Nyutu Agrovet Limited v Airtel Networks Kenya Ltd (Civil Appeal (Application) 61 of 2012) [2024] KECA 523 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 523 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 61 OF 2012

MA WARSAME, PO KIAGE, LA ACHODE, JM MATIVO & GWN MACHARIA, JJA

MAY 9, 2024

BETWEEN

NYUTU AGROVET LIMITED ..... APPELLANT

AND

AIRTEL NETWORKS KENYA LTD ..... RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya, (Kimondo, J.) dated 1st December 2011 in Nairobi HC Misc. Application No. 400 of 2011)

JUDGMENT

1. Arbitration is designed to be the cure to the malady and tedium of long, inefficient, overly formal and expensive traditional litigation. It represents a strategic departure from conventional court proceedings. In this process, parties voluntarily opt to present their grievances before one or more arbitrators, whose decisions ought to be final and binding. The purpose of arbitration lies in its departure from formalities often associated with traditional litigation, offering a simple, more flexible, expedient, cost-effective and confidential avenue for conflict resolution.

2. However, the practice and experience in this country is a far cry from, and a veritable repudiation of, the ideal situation. Arbitration has morphed into a complex, costly, protracted, catastrophic nightmare for many a party. “Watu wameteseka kuteseka” (people have suffered immeasurably), as this case demonstrates.

3. This dispute and the ensuing litigation culminating in this appeal has a damningly long and chequered history spanning a period of 17 years, and counting, as the primary dispute is yet to be heard and determined. We traverse that history, to the extent necessary, to give context to the controversy now before us.

4. On 20th December 2007, Airtel Networks Kenya Limited (the respondent), then called Celtel, entered into an agreement (the agreement) with Nyutu Agrovet Limited (the appellant) to distribute the

respondent's products at Donholm estate in Nairobi. The agreement stipulated the manner in which orders for goods would be placed and received. Notably, clause 2.7 of the agreement provided that each order accepted by the respondent shall constitute a separate contract supplemental to the agreement, breach of which would constitute a violation of the main agreement.

5. Noteworthy also is clause 13.7 which exonerated the respondent from liability in respect of consequential loss of any kind as a result of the termination of the agreement, or otherwise, whether as a result of loss by the appellant in respect of present or prospective debts, anticipated sales, expenditure investments, commitments made in connection with the agreement or on account of any other reason or clause.

6. Pivotal to this litigation is clause 18.1 which provided:

> "...any dispute or claim arising out of or relating to the agreement and/or breach thereof shall be determined by a Single Arbitrator to be appointed by agreement between the parties..."

7. This dispute was birthed when, between 9th and 16th March 2009, one George Changa, an agent of the appellant, presented two bank payment slips amounting to Kshs.11,000,000 to the respondent's shop along Koinange Street and collected goods worth that amount. Subsequently, the payment slips were discovered to be forgeries and the respondent promptly reversed the credit entries leaving the appellant with a debit of the said sum. Piqued by the astonishing discovery of the fake banking slips, the respondent terminated the agreement. Thus, the dispute was born.

8. In conformity with the arbitration clause, on 24th August 2009, the parties appointed Mr. Fred O. N. Ojiambo, SC, as the sole arbitrator. After hearing the parties, the arbitrator delivered an award of Kshs. 526, 720,698 in favour of the appellant. The bulk of the award was in respect of general damages, which the arbitrator awarded for the tort of negligence attributed to the respondent.

9. Aggrieved by the arbitral award, the respondent filed an application in the High Court dated 8th November 2011, being Miscellaneous Civil Cause Number 400 of 2011, Airtel Networks Kenya Limited vs Nyutu Agrovet Limited, under Section 35 of the *Arbitration Act* (the Act) seeking to set aside the award on various grounds.

10. After hearing the parties, in a ruling dated 1st December 2011, Kimondo, J. identified three issues: whether the arbitral award dealt with a dispute not contemplated by the parties; whether the arbitrator dealt with a dispute outside the terms of reference to arbitration; and, whether the award was in conflict with public policy. The learned judge ultimately set aside the arbitral award in its entirety, holding as follows:

> "43. In the result, the notice of motion by Airtel dated 8th April 2011 succeeds purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for the reasons and deliberations above. In the premises, the order that commends itself to me to grant is to order that the arbitral award dated 17th February 2011 and published on 2nd March 2011 by Fred Ojiambo S.C. be and is hereby set aside in its entirety. Costs would ordinarily follow the event. The primary dispute between the parties is yet to be resolved on the merits..." (Emphasis ours)

11. Immediately after delivery of that decision, the appellant's counsel orally applied for leave to appeal to this Court. The respondent's counsel opposed the application on the ground that no right of appeal

exists under Section 35 of the Act. Despite the objection, the learned judge granted leave and remarked: "it will be a matter for the appellate court to determine whether the journey was a false start."

12. The appellant then filed this appeal raising 8 grounds, in which it faults the learned judge for misapprehending the provisions of Section 35 of the Act. The respondent in turn filed an application dated 3rd May 2014 seeking an order that the record of appeal be struck out. The germane issue raised in the said application was whether an appeal lies to the Court of Appeal against a decision of the High Court made under Section 35 of the Act.

13. After hearing the application, this Court (Karanja, Mwera, Musinga, M'inoti & Mohamed JJ.A.) in their separate decisions unanimously held that there is no right of appeal to the Court of Appeal against a decision made under Section 35 of the Act, and struck out the entire appeal.

14. Relentless, the appellant sought and obtained certification to appeal to the Supreme Court in terms of Article 163 (4) (b) of *the Constitution*. Consequently, the appellant filed a petition at the Supreme Court dated 15th July 2016 being Supreme Court Petition No. 12 of 2016, Nyutu Agrovet Limited vs Airtel Networks Kenya Limited and Chartered Institute of Arbitrators-Kenya Branch (Interested Party) seeking the following orders:

    a. The appeal be allowed with costs.

    b. Return a finding of law that a party has a right of appeal from the High Court to the Court of Appeal on a ruling/decision arising out of an application made under the provisions of Section 35 of the *Arbitration Act*.

    c. Setting aside the order of the Court of Appeal delivered on the 6th March 2015 in its entirety and substituting it with (i) an order dismissing the Notice of Motion Application dated 3rd May 2012 with costs to the Petitioner and (ii) an order reinstating Civil Appeal No. 61 of 2012 [Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited].

15. By its judgment dated 6th December 2019, the Apex Court distilled two substantive issues; whether Section 10 of the Act contravenes a party's right to access justice under Articles 48, 50 (1) and 164

    (3) of *the Constitution* and therefore unconstitutional to that extent, which it answered in the negative; and, whether there is a right of appeal to the Court of Appeal under Section 35 of the Act, which it answered (Maraga, CJ dissenting) in the affirmative. It then remitted the case back to this Court with the following specific directions:

    (81) We have answered the question whether there is a right of appeal from the High Court to the Court of Appeal under Section 35 of the *Arbitration Act* but have delimited the circumstances under which the right can be exercised. We have also determined that the Court of Appeal ought to determine in limine, whether the threshold for admitting Nyutu's appeal has been met and if the appeal before it ought to be heard at all." (Our emphasis.)

16. Therefore, our mandate in this reinstated appeal is two-fold; to determine in limine, whether the threshold for admission to this Court has been met; and, if the appeal ought to be heard at all. There is no doubt that, consistent with the Supreme Court's determination, this Court is clothed with jurisdiction to entertain appeals from decisions made under Section 35, but that jurisdiction is very narrow and circumscribed. It is incumbent upon intended appellant(s) to bring themselves within the four corners of the circumscribed jurisdiction. The Court will consider each case on its own peculiar circumstances.

17. Learned counsel for the appellant, Mr. Nyaribo argued that the question of admissibility cannot be argued without going into the merits of the appeal. Counsel maintained that it is in considering and reviewing the merits of the appeal that the Court would be better placed to determine whether Kimondo, J. stepped outside the mandate set out under Section 35 (2) (i) - (vi) and (3) of the Act. To buttress his assertion, Mr. Nyaribo cited Geochem Middle East vs Kenya Bureau of Standards [2020] eKLR in which the Supreme Court stated:

> "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..."

18. Counsel maintained that there was no application for review or setting aside made before the High Court. Again, there is no Cross- appeal on that issue. Consequently, under the principle of finality, the order granting leave is conclusive on the issue of leave to appeal to this Court. To fortify his argument, counsel cited the Court of Appeal decision in Geochem Middle East vs Kenya Bureau of Standards, (supra) in support of the proposition that the Court of Appeal has jurisdiction to entertain an appeal where leave to appeal has been granted and has not been set aside. In addition, Mr. Nyaribo cited this Court's holding in Mahan Ltd vs *Villa Care Ltd. Civil Appeal No. 323 of 2020* (unreported) in support of the proposition that a party who desires to appeal against arbitration proceedings ought to first obtain leave of either the trial court or the Court of Appeal.

19. To demonstrate that the appellant's appeal falls within the circumscribed jurisdiction contemplated by the Supreme Court, counsel argued that the learned judge erred in exercising his powers by delving into matters outside the ambit of Section 35 (a)

    (2) (i) - (vi) of the Act. He cited Kurji & Another vs Shalimar Ltd [2006] 2 E.A. 176, in which this Court held that a decision can be set aside if the High Court steps outside that scope.

20. Counsel faulted the learned judge for delving into the merits of the decision, reversing findings of fact, departing from the arbitrator's reasoning and contradicting himself by interfering with the award on damages, despite finding that the arbitrator had jurisdiction. Counsel pointed out that no objection was raised to the claim for damages and interest at the earliest opportunity as required under Section 17 (2) of the Act. Consequently, under Section 5 of the Act, the respondent waived the right to object. He also complained that the learned judge dealt with the matter as if it were an appeal under Section 39 of the Act and faulted the learned judge for overturning the entire award yet the only issue was the effective date of interest as opposed to whether it was payable, noting that he left undisturbed the findings on fraud and estoppel.

21. Under the principle of severability, the learned Judge ought to have remitted the issues back to the arbitrator for re- consideration under Section 35 (2) (iv) of the Act. In conclusion, the learned counsel for the appellant urged us to set aside the decision of Kimondo, J. dated 1st December 2011, reinstate the arbitral award with costs.

22. In opposition to the appeal, learned counsel for the respondent Mr. Ngatia SC argued that the Supreme Court was categorical that this Court should in limine, determine whether the threshold for admitting the appeal has been met and whether the appeal should be heard at all. He argued that this Court can only assume jurisdiction when it is demonstrated in the clearest terms that- (a) the High Court determined the application on grounds other than as set out in Section 35 of the Act; or (b) the decision is so grave and so manifestly wrong; or (c) the decision has completely closed the door of justice to either of the parties. Counsel maintained that these parameters constitute the threshold test for admitting

an appeal under Section 35. He cited Kenyatta International Convention Center vs Congress Rental South Africa [2020] eKLR, where this Court was called upon to determine the "threshold test" only, and argued that in this appeal, the Supreme Court has added another qualifier, which is whether the appeal should be "heard at all."

23. Counsel contended that, it is quite clear from the inception that the learned Judge was fully aware that he was handling a motion under Section 35 (2) and (3) of the Act, because the ruling is replete with that caution. Counsel noted that the learned Judge appreciated the three key grievances against the award namely: the arbitrator dealt with a dispute not contemplated by the parties; the arbitrator dealt with a dispute outside the terms of reference to arbitration; and whether the award was in conflict with public policy.

24. Counsel submitted that the learned Judge appreciated that in the appointment of the arbitrator, the parties agreed that he would determine any dispute or claim arising out of, or relating to, the contract and/or breach thereof. Counsel maintained that the assessment of damages was based on tort, yet the dispute between the parties was contractual. He argued that the arbitrator expanded the scope of the contract by assessing general damages for the tort of negligence; setting up the contract period to run to the year 2013; and, employing the wrong multiplier. Therefore, the finding by the High Court was within Section 35 (2) and (3) of the Act.

25. Mr. Ngatia submitted that the High Court intervened to correct a manifestly wrong award. He pointed out that the common grounds urged before the High Court were: the appellant allowed one George Changa to use its account with the respondent, obtained goods on the strength of banking slips amounting to Kshs. 11,000,000 which were forgeries; on discovery, a reversal of the credits was made and the appellant was unable to regularize its accounts leading to termination of the agreement; a dispute arose and both parties invoked the arbitration clause and appointed a single arbitrator; an award of Kshs.541,005,922.81, based on tort was made; and the arbitrator backdated interest at 16% p. a. to 8th May 2009 which was not pleaded or prayed for whereas the award was published on 2nd March 2011. Consequently, the backdating of the interest resulted in a windfall benefit of Kshs. 195,272,143.68, to the appellant. Counsel reasoned that the said award was found to be so grave and manifestly wrong because it was not within the contemplation of the parties and/or within the terms of reference to arbitration.

26. On whether the decision has closed the doors of justice to either of the parties, he maintained that the High Court only set aside the award and proceeded to encourage the parties to have the dispute decided in accordance with the contract. Subsequent to the High Court decision, an arbitrator was appointed but apparently, the appellant intends to pursue the dispute through the appellate process instead of engaging in the arbitration, which has led to the lengthy litigation process. He cited Kenyatta International Convention Center vs Congress Rental South Africa (supra) where this Court declined to find that the decision under challenge was so grave, and so manifestly wrong, such that it had completely closed the door of justice.

27. Counsel contended that the High Court directed the parties to seek fresh arbitration process so that the primary dispute can be heard. He pointed out that before the Apex Court, the parties submitted that another arbitration process had been initiated before Mr. Chacha Odera Advocate, but, it was not pursued and it is for that reason that the Supreme Court added another qualifier to the hearing of the appeal, which is, whether the appeal should be heard at all. He urged us to order the parties to resume the arbitration process instead of "playing roulette" with the appellate process. In conclusion, learned counsel maintained that parties cannot rewrite the Supreme Court judgment. Instead, they are obligated by Article 163 (7) of *the Constitution* to comply with the order made regarding how the appeal is to be heard.

28. Having heard the parties' diametrically opposed arguments, the fundamental question for our determination, in limine, is whether the threshold for admitting the appellant's appeal has been met, and, if the appeal ought to be heard at all. This is precisely what the Supreme Court directed this Court to determine. The Black's Law Dictionary defines in limine as: "on or at the threshold; at the very beginning; preliminary." Therefore, a point in limine, within the context of civil litigation, is a pivotal legal question central to the dispute which must be determined by the court at the commencement of the proceedings in question.

29. Submitting on the issue at hand, the appellant's counsel asserted that the leave granted by the High Court remains unchallenged whether by way of appeal, review or setting aside and therefore the said order is final. Conversely, our reading of the Supreme Court decision is that this Court is to determine the two questions in limine. So, we shall.

30. Under Article 163 (7) of *the Constitution*, the Supreme Court decision is binding on this Court. In any event, at the time the Supreme Court rendered its decision, it was aware of the hesitant leave granted by Kimondo, J. It is evident that the Apex Court did not consider the question of leave as having been conclusively determined by the High Court, hence its express directions to this Court. Therefore, we are unable to agree with the appellant's contention that the question of leave was settled with finality by the High Court.

31. The other argument urged by the appellant is that Kimondo J. stepped outside the grounds set out in section 35 (2) of the Act, in setting aside the award. In resolving the issue at hand, we are alive to the fact that the Supreme Court underscored the general approach on the role and extent of court intervention in arbitration matters in Kenya as provided in Section 10 of the Act. In peremptory terms, Section 10 restricts the jurisdiction of the court to only those matters provided for by the Act. The section epitomizes the recognition of the policy of party autonomy, which underlies arbitral process. The section articulates the need to restrict the court's intervention in arbitration so as to give effect to that policy. The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps to achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

32. The Supreme Court was emphatic that judicial intervention in arbitration matters can only be countenanced in exceptional instances and such jurisdiction should be exercised carefully, so as not to open a floodgate of appeals, thus undermining the very essence of arbitration. The Apex Court expressed itself 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 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." (Emphasis ours.)

33. Speaking directly to the question of whether and under what circumstances an appeal can lie to this Court, the Supreme Court delineated the relevant contours thus:

> "(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."(Emphasis ours.)

34. In our view, this postulates the ethos of upholding contracts entered between parties on the principle of good faith. A party cannot resile from a contractual stipulation that a dispute be referred to arbitration. Concomitantly, the arbitration award is binding upon the parties and not subject to appeal, except on limited and circumscribed grounds permitted by the law. Party autonomy is the cornerstone of arbitration.

35. The grounds for setting aside arbitral awards are provided under Section 35 (2) and (3) of the Act as follows: incapacity of one of the parties; an invalid arbitration agreement; lack of proper notice on the appointment of arbitrator or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated or is outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act, and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. The High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.

36. A key principle discernible from Section 35 is that the Act cannot reasonably be construed or interpreted as ousting the inherent jurisdiction of the court to do justice. In our view, appeals may be allowed on circumscribed grounds to address miscarriage of justice as opposed to the merits of the arbitral award itself. This judicial intervention, can only be countenanced in exceptional instances as reiterated by the Supreme Court in Synergy Industrial Credit Limited vs Cape Holdings Limited [2019] eKLR in which we wholly agree. It sated:

> "Generally, therefore, once parties agree to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. Once an award is issued, an aggrieved party can only approach the High Court for setting aside the award, only on the specified grounds. 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 lead to a miscarriage of justice. Therefore, even in promoting the core tenet of arbitration which is a quicker and efficient way of settling commercial disputes, that should not be at the expense of real and substantive justice. In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in Inco Europe Ltd & others (supra) hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances. Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law. Having said so, we are of the further opinion that a decision on whether the Court of Appeal should assume jurisdiction on

appeals arising from Section 35 should be guided by the following consideration i.e. whether the High Court has overturned an award other than on the grounds in Section 35 of the Act." (Emphasis added).

37. The question for us to answer is whether this appeal satisfies the exceptional circumstances to merit leave. To answer this question, we will examine the grounds urged by the appellant in light of the enunciated tests. The gravamen of the appellant's grievances is that the learned judge in setting aside the arbitral award stepped outside the grounds set out in Section 35 (2) and (3). The U.K. Supreme Court in Mozambique vs Privinvest [2023] UKSC clarified that in determining whether a court dealt with matters outside the scope of the arbitration agreement, the court must first identify the "matters" in respect of which the proceedings have been brought. What constitutes a "matter" for these purposes, is a question of judgment and common sense but must be a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the proceedings, and is capable of being determined by an arbitrator as a distinct dispute. In our view, peripheral issues will not suffice.

38. The U.K. Supreme Court reiterated that the scope of an arbitration agreement must be determined by reference "to what rational businesspeople would contemplate," observing that "rational businesspeople are likely to intend that any dispute arising out of their contractual relationship be decided by the same tribunal." Therefore, the court must pay attention to the language of the arbitration clause. In this case, Clause 18.1 of the arbitration agreement provided that any dispute or claim arising out of or relating to the agreement and/or breach thereof shall be determined by a Single Arbitrator.

39. In Fili Shipping Co Ltd vs Premium Nafta Products and Others [On appeal from Fiona Trust and Holding Corporation and others vs Primalov and Others [2007] UKHL 40, Lord Hoffmann of the former House of Lords delivering a speech with which all their lordships concurred, said:

> " In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction." (Emphasis added)

40. In Fiona Trust (supra), (which the House of Lords upheld in Fili Shipping), decided in the English Court of Appeal, Longmore LJ, delivering the court's unanimous judgment, said:

> " As it seems to us any jurisdiction or arbitration clause ... should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all."
>
> And
>
> 'One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen.'
>
> And

> 'If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid, eg for illegality, misrepresentation or bribery, and the arbitration is merely part of that overall contract. In these circumstances it is not necessary to explore further the various options canvassed by Judge Humphrey Lloyd QC since we do not consider that the judge had the discretion which he thought he had."

41. An arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate disputes and bind the parties. It is the product of a consensual contract, so, courts must refrain from readily acceding to the invitation to "rectify the arbitration clause" by giving it an interpretation which was not contemplated by the parties.

42. Regarding the boundaries set by Section 35, the learned trial judge stated:

> "37. Under the proviso to section 35 (2) (a) (iv), if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the award which contains decisions on matters not referred to arbitration may be set aside. Now I do not have the benefit of the full evidence that was before the arbitrator. I can see from the statement of claim that save for the claim of Kshs 11,000,000 where interest was prayed for from 8th May 2009, on all the other headings in the claim interest was prayed for diverse dates from 31st May 2009 to 5thJune 2009. The arbitrator has awarded interest on all heads at 16% from 8th May 2009 which was not pleaded or prayed for. The finding on interest payable on those heads can thus be said to either have been outside the contemplation of parties or to be outside the reference in the arbitration." (Emphasis ours.)

43. Did the learned judge err in faulting the arbitrator for awarding interest on all heads at 16% from 8th May 2009 and for backdating the interest awarded, which were not pleaded? In our view, the learned Judge in disallowing unpleaded claims did not go on a frolic of his own, nor did he step outside the scope of Section 35. We find nothing in Section 35 (2) and (3) which permits an arbitrator to allow unpleaded claims. On the contrary, a reading of the reference to arbitration and the award shows that the learned judge was well within section 35 (2) and (3) since it is evident that the grant of prayers not sought in the statement of claim falls under the ground that the arbitrator went beyond the ambit of the arbitration.

44. The other grievance cited by the appellant is that the learned judge erred in declining to allow damages for tort and breach of contract. In disallowing this award, the learned judge faulted the arbitrator for expanding the margins of the arbitration agreement and for venturing into the realm of tort and damages for negligence. In effect, the learned judge found that the arbitrator had exceeded his jurisdiction. He stated:

> 39. In my considered opinion once the arbitrator embarked on assessment of general damages for the tort of negligence and set up the contract period to run to the year 2013 and to employ the arithmetic and multipliers above, he expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the realm of contract into the world of tort and damages for negligence. It may well be that the claimant had pleaded negligence at paragraph 51 (3) of its statement of claim or that it had prayed for general damages of 2.6 billion shillings. The arbitration clause in the distributorship agreement had limited the dispute to those arising out of or relating to this agreement and or breach thereof. It was for breach of contract pure and simple. The agreement appointing the arbitrator at clause 3 on terms

of reference provided "The arbitrator shall determine any dispute or claim arising out of or relating to the contract and /or breach thereof". This is (sic) in my mind rhymes very well with section 29 (5) of the *Arbitration Act*. While it is true that in the course of breach of contract a tort may arise, I am prepared to hold that in this case it may well have been completely outside the contemplation of the parties. Having then meandered outside his boundaries, it is then safe to say that the arbitrator exceeded his jurisdiction. See Superior Enterprises Ltd vs. Union Insurance Company of Kenya Ltd Nairobi HCCC 5239 of 1990 (unreported)...

41. I must clarify that the offensive part of the award of general damages is in overreaching the jurisdiction of the arbitral tribunal by going beyond the boundaries of the contract between the parties and the terms of reference of the arbitration as earlier explained. On that score alone, I would find that the applicant is well within the purview of section 35 the *Arbitration Act*." (Emphasis ours.)

45. It is important to mention that the learned Judge referred to clause 13.7.1 of the arbitration agreement. An analysis of the import of the said clause will no doubt confirm the correctness of the learned Judge's finding. Clause 13.7.1 exonerated the respondent from damages arising from inter alia consequential loss. Earlier in this judgment, we alluded to this clause, but now, because of its importance to the issue at hand, we will reproduce it here. It stipulated as follows:

> " Celtel shall not be liable for consequential damage of any kind as a result of the termination of the Agreement or otherwise, whether as a result of loss by the Distributor of present or prospective profits, anticipated sales, expenditure, investments, commitments made in connection with the Agreement or on account of any other reason or cause whatsoever".

46. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof. It is not the business of the courts to rewrite contracts entered into by parties. In National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A. 503, at 507, [2011] eKLR this Court stated:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

47. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts. Parties may by mutual consent limit the extent of liability in the event of breach of the contract, and that is exactly what happened in this case. In the circumstances, can an arbitrator be allowed to import extraneous matters while determining an issue which is outside the arbitration clause? The general approach taken by the courts when interpreting an exclusion/ limitation clause is the same as for any other part of the contract, namely:

a. Ascertain what a reasonable person would have understood the parties to mean. The "reasonable person" is assumed to have all the background knowledge, which would reasonably have been available to the parties in the situation in which they were at the time of the contract. (See Rainy Sky vs Kookmin [2011]UKSC 50, at p. 14).

b. If that approach results in two possible interpretations, then the court will generally take the interpretation that is most consistent with business common sense. (See Rainy Sky vs Koomin supra at p. 21);

c. Where the parties have used unambiguous language, the court will apply it. (See Rainy Sky vs Koomin supra at p.23);

d. There is a presumption that a party does not intend to abandon any remedies arising by operation of law. Clear express words must be used in order to rebut this presumption. (See Modern Engineering (Bristol) Ltd vs Gilbert-Ash (Northern) Ltd [1974] AC 689 at 717);

e. The court will not interpret an exclusion clause in a way that renders a party's obligation under the contract no more than a statement of intent unless no other conclusion is possible. (See Astrazeneca vs Albermarle [2011] EWHC 1574, at p. 313).

48. If there is a signed contract as in this case, its binding nature will be difficult to assail. In the absence of fraud, misrepresentation or error, a party is bound by a document to which he has penned his signature, whether he has read the contents or not. We have now sufficiently answered the appellant on this issue.

49. The learned judge held that the award of general damages was outside the scope of the terms of reference. The term 'arising out of' used in the agreement is broad, but it is not all encompassing. To determine if a cause "arises out" of an agreement, the court asks whether the tort or breach in question was an immediate, foreseeable result of the performance of contractual duties. In other words, "arising out of" requires the existence of some directrelationship between the dispute and the performance of duties specified in the contract.

50. Even if we were to be persuaded that the damages for tort and breach of contract were foreseeable, and therefore an indirect consequence of the alleged breach, hence recoverable, there is yet a major obstacle to their recovery. The parties in their wisdom clearly excluded liability for damages for consequential loss under clause 13.7.1. The court looks at the contractual text to determine whether a claim arises out of the agreement, and if so, whether it is recoverable under the contract. In the circumstances of this case, we find and hold that damages for consequential loss were not contemplated and were expressly excluded in clause 13.7.1. Accordingly, the learned judge was correct in disallowing damages for tort and breach of contract.

51. The other argument by the appellant is that the learned judge determined the application before him as if he was dealing with an appeal under section 39 of the Act. We have read the entire ruling and are satisfied that the learned judge clearly identified the issues for determination, all of which were drawn from the grounds under Section 35. He was clearly alive to the nature of the application before him confining his analysis anddetermination to Section 35. We find no merit in that argument and therefore reject it.

52. he other assault mounted by the appellant is that the learned judge failed to invoke the doctrine of severability and allow matters, which fell within the scope of the agreement and only reject those falling outside its ambit. Our understanding of this argument is that the learned Judge ought to have set aside only the part of the award that fell outside the scope of the contract and upheld what was within. We note that the learned Judge in setting aside the arbitral award in its entirety had in mind Section 35 (2) (a) (iv) which provides for the principle of severability as follows:

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

53. This proviso clearly stipulates when the principle of severability may be invoked, which is if the decision contains both matters referred and matters not referred to arbitration. In that case, the judge can separate or sever the two types of matters but can only set aside the part of the decision containing matters not referred to arbitration. Having so appreciated this provision, and from our perusal of the record, the decision did not contain any matter not referred to arbitration. It therefore follows that the question of severability did not arise, and we find no substance in the complaint. Moreover, this issue was not raised before the trial judge and it is not one of the grounds of appeal. We therefore think, with respect that this was an afterthought improperly urged before us in submissions.

54. Arising from our conclusions on the issues discussed herein above, it is our finding that the appellant has not demonstrated that the learned judge in setting aside the arbitral award, stepped outside the grounds set out in Section 35 (2) and (3) of the Act. The appellant has failed to demonstrate that the decision of the High Court is so grave, so manifestly wrong and has completely closed the doors of justice to either of the parties. The appellant has totally failed to bring its case within this Court's circumscribed and narrow jurisdiction for granting leave, which should be sparingly exercised and only in the clearest of cases.

55. The upshot of the foregoing careful ruminations on this appeal, the dispositive orders we arrive at are follows:

    a. Leave to appeal against the decision of the High Court dated 1st December 2011 is denied.

    b. For avoidance of doubt, what leave was granted by Kimondo, J.is set aside.

    c. The appeal herein be and is hereby struck out.

    d. Costs of this appeal shall be borne by the appellant.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

…….. JUDGE OF APPEAL