

“That on the basis that parties agree that the court of appeal issues orders of stay of proceedings by this court pending the submissions of a report by the DCI as ordered by this court, within 45 days; it also being that the court does not have the physical court file today and further that the DCI has written to court seeking clarification on the extent of investigations the court expects; the court discerns it appropriate that the following orders be made:-

 - a. Ms. Asli’s client shall visit the DCI offices within 72 hours from now, and record a statement on his allegations of what he was told by one Mr. Amina on the possible outcome of the case.
 - b. Let the DCI file a report in court establishing whether Mr. Amina and or Mr. Zakhem have done anything that compromises, perverts or defeats the fair and just determination of the dispute in this matter.
 - c. The matter is stood over to 11.10.2024 at 9.30 am for hearing of the pending applications. Such hearing shall proceed unless there shall have been a contrary order by a competent court.”
5. The deponent swears that he has been advised by his advocate that this Court lacks jurisdiction to entertain this appeal “emanating from proceedings anchored on sections 35 and 36 of the *Arbitration Act*” as leave has not been sought under section 39 of that Act. Moreover, the appeal is said to be against public policy as it seeks to delay the final resolution of the dispute, and undermines the efficiency and finality envisioned by the *Arbitration Act*. The interests of justice thus dictate that the notice of appeal be struck out for being incompetent, vexatious and an abuse of the court process.



6. By a replying affidavit sworn on 1st April 2025 by its director Ibrahim Zakhem, Zakhem opposes the motion as devoid of merit, stating that it is based on “a clear misinterpretation of section 39 of the *Arbitration Act*.” The deponent also asserts that the notice of appeal is not premised on sections 35, 36 and or 37 of the *Arbitration Act* and, therefore, the question of leave does not arise. He states at paragraph 6 as follows;

“6. . That the draft Memorandum of Appeal produced at page 22-25 raises questions of impartiality and the right to fair hearing especially the conduct of he learned judge in issuing of orders that overlap and contradict orders issued by this Court which are all issues hinged on the respondent’s constitutional right to fair hearing. This Court has jurisdiction as the appeal engages constitutional questions of fundamental import, appealable as of right under Article 164(3), and not subject to the leave constraints of section 39 which is misapplied by the applicant.”

7. He refers to a ruling of this Court dated 21st February 2025 in Civil Application No. E503 of 2024, between these same parties in which the court stated that “the order appealed from was not a determination of the section 35 and 36 [of the *Arbitration Act*] application, rather, it was an order within the undetermined proceedings.” The deponent avers that on 27th August 2024, the learned judge fixed the matter for hearing on 30th September 2024, and again on 11th October 2024, notwithstanding an extant order of stay of proceedings issued by this Court. It is the continued disregard to this Court’s orders by the learned Judge that necessitated the filing of the impugned notice of appeal on the basis which Zakhem sought and was granted a stay of proceedings pending appeal “so as to avert gross miscarriage of justice and preserve [its] right of appeal.”

8. It is further deposed to that the application that originates the challenged appeal was filed under Articles 10 (2) (b), 159 and 160 of *the Constitution*, and Rules 9 and 21 of the Judicial Service Code of Conduct and Ethics) Regulations, 2020, asserting Zakhem’s constitutional right to a fair hearing before an impartial tribunal, which are beyond and do not come from sections 35 and 36 of the *Arbitration Act*, hence the inapplicability of the leave requirement under section 39. Finally, he states that as the appeal is not raising questions of law arising out of an arbitral award, leave under section 39 is not required.

9. Ecobank Limited (‘Ecobank’) incorrectly named as the “1st Interested Party” whereas it should be a respondent, also opposed the application. In an affidavit expressed as sworn on 28th March 2025 by its Director Legal Services, one Caroline Mbenge, she swore at paragraphs 4 and 6 as follows;

“4. That I have considered the said application and now wish to state as follows:

- a. The same was not listed under section 36 of the *Arbitration Act*, 1995;
- b. The same was filed under the provisions of Articles 10(2)(b) and 160 of *the Constitution* 2010 and Rule 9 and 21 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 and other enabling provisions of the law.
- c. The disposal of the application does not in any way affect the pending applications seeking to set aside and/or enforce an arbitral award which have been filed by the appellant and the respondent herein.



...

6. That the decision does not by any stretch of imagination determine a section 35 or section 36 application which applications, I am advised, are still pending before the High Court a fact that was noted by this Court while allowing an application for stay of proceedings in Nairobi C.A Number NAI E503 OF 2024 (Zakhem International Construction Limited vs Oilfields Engineering and Supplies Limited & Others) wherein in granting an Order of stay of proceedings of Nairobi HCCOMM Number E042 of 2001 and E036 of 2024 the Court held:

‘...while it is true that the impugned order was made in proceedings under sections 35 and 36 of the *Arbitration Act*, the Order itself is not a determination of those proceedings. That is, the Order is not for setting aside the award or enforcing it. It is simply an order within the undetermined proceedings.’”

10. She concluded by urging that the appeal by Zakhem is properly founded, the application before us is without merit, and should be dismissed.
11. Those three parties filed written submissions which elucidated on the positions they took which they supported with various authorities cited. For Oilfields, the firm of Okubasu & Munene Advocates asserted that this Court has no jurisdiction to entertain the appeal, basing its argument on the policy of judicial non- intervention (save as expressly provided by law) that underlies the UNICITRAL Model Law an International Commercial Arbitration, domesticated by the *Arbitration Act*, 1995. They submitted that section 10 of the Act limits the jurisdiction of the courts in absolute terms for the instances stated, which is an acknowledgement of ‘party autonomy’ in matters arbitration. This has been given solid juridical pronouncement by the Supreme Court in various decisions including Nyutu Agrovet Limited Vs. Airtel Networks Ltd & Another [2019] KESC 11 (KLR) as Geotherm Middle East Vs. Kenya Bureau Of Standards Petition 47 of 2019; [2020] KE SC 1 KLR with the aim of maintaining arbitration’s expeditious and efficient handling of commercial disputes.
12. They went on to contend that the applications before the High Court “are anchored under 35 and 36 of the *Arbitration Act*” and that the said sections operate whether or not the High Court has made a final determination thereunder. Accordingly, they argue, any appeal therefrom must be with consent of all parties or with leave under section 39 of the *Arbitration Act*, which is a complete code. They cited in aid several cases including Okeno & Sons Building Contractors Vs. Bukura Agricultural College [2018] eKLR and Anne Mumbi Hinga Vs. Victoria Njoki Gathara [2009] KESA 466 (KLR) both being decisions of this Court on the necessity of such leave, absent which an appeal would be incompetent, as would be any notice of appeal as stated in Peter Nyaga Murake Vs. Joseph Mutunga Nairobi C.A. 86 of 2015.
13. For Zakhem, submissions were filed by Ahmednassir Advocates, LLP. They referred to this Court’s ruling of 21st February 2025 in Civil Application No. E503 of 2024 which stated that while it was true that the impugned order was made in the proceedings under sections 35 and 36 of the *Arbitration Act*, “the order itself is not one setting aside the award or enforcing it. It is simply an order within the undetermined proceedings.” They contend that section 39 of the *Arbitration Act* “applied exclusively to appeals on questions of law arising out of an arbitral award,” which is not the case herein. The section is, therefore, irrelevant to the issue before us, as is section 10 of the Act. Citing the Indian case of State Of Maharashtra & Another Vs. Rambas Construction Co. & Another (6) MHLJ 678 12



July 2006, they urged that the appealable order for purposes of appellate jurisdiction (and the leave that must precede it) is one that deals with the merits of an arbitral award, which is not applicable herein. They were emphatic that “the appeal before this Court does not concern the substantive validity or enforceability of the arbitral award, but rather the procedural integrity of the judicial process, specifically the impartiality of the judge adjudicating the enforcement challenge,” anchored on the breach of Zakhem’s rights to fair trial before an impartial tribunal under Article 50(1) of *the Constitution*.

