Vio Tech Limited v Upperhill Chambers Limited & another (Civil Application E026 of 2024) [2024] KECA 1496 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KECA 1496 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E026 OF 2024

DK MUSINGA, MSA MAKHANDIA & K M'INOTI, JJA

OCTOBER 25, 2024

BETWEEN

VIO TECH LIMITED ..... APPLICANT

AND

UPPERHILL CHAMBERS LIMITED ..... 1ST RESPONDENT

CHINA WU YI LIMITED ..... 2ND RESPONDENT

(Being an application for certification as a matter of general public importance, leave to appeal against the decision of the High Court of Kenya (Mongare, J.) dated 11th January 2024 in Misc Application No. E162 of 2022)

RULING

1. Pursuant to clause 31.0 of a subcontract agreement dated 22nd June 2017 between, Vio Tech Limited, "the applicant" and China Wu Yi Limited "the 2nd respondent", the applicant instituted arbitral proceedings against the 2nd respondent before John Ohaga, SC, a single arbitrator, seeking in excess of Kshs. 60,000,000.00 on account of payment of interim valuations.

2. The 2nd respondent filed a statement of defence and counterclaim demanding that the award be published in its favour against the applicant in excess of the sum of Kshs 27,000,000. Subsequently, the 2nd respondent successfully sought the joinder of Upperhill Chambers Limited, "the 1st respondent", to the proceedings.

3. Upon joinder, the 1st respondent filed a defence and counterclaim seeking an award of Kshs 26,457,165.00 mistakenly paid to the applicant as part of the composite interim payment of certificates submitted to the 2nd respondent. After hearing the parties, the single arbitrator rendered his award dated 30th August 2021 dismissing the claim by the applicant against the 2nd respondent. As regards

the counterclaim by the 2nd respondent, the same was allowed to the limited extent of Kshs 1,500,000. Turning to the 1st respondent's counterclaim, it was allowed in the sum claimed.

4. The arbitrator, however, reserved the issue of costs between the applicant and 2nd respondent to be agreed, if not, be taxed at a later date. The arbitrator further directed that the amounts be paid within 45 days of the award. However, this was not to be, which compelled the 1st respondent to apply to court for the award to be recognised as an order of the court and leave to enforce the award as a decree of the court, which application was allowed.

5. It is against this backdrop that the applicant has now approached this Court seeking orders of certification; leave to appeal the ruling and order aforesaid to this Court, as well as stay of further proceedings in the trial court. The application is anchored on sections 3A and 3B of the *Appellate Jurisdiction Act*, rules 5 (2) (b), 41 (1) & (2), 42, 43, and 44 of the Court of Appeal Rules "Our Rules", section 39 of the *Arbitration Act*, rule 11 of the Arbitration Rules, 1997 and all other enabling provisions of the law.

6. The application is based on the grounds on its face and the supporting affidavit sworn by Mr. Samson Njoroge, in which he reiterated the history of the dispute, which we need not rehash. Suffice to add that according to the applicant, the award was partial as it left the issue of costs to be determined at a future date, and was, therefore, incapable of enforcement as per section 36 of the *Arbitration Act*; that in allowing the application, the trial court failed to revert to the binding authorities of this Court on the issue cited by the applicant. Instead, it relied on the High Court decisions which caused an injustice to the applicant; that the instant application had been made promptly; that the intended appeal raises substantive questions of general public importance, inter alia, whether section 36 qualifies what kind of awards may be enforced; and, whether an award which reserves some issues, such as costs, for consideration at a later date is a final award capable of enforcement. The applicant too will be urging whether or not the decisions of this Court in Kenfit Limited vs. Consolata Fathers (2015) eKLR and Ezra Odondi Opar vs. Insurance Company of East Africa Ltd [2020] eKLR are binding on the High Court. That if no order of stay of proceedings in the trial court is issued, the respondents may proceed to enforce the award, thereby rendering the intended appeal, which is arguable, nugatory.

7. The Motion is opposed by the respondents. The 1st respondent through its replying affidavit sworn by Caroline Mallo dated 11th March 2024 depones that it was aware of the final award made against the applicant of Kshs. 26,457,165.90 which was the only issue between the applicant and the 1st respondent as it was not awarded costs. That if the applicant was aggrieved by the award, it was entitled to file an application to set it aside within three months of delivery, but opted not to. That it was then that the 1st respondent successfully applied to have the award recognised as an order of the court. The 1st respondent further depones that the requirement for leave to appeal to this Court from the High Court is derived from the judgment of the Supreme Court in Nyutu Agrovet Ltd vs. Airtel Networks Ltd (2019) eKLR (Nyutu). Further, that the limited jurisdiction set out therein is not applicable in the circumstances of this case, as no decision on an application under section 35 of the *Arbitration Act* was made by the High Court. That from the application and the written submissions in support thereof, the applicant seeks certification under Article 163 (4) (b) which only applies to intended appeals from this Court to the Supreme Court. On this account, the 1st respondent contended that the application was hopelessly incompetent and ought to be struck out with costs.

8. The 2nd respondent on its part filed a replying affidavit sworn by Rhodes Ndambuki on 8th March 2024, in which he reiterates the averments of the 1st respondent, save to add that the applicant was guilty of laches and inordinate delay in filing the application.

That the applicant had not relied on Article 163(4)(b) of *the Constitution* so as to invoke this Court's jurisdiction and therefore this Court lacks jurisdiction to hear and determine the application. Further, that the issue of costs being relied on as the key ground for the application was resolved by the arbitrator in his award.

9. That the foregoing notwithstanding, the applicant had withdrawn its notice of appeal dated 19th January 2024 vide a notice dated 5th March 2024, hence this Court does not have jurisdiction to entertain the application as a party seeking any orders from this Court must first file a notice of appeal under rule 77(1) of our Rules. That being the case, the entire application is incompetent and ought to be struck out in limine.

10. The application was canvased by way of written submissions with limited oral highlights. Mr. Waigwa, learned counsel, appearing for the applicant, argued that the applicant had met the threshold for certification for reasons that the matters that will be raised in the intended appeal were of general public importance. He relied on the case of Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone [2013] eKLR. He further relied on the case of Kenfit Limited vs. Consolata Fathers [2015] eKLR and Ezra Odondi Opar vs. Insurance Company of East Africa Ltd [2020] eKLR to submit that the High Court could only recognize and enforce a final award by an arbitrator if the award does not reserve any matter for consideration by the arbitrator or any other persons at a later date. On the nugatory aspect, it was submitted that if further proceedings are not stayed, execution will ensue, thereby shutting the door against the applicant in its bid to set aside the arbitration award.

11. On its part, the 1st respondent, through Mr. Ngatia SC, also reiterated the depositions in its replying affidavit. Suffice to add, it was submitted, the award dealt with rival claims in which the 1st respondent was awarded Kshs. 26,457,165.90 without costs. Therefore, as between the applicant and the 1st respondent, there was finality in the award. Further, that after waiting for a potential section 35 of the *Arbitration Act* application by any of the parties and none was forthcoming, the 1st respondent properly filed the application, whose ruling is the subject of the intended appeal. Counsel submitted that to the extent that the application was brought under section 39 of the *Arbitration Act*, it was, a non-starter because the arbitration proceedings were not under the said section. That when the applicant seeks leave to appeal on account of matters of general public importance, it is calling in aid Article 163(4) which deals with appeals from this Court to the Supreme Court.

12. On whether there was an automatic right of appeal against an arbitral award in the absence of express agreement between the parties, counsel relied on the case of Baku Raphael vs. Attorney General [2015] eKLR to submit that a right of appeal is a creature of statute and there is no such thing as inherent appellate jurisdiction and if there is, it must be provided for in the law. Further, he relied on the cases of Mc Asphalt Marine Transport Ltd vs. Liberty International Canada, 2005 O. J. No 1424, and Synergy Industrial Credit Limited vs. Cape Holdings Limited (2019) eKLR (Synergy), to submit that limitation of judicial intervention in arbitration proceedings is in line with the principle of finality of arbitration. Otherwise, excessive judicial interference with arbitral awards will not only be a paralyzing blow to the healthy functioning of arbitration processes but also a clear negation of the legislative intent of the *Arbitration Act*. Relying on the cases of Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR and Nyutu, counsel submitted that the appeal is intended to frustrate the 1st respondent's right to enforce the arbitral award.

13. The 2nd respondent through its learned counsel, Mr. Mwangi, submitted that in failing to seek the setting a side of the award under section 35, of the *Arbitration Act*, the applicant had not availed itself of the remedy, and that the time had since run out. Relying on the case of Equity Bank Ltd vs. West Link Mbo Ltd [2013] eKLR, it was submitted that this Court's jurisdiction is invoked by the filing of

a notice of appeal. That considering rule 75(4) of our Rules, even if the applicant was seeking leave, it was not required to wait until leave is granted for it to file a notice of appeal. On certification, it was submitted that no reference was made to Article 163(4) (b) of *the Constitution* and therefore the threshold had not been met. Further, that this Court lacks jurisdiction to entertain the intended appeal as the dispute was not initiated as a constitutional reference in the High Court for enforcement of the Bill of Rights.

14. It was further submitted that the applicant had not met the threshold for the granting of an order for stay of proceedings under rules 5(2)(b) of our Rules. He further submitted that the intended appeal will not in any event raise arguable grounds. That the issue of pending costs which forms the basis of the applicant's intended appeal was conclusively determined by the arbitrator in the award as against the 2nd respondent. Reliance was placed on the case of Dyna Technologies Pvt Ltd vs. Crompton Greaves Ltd [2019] SCC for this submission.

15. We have considered the application, the affidavits, the rival submissions, the authorities cited, and the law. The applicant seeks leave to appeal against the ruling of the High Court dated 11th January 2024 as well as an order of stay of further proceedings. We propose to start with the first prayer for leave to appeal and only consider the second prayer if the first prayer is successful. Should the first prayer fail, there will be no occasion to consider the second prayer.

16. We agree with the respondents that there is utter confusion on the part of the applicant on the exact nature of the application before us. Although the applicant did not invoke Article 163(4) (b) of *the Constitution*, the applicant has relied extensively on the decision of the Supreme Court in Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone (supra). That decision is relevant to applications under Article 163(4) (b) of *the Constitution* regarding matters that are found to be of general public importance as a prelude for leave to appeal from a decision of this Court to the Supreme Court. The application before us does not involve a decision of this Court which is intended to be appealed to the Supreme Court. On the contrary, the applicant intended to appeal to this Court from a decision of the High Court. Submissions on a matter of general public importance under *the Constitution* are totally misplaced in this application.

17. Secondly, in Nyutu the Supreme Court held that the limited and circumscribed right of appeal under section 35 of the *Arbitration Act* cannot be invoked on the basis that the intended appeal raises matters of general public importance. The Court expressed itself as follows:

> "(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).

18. Accordingly, in an application for leave to appeal to this Court under the limited and circumscribed jurisdiction arising out of section 35 of the *Arbitration Act*, there is no room for consideration whether the intended appeal raises matters of general public importance.

19. Thirdly, the applicant has relied on section 39 of the *Arbitration Act*. That section provides for an application or appeal to the High Court and subsequently to this Court by any party to arbitral

proceedings on any question of law arising out of an arbitral award. However, in the first instance, the right to lodge such an application or appeal is conditional upon the parties to the arbitral proceedings having agreed to such right of appeal prior to the delivery of the arbitral award. In the matter before us, the applicant has not pointed out any agreement between the parties prior to the delivery of the arbitral award, where the parties agreed to reserve the right of appeal to this Court.

20. In the second instance, this Court may grant leave to appeal under section 39(3) (b) if it is satisfied that the intended appeal raises a point of law of general public importance and the determination of which will significantly affect the rights of any of the parties. Of this provision, the Supreme Court held as follows in Synergy:

> " [77] ...On our part, we take the position that, unlike other provisions in the [Arbitration] 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."

