Cytonn Investments Management Plc v Njuguna (Civil Application E363 of 2024) [2025] KECA 1317 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KECA 1317 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E363 OF 2024

M NGUGI, P NYAMWEYA & WK KORIR, JJA

JULY 18, 2025

BETWEEN

CYTONN INVESTMENTS MANAGEMENT PLC ..... APPLICANT

AND

MARGARET MARY NJUGUNA ..... RESPONDENT

(Being an application for leave to appeal against the ruling and order of the High Court at Nairobi (F. Mugambi J.) dated 14th June 2024 and for stay of execution pending the lodging, hearing and determination of an intended appeal in Nairobi Misc. Arbitration E030 of 2023 consolidated with Nairobi Miscellaneous Arbitration E018 of 2023)

RULING

1. The application before us dated 15th July 2024 arises from the ruling of the High Court (F. Mugambi J.) dated 14th June 2024. In its ruling, the court dealt with two applications arising from an arbitral award dated 31st January 2023 by Mercy Nduta Mwangi, FCI Arb. as a sole arbitrator.

2. In its application dated 1st May 2023 and filed in court on 2nd May 2023 in Misc. Arb. No.030 of 2023, the applicant, Cytonn Investments Management PLC (hereafter 'Cytonn' or 'the applicant') sought to set aside the arbitral award. The grounds on which the application was based were that there was no valid arbitration agreement under Kenyan law between it and the respondent, Margaret Mary Njuguna; that the award conflicted with the public policy of Kenya; that the applicant was prevented from effectively presenting its case due to the arbitrator's clear bias against it; and that the making of the award was induced by bias and undue influence.

3. In her reply to the application, the respondent argued that the application was filed out of time; did not meet the threshold for setting aside arbitration awards under section 35 of the *Arbitration Act*; that the grounds raised by the applicant exceeded the parameters of section 35 of the *Arbitration Act*; and that the court was precluded from delving into the merits of the arbitration.

4. The second application was an application by the respondent dated 1st March 2023 filed in Misc. Arb. No. E018 of 2023. In her application, the respondent sought enforcement of the arbitral award.

5. The two applications were consolidated and heard together.

   The court dealt first with the application to set aside the arbitral award. Upon considering the application, the court found that the applicant's application dated 1st May 2023 and filed in court on 2nd May 2023 was filed out of time. The court concluded, therefore, that it had no jurisdiction to hear the application, and struck it out.

6. With respect to the application brought under section 36 of the *Arbitration Act* for enforcement of the award, the court found that it met the requirements of section 36(2) of the Act. It therefore granted the orders sought in the application and allowed enforcement of the award in which the arbitrator had awarded the respondent Kshs. 41,404,959 together with compound interest from 1st October 2021. The award was also adopted as a judgment of the court.

7. Cytonn was dissatisfied with the ruling. It filed a notice of appeal dated 28th June 2024 and is now before us with the application dated 15th July 2024 seeking two substantive orders. It seeks, first, leave of this Court to appeal against the ruling of the High Court; and secondly, stay of execution of the impugned ruling pending hearing of its intended appeal. The application is brought under rule 5(2) (b) and rules 41, 44 and 45 of the Court of Appeal Rules, 2022. It is supported by an affidavit sworn by Edwin Harold Dayan Dande, the applicant's Chief Executive Officer.

8. In the grounds in support of the application and the affidavit in support, Cytonn argues, among other things, that the High Court failed to consider the grounds it had raised under section 37 of the *Arbitration Act* in opposing enforcement of the award; and that it has an arguable appeal that raises important questions of law that will affect the rights of the parties and the public interest; that the decision of the court was manifestly erroneous, unjust, and had the effect of denying it a fair hearing; that the High Court failed to consider its replying affidavit filed pursuant to section 37 of the *Arbitration Act*, which raised objections to the enforcement of the arbitral award, including the absence of a valid arbitration agreement, public policy violations, and allegations of bias by the arbitrator. It further argued that the court wrongly computed the statutory 90-day period under section 35(3) of the *Arbitration Act*, thereby striking out the application to set aside the award on the basis of being time-barred. Cytonn maintained that the effect of the ruling was to condemn it unheard and unjustly close the doors of justice to it, contrary to Article 50 of *the Constitution*.

9. In its submissions dated 7th August 2024, the applicant reiterated the averments in the affidavit sworn by Mr. Dande and a further affidavit, also sworn by Mr. Dande on 25th July 2024. It maintained that there was no valid arbitration agreement between the parties, that the arbitral award conflicted with the public policy of Kenya; and that the award was made as a result of bias against the applicant on the part of the arbitrator. The applicant contended that the failure by the High Court to consider these matters amounted to a denial of its right to a fair hearing under Article 50 of *the Constitution*.

10. The applicant submitted, on the authority of the decision of the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited [2019] eKLR (The Nyutu Agrovet case) and Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR (The Synergy case), that the impugned decision was so manifestly wrong that it warranted intervention by this Court.