14. They next sought to distinguish the Anne Mumbi Hinga case (*supra*) on the basis that there, unlike here, the High Court had heard and determined an application under section 36 of the *Arbitration Act* enforcement of an arbitral award. The context of this Court’s pronouncements therein was, therefore, different from the present case. The decision of this Court in EPCO Builders Ltd Vs. Adam S. Marjan Arbitrator & Another Civil Appeal No. 248 of 2005 was cited as an example where an appeal was allowed for constitutional breaches, such as unfair process, which justify intervention beyond the *Arbitration Act*. The English case of ZCCM Investments Holdings PLC [2019] FWHC 1285 was referred to for the holding that the order sought to be appealed from was not an award under section 68 of the Act (*pari materia* with our section 39) and leave was not required to initiate an appeal.
15. Ecobank’s submissions, filed by Majanja Luseno & Co. Advocates, assert that there are two pending applications filed under sections 35 and 36 of the *Arbitration Act* one seeking recognition of, and the other seeking to set aside, the arbitral award. The intended appeal, however, arises out of proceedings, not under those sections of the Act, but rather out of an application for recusal of the learned Judge for alleged bias and lack of impartiality. Such application is governed, not by the *Arbitration Act*, but by Article 50 of *the Constitution* that enshrines the right to fair hearing. To them, an appeal based on *the Constitution* for the protection of constitutional rights does not require prior leave and the Supreme Court in the Nyutu case (*supra*) did recognize that this Court has jurisdiction to inquire into any unfairness of misconduct in the High Court’s decision-making process. A Judges’ orders should not be immune from appellate review where there are allegations of bias and want of impartiality. They were emphatic that section 39 of the *Arbitration Act* requires leave to appeal only on matters of law arising out of the arbitral award, which the present intended appeal is not concerned with.
16. At the hearing of the application those respective submissions were highlighted orally by learned counsel Dr. Okubasu who appeared with Mr. Odero and were led by Prof. Ojienda, SC for Oilfields; Ms. Asli for Zakhem; and Mr. Mwangi for Ecobank. As their addresses along the lines we have already captured, we shall not rehash them. Mr. Kinyanjui, learned counsel for Azicon Kenya Limited and LJA Associates LLP named, again incorrectly, as “3rd and 4th Interested Parties,” did not make any submissions, and informed us that his clients were neutral in the matter of the striking out application.
1. Having given full and careful consideration to the motion, the affidavits in support and opposition thereto, as well as the submissions made in support of the rival positions, the single issue we must decide is whether the decision of the learned Judge declining a plea for his recusal on grounds of alleged bias, lack of impartiality and denial of the right to fair hearing exhibited, *inter alia*, by his decision to proceed with hearing of a matter before him in the face of orders of this Court staying proceedings, is one appealable to this Court only with leave under section 39 of the *Arbitration Act*. We think that for a proper appreciation of this issue, it is apposite to set out the provision of that section in full. We do so because we think that the omission of sub-section (2) thereof in the submissions filed by counsel for Oilfields, be it by inadvertence or by design, leads to a distorted or incomplete picture of the matter. The section provides;

“39.



- (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 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 and 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.”

17. Now, it is not in dispute that both statutory and decisional law in this country remains faithful to the ethos of party autonomy so that, as a general rule, arbitral awards should not lightly be interfered with by the courts. Indeed, section 10 of the *Arbitration Act* captures this philosophy in the most explicit terms:

“Except as provided in this Act, no court shall intervene in matters governed by this Act”.



18. It must be with that principle of judicial of non-intervention in mind that part VI of the Act titled “Recourse to the High Court Against Arbitral Awards” must be understood. An arbitral award can only be set aside for the specific grounds set out in section 35 of the Act. Section 36 sets out the process for recognition and enforcement of arbitral awards by the High Court, which can refuse such recognition or enforcement only for the reasons set out in section 37, and which are essentially the same as those for setting aside such awards under section 35. Section 39, which we have set out above in extenso deals with applications and appeals to the High Court. For applications thereto, the trigger has to be any question of law arising in the course of the arbitration. The High Court is called upon to resolve such issues as may emerge during the arbitration - obviously before the arbitrator(s). If, however, the question of law emerges out of an award already made by the arbitrator, the way to approach the High Court for a resolution thereof is through an appeal. The High Court deals with applications arising in the course of the arbitration by determining the question of law, which determination will then guide the ongoing arbitral process.
19. As for the question of law that arises out of the arbitral award already rendered, the power of the High Court on the appeal to it is to confirm, vary or set aside the award. It may, if so minded, remit the matter back to the arbitral tribunal or any other that may have been appointed, for that tribunal to reconsider or consider it, as the case may be. It is common ground that the High Court in the present case is yet to pronounce itself on the arbitral award that has been referred to it. It is yet to recognize or enforce the award as urged by one party, or to set it aside as besought by the opposite party.
20. It is while those paths remain open and undetermined before the High Court that Oilfields became disgruntled by what it considers to be the learned Judge’s bias, lack of impartiality and infringement of its right to fair hearing. It made an application for the recusal of the learned Judge. That application was not an application under Section 39(1) of the *Arbitration Act* as we have quoted and explained it. Rather, it was an application anchored in *the Constitution* and the *Judicial Service Act* and the Regulations thereunder. It had nothing to do with either the process or the legal standing of the arbitral award. It had everything, and only has to do, with the alleged conduct or misconduct of the learned Judge on the question of fair hearing.
21. That being the case, is the learned Judge’s decision to refuse the recusal application one that can be appealed from to this Court only with either the consent of the parties (which the applicant herein would not and is not giving) or with leave of the High Court or, failing that leave, the special leave of this Court as stipulated in section 39(3) of the *Arbitration Act*?
22. We think not.
23. The sub-section indicates in clear terms that it deals with an appeal against a decision of the High Court under subsection (2). We have already pointed out from its text, and demonstrated, that subsection (2) deals with a decision of the High Court that;
 - a. determines a question of law arising in the course of a pending arbitration referred to it by way of an application or
 - b. confirms, varies, or sets aside an arbitral award or remits the matter to the same arbitrator(s) for reconsideration or to a different one already appointed for consideration.
24. The High Court has not rendered itself in either of the above respects and it must therefore follow, per force, that the consent or leave limitation contained in section 39(3) is not applicable to the case at bar.
25. Being of that mind, it is easy and logical to see why this Court’s decision in ANNE MUMBI HINGA is distinguishable for the reason that whereas it held emphatically, and we concur, that an appeal hereto



without leave was incompetent and for striking out, the Court was dealing with a matter where the High Court had already pronounced itself on the arbitral award under section 39(2), unlike in this case where no determination on the same has been made.

26. Our conclusion aligns with the Indian and English authorities cited to the effect that appeals are entertainable without leave on decisions or applications made at the High Court, other than on the arbitral award itself for – which there must be leave. It is worth noting that what the entire arbitral scheme and the law on it seeks to immunize from liberal judicial intervention is the arbitral award itself in paying due homage to the autonomy of parties in choosing that mode of dispute resolution. We are unprepared to hold that non-intervention by way of appeal, unless with leave, is meant to put a hedge of protection from appellate enquiry on every procedural deed or misdeed of a Judge seized with an arbitral matter.
27. The inevitable fate of the motion before us, which Dr. O’Kubasu to his credit conceded was “hazy,” is rejection. The same is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