21. What then, is the point of law of general public importance identified by the applicant for determination by this Court? It is that the High Court erred by failing to follow binding decisions of this Court in Kenfit Limited vs. Consolata Fathers (supra) and Ezra Odondi Opar vs. Insurance Company of East Africa Ltd. (supra) to the effect that an arbitral award may only be recognised and enforced if the arbitral tribunal has not reserved any issue for further consideration. The applicant contends that in this case the arbitral tribunal reserved the issue of costs between the applicant and the 2nd respondent and therefore the High Court should not have recognised and enforced the arbitral award. In the applicant's view there is great uncertainty in the law.

22. With respect, we think that in the circumstances of this case, the decisions of this Court cited by the applicant as having been ignored by the High Court are easily distinguishable in the

sense that the applicant was not awarded any costs by the Arbitral Tribunal against the 1st respondent which sought recognition and enforcement of the award. To that extent, there is no pending or reserved issue for determination by the arbitral tribunal as between the applicant and the 1st respondent. Accordingly, we do not perceive any real point of law of general public importance, the determination of which will significantly affect the rights of the parties.

23. That leaves the limited and circumscribed jurisdiction recognised by the Supreme Court in Nyutu and Synergy. That jurisdiction is exceptional and to be invoked in the clearest of cases that satisfy the narrow confines defined by the Supreme Court. In Nyutu, the Supreme Court held as follows:

> " (72) Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus

undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in [AKN & another v ALC & others [201] SGCA 18] that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself...

(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).

24. The Supreme Court then concluded as follows:

"(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.

(78) In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice."

25. A bench of five judges of this Court, in determining the Nyutu case after the Supreme Court remitted the same back to the Court of Appeal, explained the approach of the Court under the Nyutu and Synergy circumscribed jurisdiction:

"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."(Emphasis added)

26. It is worth recalling that the Nyutu and Synergy cases concerned section 35 of the *Arbitration Act*, which deals with setting aside of an arbitral award. The application before us is against a ruling of the High Court recognising and enforcing an arbitral award as a decree of the Court under section 36 of the *Arbitration Act*. From the record before us, the applicant did not make any application before the High Court under section 35 of the *Arbitration Act* to challenge the arbitral award. Nothing, even remotely in the application before us, concerns section 35 of the *Arbitration Act*.

27. It may be possible that the limited and circumscribed jurisdiction in Nyutu and Synergy may be available, mutatis mutandis to intended appeals arising from section 36 of the *Arbitration Act* where the parties have first made both applications for setting aside and for recognition of the arbitral award and the same have been determined separately by the High Court. In such cases, if the recognition and enforcement is "so grave, so manifestly wrong and which has completely closed the door of justice

to either of the parties", there may be occasion to invoke the limited and circumscribed jurisdiction. We say so, taking into account the fact that the grounds for setting aside an arbitral award and for refusal to recognise the award are virtually similar. However, in the circumstances of the application before us, the applicant did not challenge or apply to set aside the arbitral award under section 35 of the *Arbitration Act*. We accordingly agree with the respondents that having not made any application under section 35 of the *Arbitration Act* to set aside the arbitral award, the applicant cannot invoke the limited and circumscribed jurisdiction recognised by the Supreme Court in Nyutu and Synergy.

28. That aside, we ask ourselves what is the exceptional issue that the applicant intends to agitate on appeal before this Court? It is the same issue we have already considered under a point of law of general public importance, namely the alleged failure by the High Court to follow binding decisions of this Court. In view of what we have already stated above, the applicant had not demonstrated any exceptional issue for determination by this Court in the intended appeal.

29. We are satisfied, therefore, that the applicant has failed to bring itself within the four corners of the limited and circumscribed jurisdiction in Nyutu and Synergy and that there is nothing before us to persuade us that in its ruling, the High Court made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. We must repeat the word of the Supreme Court in Geochem Middle East v. Kenya Bureau of Standards [2020] eKLR:

> "...[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).

30. We do not find it necessary to delve into the issue of whether the application is incompetent for lack of a notice of appeal. A notice of appeal is a foundational and mandatory document in an application for injunction, stay of execution or stay of proceedings (See Equity Bank Ltd vs. West Link Mbo Ltd. (Supra). Having failed in its application for leave to appeal, the prayer for stay of execution is moot.

31. Ultimately, the applicant's notice of motion dated 24th January 2024 has no merit and is hereby dismissed with costs to the respondents. It is so ordered.

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

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.