11. The respondent opposed the application by her affidavit sworn on 18th July 2024 and grounds of opposition of the same date. The respondent argued in these grounds that no appeal lies in law from the ruling and order of the High Court which arose from a decision made under section 35 of the

Arbitration Act; that the appeal does not meet the threshold established by the High Court in Nyutu Agrovet case; and that this Court has no jurisdiction to entertain the appeal.

12. The respondent averred that she was a retiree who had invested her life savings in a product managed by the applicant; and that the arbitral award had been lawfully and fairly obtained. She averred that the application to set aside the award had been properly dismissed by the High Court as it was filed out of time, and that the applicant had not sought leave to appeal as required under section 35 of the *Arbitration Act*.

13. In her written submissions dated 28th August 2024, the respondent argued that the appeal was incompetent and did not raise any issue of general legal importance. She maintained that the High Court's decision was based on proper interpretation of the law and within the bounds of judicial discretion.

14. At the hearing of the application, learned counsel, Mr. Mueke, appeared for the applicant and highlighted its submissions dated 7th August 2024. He submitted that in its decision in Nicholas Kiptoo Arap Korir Salat v IEBC & Others [2014] eKLR, the Supreme Court held that a Notice of Appeal is a jurisdictional prerequisite and does not require prior leave. He also relied on Geothermal Development Company v Lantech Africa Ltd [2024] KECA 981 (KLR) and University of Nairobi v Multiscope Consulting Engineers [2020] KECA 376 (KLR) to submit that this Court retains jurisdiction in exceptional circumstances, even where the High Court enforced rather than set aside an arbitral award.

15. In his oral highlights of the respondent's submissions dated 28th August 2024, learned counsel, Mr. Gachugi argued that leave to appeal must first be sought before filing a Notice of Appeal, relying in support on the Nyutu Agrovet case and Geo Chem Middle East v Kenya Bureau of Standards [2020] KESC 1 (KLR). It was his submission that the impugned ruling did not disturb the arbitral award and it did not therefore fall within the narrow exception for appellate intervention set in the Nyutu Agrovet case.

16. In his submissions in reply, Mr. Mueke argued that there were two grounds that demonstrated a grave miscarriage of justice and justified the intervention of this Court: firstly, the erroneous computation of time under section 35(3) of the *Arbitration Act* read together with section 57 of the *Interpretation and General Provisions Act* and, secondly the High Court's failure to consider objections under section 37 of the *Arbitration Act*. He urged this Court to allow the application as prayed.

17. We have considered the application, the affidavits in support and opposition thereto, the respondent's grounds of opposition, and the submissions of the parties. The success or failure of this application turns on the question whether the applicant has met the threshold for grant of leave to appeal from a decision of the High Court under section 35 of the *Arbitration Act*.

18. It is well settled that no appeal lies to this Court from a decision of the High Court under section 35 of the *Arbitration Act*, except in the narrow circumstances set by the Supreme Court in the Nyutu Agrovet and Synergy cases. As enunciated in the Nyutu Agrovet case:

> " ...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."

19. In its decision in Geo Chem Middle East v Kenya Bureau of Standards (supra), the Supreme Court observed, after citing the above paragraph from the Nyutu Agrovet case, that:

> "This principle as illuminated in the foregoing quote, is now the governing law regarding appeals from the High Court to the Court of Appeal in arbitration disputes, arising from Section 35 of the *Arbitration Act*. Our pronouncement in Nyutu and Synergy, makes it abundantly clear that such appeals are not as open ended as the Court of Appeal appeared to suggest."

20. In the matter before us, the applicant seeks leave to appeal against a decision of the High Court declining to set aside an arbitral award under section 35 of the *Arbitration Act*. In seeking to appeal against the said decision, the applicant contends that the High Court erred in computing the 90-day time line under section 35(3) of the *Arbitration Act* for filing an application to set aside the arbitral award; and in failing to consider its replying affidavit filed pursuant to section 37 of the Act in opposition to enforcement of the award.

21. The applicant further seeks to argue on appeal that it was condemned unheard in violation of its right to fair hearing under Article 50 of *the Constitution*; and it further seeks to raise issues related to the arbitration process and the arbitral award itself: that there was no valid arbitration agreement between the parties; that the arbitrator was biased against the applicant; that the award was obtained by mala fides and undue influence; and that the award was against the public policy of Kenya.

22. All these arguments, in our view, do not demonstrate any exceptional circumstances or grave injustice that was occasioned, so as to meet the threshold set in the Nyutu Agrovet and Synergy cases, and as elaborated in the Geo Chem case in respect to an appeal from a decision of the High Court under section 35 of the *Arbitration Act*.

23. Accordingly, we find that the applicant has not satisfied this Court that it is deserving of leave to appeal, and we decline to grant leave.

24. As the response to the issue whether this Court should grant leave to appeal is in the negative, we need not consider the question whether the applicant is entitled to an order under rule 5(2)(b) of this Court's Rules.

25. We accordingly find that the application dated 15th July 2024 is without merit, and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2025.

MUMBI NGUGI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGES OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar