County Government of Kitui v Power Pump Technical Company Limited (Civil Appeal (Application) 171 of 2019) [2024] KECA 1501 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KECA 1501 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 171 OF 2019

FA OCHIENG, K M'INOTI & F TUIYOTT, JJA

OCTOBER 25, 2024

BETWEEN

COUNTY GOVERNMENT OF KITUI ..... APPLICANT

AND

POWER PUMP TECHNICAL COMPANY LIMITED ..... RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Nzioka, J.) dated 31st October 2018 in HC Misc A No. 193 of 2018)

RULING

1. The motion on notice before the Court is dated 8th August 2024 and is taken out by the applicant, the County Government of Kitui. In the application, the applicant seeks a host of reliefs, among them admission for hearing and determination of its appeal from the order of the High Court dated 31st October 2018 which recognised an award of an arbitral tribunal as a decree of the court; stay of execution of the said decree and consequential orders; and consolidation of Civil Appeal No. 171 of 2019 with Civil Appeal No. 176 of 2020.

2. At the hearing of the application, we directed the parties to address the Court first on the prayer for admission of the appeal because, the fate of the other prayers sought by the applicant will depend on the outcome of that prayer. If the prayer for admission of the appeal does not succeed, there would be no basis for entertaining an application for stay of execution pending the hearing and determination of a non-existent appeal, or even for consolidation. This ruling is therefore confined to that single issue of whether or not the appeal should be admitted for hearing and determination by this Court.

3. The applicant's prayer is framed as follows:

> "2. That pending the hearing and determination of this application this Honourable Court do admit the appeal herein for hearing and determination

against the decision of the High Court Commercial Misc. Application No. 193 of 2018 dated 31st October 2018."

4. As framed, the above prayer does not make much sense as it seeks admission of the appeal pending the hearing and determination of this application for admission of the appeal. If such a prayer is granted pending the hearing of the application, one wonders what is left to be heard interpartes. Such a prayer cannot be granted ex parte. Moreover, the Court of Appeal Rules do not contemplate the granting of ex parte orders.

5. Be that as it may, the brief background to the application is as follows. Following arbitral proceedings between the applicant and the respondent, Power Pump Technical Co. Ltd, the arbitral tribunal issued its award on 8th December 2017, in favour of the respondent.

6. On 20th December 2017 the respondent applied for amendment of the award and on 16th January 2018, the arbitral tribunal amended the award with the consent of both parties as follows:

> " 1. That award No. 1 of sum of Kshs 3,791,415.96 with interest at the rate of 14.5% p.a. with effect from 1/9/16 is corrected to read 3,792,415.96 together with interest at the rate of 14.5% p.a. with effect from 20/5/11 until payment in full.
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> 2. That award No. 2 of the sum of Kshs 2,405,340 in respect of the watchman's ages accrued at the rate of Kshs 9,000 per month as at 30/7/14 is amended to read the salaries accrued at the rate of kshs 27,000 per month with effect from 30/7/2014 together with the interest at the rate of 14.5% p.a. with effect from 3/7/2014 until payment in full.
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> 3. That the award of costs is amended and awarded as follows:
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> a. The costs of the reference is assessed at the sum of Kshs 3,176,797 and the 1st respondent is directed to reimburse the claimant 50% of the said sum, i.e. Kshs 1,588,398 already paid to the tribunal within thirty (30) days from the publication of this corrected award;
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> b. The costs of the arbitration is assessed pursuant to section 32B of the Arbitration (Amendment) Act, 2009, at the sum of Kshs. 1,500,000 to be paid by the 1st respondent to the claimant within thirty (30) days of publication of this corrected award."

7. On 20th April 2018, the respondent applied to the High Court under section 36 of the *Arbitration Act* for leave to enforce the award as a decree of the court.

8. On its part, the applicant applied to the High Court on 11th May 2018 to set aside the arbitral award. The application was made under section 35 of the *Arbitration Act* and was based on the various grounds, among them that the respondent's advocate had no instructions to consent to the amendment of the award; that the consent was contrary to law and public policy of Kenya; that the arbitral tribunal did not have jurisdiction to effect the amendments of the award; that the award dealt with a dispute that was neither contemplated nor falling within the terms of the arbitration; that the award contained matters beyond the scope of the reference; and that the award was contrary to the public policy of Kenya, justice and morality and in contravention of the *Public Procurement and Asset Disposal Act*.

9. On 5th June 2018, the High Court, ex tempore, struck out the applicant's application for setting aside the arbitral award as incompetent, having been filed more than three months from the dated of the arbitral award, in violation of section 35(2) and (3) of the *Arbitration Act*. The court gave reasons for that ruling on 7th June 2018.

10. On 31st October 2018 the High Court allowed the respondent's application for recognition and enforcement of the arbitral award as a decree of the court. On 6th November 2018, the applicant lodged a notice of appeal.

11. Although the applicant claims to have obtained from the High Court leave to appeal, and relies on page 143 of the record, that is misleading. The record before us indicates that the applicant applied and was grant leave to appeal on 25th June 2018 (page 143). That was about four months before the ruling recognising the arbitral award as a decree of the Court. The leave that was granted therefore relates to the ruling which struck out the application to set aside the arbitral award, but not the ruling recognising the arbitral award, which came several months later and is the subject of this application and Civil Appeal No. 171 of 2020.

12. Undeterred, on 22nd June 2018 the applicant filed in the High Court Judicial Review Misc. Application No. 254 of 2018, seeking among others, an order of certiorari to quash the arbitral award. That application was struck out on 23rd July 2018 after the High Court found that it was illegitimate and a collateral attack on the arbitral award. The applicant was aggrieved and lodged Civil Appeal No. 176 of 2020 which it wishes to consolidate with Civil Appeal No. 171of 2020.

13. In an effort to enforce the arbitral award, the respondent obtained from the High Court, an order of mandamus compelling the applicant to pay the decretal amount and an order for the County Secretary to show cause why she should not be committed for contempt of court. Arising from those proceedings, part of the decretal amount has been paid to the respondent and the High Court is seized of the matter regarding payment of the balance.

14. Turning to the application now before us for admission of the appeal, the applicant has, in the supporting affidavit sworn on 8th August 2024 by Agnes Mulewa, its Acting Secretary, narrated in detail the background we have set out above. In its submissions dated 20th September 2024, and in so far as those submissions are relevant to the application for admission of the appeal, the applicant cites the decisions of the Supreme Court in Nyutu Agrovet Ltd. v. Airtel Networks Kenya Ltd. [2019] eKLR (hereafter Nyutu) and Synergy Industrial Credit Ltd v. Cape Holdings Ltd [2019] eKLR (hereafter Synergy) and submits that notwithstanding the non-existence of a right of appeal to this Court under the *Arbitration Act*, the Supreme Court held that this Court has a narrow and circumscribed jurisdiction to entertain appeals from the High Court relating to setting aside, recognition and enforcement of arbitral awards.

15. It is the applicant's further submission that allowing the recognition and enforcement of the arbitral award, the High Court stepped out of the grounds for recognition of an arbitral award and ignored the applicant's replying affidavit, evidence and submissions. It is contended that the applicant's evidence showed that the arbitral award dealt with a dispute not contemplated by or falling within the terms of reference and that it contained matters beyond the scope of the reference; that the arbitral award was induced or affected by fraud, bribery, corruption or undue influence because the consent order was entered into without the applicant's consent; and that the award is contrary to the public policy of Kenya, immoral, unjust, illegal and inconsistent with the values and principles of *the Constitution* and the *Public Procurement and Asset Disposal Act*, in that it was excessive and constituted unjust enrichment.

16. The applicant further faulted the High Court for holding that the application for recognition and enforcement of the arbitral award as a decree of the court was not opposed since the applicant was relying on its affidavit which was in the application for setting aside the arbitral award. In the applicant's view, this constituted a violation of its right to a fair hearing under Article 50 of *the Constitution*, was manifestly wrong and a violation of Article 159(2) (d) which obligates courts to ignore procedural technicalities.

17. The applicant concluded by submitting that the proceedings in the High Court were marred by unfairness and that it was necessary to admit the appeal for hearing so as to protect the integrity of the judicial process, prevent injustice and restore confidence in the administration of justice. The applicant added that the appeal raises matters of general public importance whose determination is necessary for its rights and the interests of the residents of its County. In particular, the applicant took issue with the holding of the High Court that, for purposes of an application to set aside an arbitral award, the three months period starts to run from the date the arbitral tribunal publishes the award by notifying the parties that the award is ready for collection, rather than from the date when the parties actually receive the award. In the applicant's view, that interpretation is a violation of its constitutional right to protection of the law.

18. The respondent opposed the application vide a replying affidavit sworn by its Managing Director, Philip Kioko Kathenge and a Notice of Preliminary Objection dated 30th September 2024. The respondent addressed all the three prayers sought by the applicant, but since this ruling is restricted to the prayer for admission of the appeal, it will serve no purpose to delve into those other prayers.

19. As far as admission of the appeal is concerned, the substance of the respondent's objection is that the parties did not reserve a right of appeal to this Court under section 39 of the *Arbitration Act* and therefore the Court lacks jurisdiction to entertain the appeal and application for admission of the appeal. It is the respondent's view that allowing the applicant to appeal in the circumstances of this case will constitute an unprecedented attack on parties' autonomy in arbitration and undermine the principle of limited judicial intervention in arbitration, thus making Kenya an unattractive destination for arbitration.

20. The respondent also pleads that the applicant's appeal lacks merit because it raises nothing new, save a challenge to the merits of the arbitral award, which is not enough to warrant admission of the appeal. Further, that under the *Arbitration Act* the arbitral tribunal has power to amend an award and therefore that cannot constitute a good ground for admission of the appeal. It is the respondent's view that the appeal does not raise any matter of general public importance as it is a pure commercial contract between two parties.

21. It is further contended that after the publication of the amended arbitral award, the applicant undertook to settle the sum awarded to the respondent, but failed to do so. The respondent also cites the applicant's inordinate delay, since 2018, before making the present application. In addition, the competency of the appeal is also challenged on the basis that the applicant served the notice of appeal upon the respondent outside the period prescribed by the Court of Appeal Rules.

22. We have carefully considered this application, the ruling of the High Court dated 31st October 2018, the submissions and authorities relied upon by the parties as well as the law. Before we consider the application on merits, there are a number of preliminary issues that we must address and settle.

23. The first is the respondent's contention that the notice of appeal on record is invalid because the applicant did not serve it within the prescribed time. That issue is not properly before us in this application. The respondent has a remedy under rule 86 of the Court of Appeal Rules. In Peter

Njuguna Njoroge v. Zipporah Wangui Njuguna [2013] eKLR, this Court held as follows on a similar objection:

> "We have anxiously considered the respondent's objection that there is no valid notice of appeal on record. In our view, we must avoid making a determination on that issue because the rules of this Court expressly provide the parties with solutions, which they are yet to invoke. The first is that a party who contends that a notice of appeal on record is invalid has a clear remedy under the rules how to deal with that notice. The second is that a party who has lodged a notice of appeal that is alleged to be invalid has an option under the rules to take steps to regularize any irregularity. As of now, neither the applicant nor the respondent has availed themselves of the remedies at their disposal under the rules."
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> (See also National Industrial Credit Ltd v Aquinas Francis Wasike & Another [2006] eKLR).

24. The second issue is the applicant's contention that because the High Court has already granted it leave to appeal, its prayer is now for "admission" of the appeal by this Court. Our reading of the decisions of the Supreme Court in Nyutu and Synergy is that although there is no right of appeal to this Court from a decision of the High Court arising from section 35 of the *Arbitration Act*, this Court has a limited and circumscribed jurisdiction in exceptional circumstances where the High Court is demonstrated to have "made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties."

25. Those 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.

26. 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. In addressing the matter, a five-judge bench of this Court in a ruling dated 9th May 2024 in the Nyutu case explained the approach that the Court would take, as follows:

> "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."

27. 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. Of course, as we have already noted, from the record, the leave granted to the applicant by the High Court to appeal to this Court does not even apply to the application before us or the appeal connected with this application.

28. The other issue is the nomenclature of "admission" of the appeal as opposed to "leave to appeal". Again, reading the decisions of the Supreme Court in Nyutu and Synergy, it is sufficiently clear to us that what the applicant calls an application for "admission of the appeal" is in essence an application for leave to appeal on the grounds that the intended appeal satisfies the limited and circumscribed jurisdiction identified by the Supreme Court. Where the Court is satisfied that the intended appeal

falls within the four corners of the limited and circumscribed jurisdiction, it grants the party leave to appeal. Where it does not, the Court declines leave.

29. The terminology of leave to appeal instead of admission of an appeal accords well with the Rules of this Court. Rule 41 provides for two types of leave to appeal. One, which is granted by a superior court below, and one which is granted only by this Court. The limited and circumscribed jurisdiction recognised in Nyutu and Synergy would fall within the second category, namely appeals which lie to this Court only with leave of this Court. In short, we are persuaded that an application like the one before us ought to be framed as an application for leave to appeal under the limited and circumscribed jurisdiction, rather than an application for admission of the appeal.

30. Indeed, reading the subsequent decision of the Supreme Court in Geochem Middle East v. Kenya Bureau of Standards [2020] eKLR (hereafter Geochem), there is clarity that the application before the Court is really an application for leave to appeal under the limited and circumscribed jurisdiction:

> " 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..."

31. The last issue is the whether the decisions of the Supreme Court in Nyutu, Synergy and Geochem are applicable where the applicant seeks to appeal from a decision of the High Court under section 36 rather than section 35 of the *Arbitration Act*. The above three decisions of the Supreme Court arose from section 35 of the *Arbitration Act* on setting aside an arbitral award. Although the applicant has mixed up the issues a bit, the application before us is in respect of an appeal from the decision of the High Court recognising an arbitral award under section 36 of the *Arbitration Act*, thus raising the question whether the three decisions of the Supreme Court are applicable.

32. Ordinarily this issue does not arise because in the High Court, invariably, the successful party and the aggrieved party apply, respectively, for recognition and enforcement of the award, and for the setting aside of the same. The applications are consolidated and heard and determined together in one ruling. But in the matter before us, the application for recognition and enforcement of the arbitral award was made on 20th April 2018 and determined in the ruling dated 31st October 2018, whilst the application to set aside the arbitral award was made on 11th May 2018 and determined extempore on 5th June 2018. As already indicated, the application before us relates to the appeal against the ruling and order dated 31st October 2018 which concerns recognition and enforcement of the arbitral award under section 36 of the *Arbitration Act*.

33. In our view, to the extent that there is no right of appeal under the *Arbitration Act* from the decision of the High Court under section 36 recognising and enforcing an arbitral award, the decisions of the Supreme Court in Nyutu, Synergy, and Geochem would apply mutatis mutandis to section 36 of the *Arbitration Act* if the decision of the High Court is "so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties." This would be the case, where, as in the present instance, the application to set aside aside and the application to recognise and enforce are made and determined separately. In other words, the limited and circumscribed jurisdiction of this Court recognised by the Supreme Court under section 35 of the *Arbitration Act* would be available to a party under section 36 who establishes those exceptional circumstances to the satisfaction of this Court. In addition, we bear in mind that the grounds for setting aside an arbitral award under section 35 of the

Arbitration Act and the grounds for refusal to recognise and enforce such an award under section 37 are virtually the same grounds.

34. Turning to the merits of the application before us, the first issue is whether the application has been made timeously and without unreasonable delay. Under rule 41(1) (b) of the Court of Appeal Rules, where an appeal lies to this Court with the leave of the Court as in this case, the application for leave has to be made within 14 days from the date of the decision against which it is desired to appeal. That was still the prevailing position under rule 39(b) of the previous Rules, the Court of Appeal Rules 2010. The decision of the High Court that the applicant intends to appeal was rendered on 31st October 2018, and the application for leave before us was filed on 8th August 2024, almost five years later. There is nothing on record to suggest that the applicant applied and obtained extension of the time prescribed by rule 41(1) (b).

35. But even if we were to excuse the applicant on the grounds that the law was unsettled or in a state of flux until the decisions of the Supreme Court in Nyutu, Synergy and Geochem, the decisions in the first two cases were rendered on 6th December 2019 whilst that in the last case was rendered on 18th December 2020. From December 2020 the Supreme Court had settled the law, but it took the applicant almost four years to make an application which ordinarily should be made within 14 days. In our view, this application is awfully out of time.

36. Be that as it may, it is common ground between the applicant and the respondent that there is no right of Appeal to this Court under the *Arbitration Act*, save to the extent provided by the Act and the limited and circumscribed jurisdiction recognised by the Supreme Court in Nyutu and Synergy. In Nyutu, the Supreme Court held as follows regarding the limited right of appeal to this Court:

> "(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." (Emphasis added).
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> The Court then concluded as follows:
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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.

77. 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."

37. Subsequently, the Supreme Court clarified the issue further in Geo Chem where it held:

> "...[W]e 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).

38. As we have already noted, in the same Geo Chem case the Supreme Court held that in an application for leave to appeal pursuant to the limited and circumscribed jurisdiction under section 35 of the *Arbitration Act*, this Court has to interrogate the substance of the intended appeal and determine whether it merits grant of leave. The apex Court cautioned against general grant of leave to appeal.

39. }What then are the exceptional circumstances that the applicant has identified to warrant leave to appeal to this Court under the limited and circumscribed jurisdiction? This is because, as held by the Supreme Court in Nyutu:

> "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." (Emphasis added).

40. The first exceptional reason is fraud, bribery and corruption.

Under section 35(2) (vi) of the *Arbitration Act*, fraud and corruption are such grave matters that an arbitral award will be set aside by the High Court if it is proven that the award was induced or affected by fraud, bribery, undue influence or corruption. We have no doubt in our minds where the High Court ignores clear evidence of an arbitral award being vitiated by fraud, bribery, undue influence or corruption, that would constitute exceptional circumstances warranting grant of leave to appeal to this Court. But what is the evidence of fraud, bribery or corruption put forth by the applicant?

41. Those serious allegations by the applicant are founded on the claim that the its former advocate did not have instructions to consent to the amendment of the award. It is a well-established principle in this jurisdiction that an advocate on record has general power to act and bind the client when he or she is acting bona fides. In Broke Bond Liebig (T) Ltd v. Mallya [1975] EA 266, the former Court of Appeal for Eastern Africa cited with approval the following holding in Hirani v. Kassam [1952] 19 EACA 131:

> "Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and those claiming under them...and cannot be varied or discharged unless it was obtained by fraud or collusion, or by an agreement contrary to public policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.."

42. And in Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd. [1982] KLR 485, the High Court reiterated the above position and added that:

> "A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority of his advocate unless such limitation was brought to the notice of the other side."

43. In Orbit Chemical Industry Ltd v. Attorney General [2012] eKLR, the High Court conducted a detailed review of decisions on an advocate's authority to bind the client and distilled a number of principles, the most relevant to this application being the following:

> " (i) Where a settlement reached is within the apparent authority of the counsel, the same is binding on the client;
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> ii. Where an action has been commenced the solicitor retained becomes the agent of the client and has an implied authority to compromise the action and no limitation of such implied authority can be relied upon by the client as against the other side unless such limitation had been brought to the knowledge of the other side before the compromise was arranged. The onus is upon the plaintiff to show that the authority had been limited. There is no room or authority for the client to limit that authority by way of secret instructions;
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> iii. The opposite party transacting with such counsel holding himself out as having ostensible authority to act in the matter need not ask such counsel to prove the extent of his ostensible authority before transacting with him irrespective of the magnitude of the compromise;
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> iv. Where the opposite party has no notice of the limitation, he is entitled to assume that the counsel had ostensible authority to compromise the transaction on behalf of the client on the terms contained in the compromise; and
>
> v. Generally an advocate is authorized to act as his clients agent in all matters not falling within an exception which may reasonably be expected to arise for discussion in the course of the proceedings."

44. This Court restated the principle on the authority of counsel to compromise an action on behalf of the client in Kenya Commercial Bank v. Benjoh Amalgamated Ltd. & another [1998] eKLR. We agree with those consistent pronouncements.

45. From the record, other than the applicant's bare statement that its former advocate did not have instructions to enter into the consent to amend the arbitral award, there is not an iota of evidence of fraud, bribery or corruption. There is also no allegation that the applicant notified the respondent of any purported limitation to its advocate's authority. With respect, the Court is being invited by the applicant to infer fraud, bribery or corruption, without any basis. Such serious allegations cannot be inferred by the Court (See Kinyanjui Kamau v. George Kamau [2015] eKLR) and cannot constitute the special circumstances on the basis of which the circumscribed jurisdiction of this Court may be invoked.

46. The assertion that the arbitral tribunal did not have jurisdiction to correct or amend the award flies in the face of the provisions of section 34 of the *Arbitration Act* which expressly allows, on application

by the parties or on the arbitral tribunal's own initiative, correction and interpretation of the arbitral award and the making of an additional award. The relevant provisions provide as follows:

> 34. (1) "Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties—
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> a. a party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and
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> b. a party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.
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> 2. If the tribunal considers a request made under subsection (1) to be justified it shall, after giving the other party 14 days to comment, make the correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.
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> 3. The arbitral tribunal may correct any error of the type referred to in subsection (1) (a) on its own initiative within 30 days after the date of the arbitral award.
>
> 4. Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
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> 5. If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within 60 days."

47. The arbitral award was published on 8th December 2017 and the respondent applied for amendment in writing and with notice to the applicant on 20th December, 2017 which was within the 30 days allowed by the above provision. Upon service of the application for amendment on the applicant, the parties recorded a consent order and on 16th January 2018, the arbitral tribunal approved the consent order.

48. In light of the above provisions and facts, we do not think there is any basis to request this Court to grant the applicant leave on exceptional grounds to agitate the issue whether the arbitral tribunal had jurisdiction to amend or correct the arbitral award.

49. The applicant's contention that it is entitled to leave to appeal so as to demonstrate that the decisions of the High Court on when time starts to run for purposes of an application to set aside an arbitral award are in violation of *the Constitution* does not arise in the appeal in respect of which the application before us relates. The issue in the appeal is whether the High Court erred in recognising the arbitral award as its decree and enforcing the same. The question whether the applicant's application to set aside the arbitral tribunal was filed out of time was determined by the ruling of the High Court delivered on 7th June 2018, which is not the subject of this application and Civil Appeal No. 171 of 2019.

50. Moreover, granted what we have stated above regarding the authority of an advocate to bind a client, the applicant cannot be heard to say that it was not notified or was not aware of the date of the amended award.

51. We equally do not find anything exceptional in the applicant's argument that the High Court erred in holding that the application for recognition and enforcement of the arbitral award was not opposed and ignoring the fact that the applicant was relying on its affidavit which was in the application for setting aside the arbitral award. We do not see how the applicant can claim to have responded to the application for enforcement of the arbitral award by an affidavit filed in the separate application to set aside the arbitral award, which application was struck out by the Court long before the application for recognition and enforcement of the arbitral award was heard. Once the application to set aside the arbitral award was struck out, the affidavit in its support did not survive to respond to the separate application on enforcement of the award. Again, with respect, there is nothing exceptional in the contention to warrant invocation of the Court's limited and circumscribed jurisdiction.

52. Lastly, the applicant's contention that the High Court misapprehended or ignored its relying affidavit, evidence and submissions and stepped out of the grounds for recognition of an arbitral award is no more than a challenge of the merits of the decision of the High Court. That is what the Supreme Court precisely stated is not a valid ground for allowing a party to appeal to this Court in arbitral proceedings because arbitral disputes are not supposed to follow the ordinary hierarchical appeal mechanism from one court to the next. Moreover, the circumscribed jurisdiction is intended to address process failures and not the merits of the arbitral award.

53. The decision of the Court of Appeal of Singapore in AKN & another v. ALC and others [2015] SGCA 18 which was cited with approval by the Supreme Court in Nyutu and Synergy is instructive in this respect. The court held:

> " In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration." (Emphasis added).

54. In Nyutu the Supreme Court rejected the submission that the limited and circumscribed jurisdiction of this Court in arbitral matters may be invoked on the basis that the intended appeal raises a point of law of general public importance. The Apex Court expressed itself thus:

> " (74) Whereas the above proposals are clearly progressive and well thought out, if adopted as they are, they may considerably broaden the scope of the exercise of the limited jurisdiction under consideration. As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention. Thus, we do not think as suggested by the Interested Party that an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underling dynamics. To that extent we reject that proposal" (Emphasis added).

55. The Court further explained in Synergy that the right of Appeal under section 39 of the *Arbitration Act* is separate and distinct from the limited and circumscribed right of appeal it recognised under section 35 of the *Arbitration Act*. The Supreme Court thus held:

> "[77]... On our part, we take the position that, unlike other provisions in the Act, section 39 specifically provides intervention by the Court of Appeal where parties to a domestic arbitration agree that an application should be made to the High Court for a determination of a question of law arising in the arbitration process or the award. Such a High Court

decision is appealable to the Court of Appeal if the parties have agreed so or if the Court of Appeal finds that a point of law of general importance is involved. That section is thus very particular on when it can be invoked. It is an independent provision separate from all others and particularly section 35 which is our main concern."

56. Accordingly, to the extent that the application before us invokes the limited and circumscribed jurisdiction under section 35 of the *Arbitration Act*, we have no basis to delve into whether there is an issue of general public importance involved or disclosed in the applicant's appeal. But even if we were required to undertake such an evaluation, from what we have stated above, no such issue is apparent.

57. Taking all the foregoing into account, we are not persuaded that the applicant has demonstrated that the High Court made a decision so grave, so manifestly wrong, so as to warrant invocation of the limited and circumscribed jurisdiction of this Court in arbitral proceedings as defined by the Supreme Court. In our view, what is before us is precisely the type of cases the Supreme Court warned against entertaining, namely, where the applicant merely seeks another shot at an undeserved opportunity to appeal, which completely negates the essence of party autonomy, expedition and efficiency in arbitration. It bears repeating the following words of the Supreme Court in Synergy:

> " In applying the above criteria, it would be expected that the Court of Appeal would jealously guard the purpose and essence of arbitration under Article 159(3)(d) so that floodgates are not opened for all and sundry to access the appellate mechanism. Similarly, it would be expected that a leave mechanism would be introduced into our laws by the Legislature to sieve frivolous appeals and not create backlogs in the determination of appeals from setting aside of award decisions by the High Court."

58. The upshot is that we are persuaded that this application is totally bereft of merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2024.

K. M'INOTI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. A. OCHIENG

.....

JUDGE OF APPEAL

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

Signed Deputy Registrar.