**Bomas of Kenya Limited v Standard Investment Bank Limited (Civil Application E456 of 2021) [2023] KECA 544 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 544 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPLICATION E456 OF 2021**

**HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA**

**MAY 12, 2023**

**BETWEEN**

**BOMAS OF KENYA LIMITED ..... APPLICANT**

**AND**

**STANDARD INVESTMENT BANK LIMITED ..... RESPONDENT**

***(Application for stay of execution pending hearing of intended appeal and leave to appeal against the ruling and orders of the High Court at Nairobi (Mabeya, J.) dated 25th November, 2022 in Nairobi HCComm. Misc. No.E230 of 2021)***

**RULING**

1. By a notice of motion dated 9th December, 2022, Bomas of Kenya Limited (the applicant) seeks leave to appeal to this Court against the ruling and orders made in Nairobi HCComm Misc. No. E230 of 2021 (Mabeya, J.) dated 25th November, 2022. It also prays for stay of the said ruling pending the hearing and determination of its intended appeal to this Court. The application is premised on section 39(3) (b) of the *Arbitration Act* (the Act), Rule 5(2) (b), 39(a), 42 & 43 of the *Court of Appeal Rules* 2010 and article 164(3) (a) of the *Constitution*.

2. Briefly, the primary dispute relates to a contract in which the respondent was contracted by the applicant to carry out a feasibility study on proposed development of the Bomas International Convention and Exhibition Centre. A dispute arose between the parties relating to the contract which was referred to arbitration before a sole arbitrator, Mr. Collins Namachanja, FCIArb. The arbitrator published his final award on 4th May, 2020. The applicant did not challenge the award within the three months as stipulated under Section 35 (3) of the *Act*. According to the applicant, the parties only collected the award on 17th February, 2021 after paying the arbitral fees in full.

3. On 29th March, 2021, the respondent filed an application before the High Court seeking orders to enforce the award. On 17th May, 2021, the applicant filed an application seeking to set–aside the arbitral

award. Notably, the applicants' application was premised on the grounds set out in section 37 of the *Act*. We shall discuss these grounds in detail later. In opposition to the applicant's application, the respondent filed a notice of a preliminary objection on 18th May, 2021 premised on section 35 (3) of the *Act*. Both applications were heard together and determined vide a ruling dated 25th November, 2022 in which the learned judge struck out the applicant's application for being incurably time barred and allowing the respondent's application for recognition and enforcement of the award.

4. Aggrieved by the said ruling, the applicant lodged a notice of appeal dated 8th December, 2022 seeking leave to appeal against part of the said ruling. The application before us is supported by an affidavit sworn on 9th December, 2022 by Peter Gitaa, the applicant's Chief Executive Officer. The salient averments are:- that the judge made a far-reaching error of law contrary to section 6 (1) of the *Act*; that the judge failed to enquire into the substance of the objections raised; that its application was not considered on merits instead it was dismissed on account of the respondent's preliminary objection; that the finding was arbitrary; that the High Court shut the doors of justice to the applicant by refusing to consider their objections as required by law; and this Court is the applicant's only hope to salvage justice.

5. On the plea for stay, he averred that:

   (a) the applicant is a state owned corporation dependent on Government funding and its assets are held in trust for the people of Kenya, so, unless stay is granted, the respondent will enforce the award to recover the sum of Kshs.81,335,280 together with costs and interests, thereby decimating the applicant's operations;

   (b) that the loss suffered cannot be compensated or restored by way of costs or damages;

   (c) no prejudice will be suffered by the respondent if stay is allowed because the award continues to attract interests as directed by the arbitrator and costs as awarded by the High Court.

6. The respondent opposed the application vide a replying affidavit sworn on 22nd December, 2022 by Job Kihumba, its Executive Director. He averred that:

   (a) the contract entered into between the parties on 16th October, 2015 did not provide for any appeal against a decision of the High Court on recognition and enforcement of the award

   (b) an appeal only lies from the High Court to this Court on a determination under section 35 of the *Act* where the High Court in setting aside an arbitral award stepped outside the grounds set out under section 35 of the *Act*;

   (c) the limited jurisdiction of this Court should be exercised sparingly where a decision by the High Court is manifestly wrong such as closing the door of justice to either party; and,

   (d) that there is no question of law of general public importance for determination by this Court in the intended appeal.

7. On the prayer for stay, he averred that :

   (i) the intended appeal is a ploy by the applicant to refuse to honour its contractual obligations by paying the decretal debt;

   (ii) the respondent is capable of refunding the money in the event the intended appeal succeeds;

   (iii) if this Court is inclined to allow the application, then the applicant should be ordered to provide security for costs because the applicant stands to suffer irreparable loss if the appeal fails; and,

(iv) the decretal debt continues to attract interests at 13% p.a.

8. In his submissions, the applicant's counsel argued that section 36(1) of the *Act* makes enforcement of an arbitral award subject to the grounds set out in section 37 of the *Act*. He argued that the applicant raised the said grounds in its replying affidavit but the High Court arbitrarily dismissed it and stepped outside the bounds of section 35 of the *Act*. He contended that sections 35(2) and 37(1) of the *Act* prescribes the grounds which a party can rely on in opposition to enforcement of an arbitral award, and reasoned that because the grounds under sections 35(2) and 37(1) of the *Act* are almost verbatim similar, it is inevitable that pleadings founded on these sections would be similar. He cited this Court's decision in *University of Nairobi v Multiscope Consulting Engineers* (2020) eKLR, Civil Application No. 129 of 2020 which while considering an application for leave to appeal against a decision of the High Court in an arbitral matter, stated:

> "It is common ground that the applicant's motion to set aside the arbitral award was not heard on merit but was struck out on the ground that it was filed out of time contrary to section 35(3) of the *Arbitration Act*. This means that the substantive issues raised in the motion were not addressed or determined."

9. Opposing the application, learned counsel for the respondent submitted that the applicant has not demonstrated any exceptional issues requiring determination in the intended appeal. He cited the Supreme Court decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* (2019) eKLR that an appeal against a decision of the High Court under Section 35 of the *Act* may only lie upon grant of leave in exceptional cases. Counsel maintained that as per the above authority, an appeal may only lie where the determination was so manifestly wrong so as to close the door of justice to either party and this jurisdiction should be sparingly exercised and only in the clearest of cases. Lastly, counsel submitted that the applicant has not demonstrated that the High Court stepped outside section 35 of the *Act* in recognizing and enforcing the award and urged the Court to find that the applicant has not satisfied the tests set out by the Supreme Court to merit the leave sought.

10. First, we will address the prayer for leave to appeal. A convenient starting point is to underscore that the general approach on the role and intervention of the court in arbitration disputes in Kenya is provided in Section 10 of the *Act* which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. The section epitomizes the recognition of the policy of party's #autonomy" which underlie the arbitration generally and in particular the *Act*. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy. (See *Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed p. 293*). The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

11. By agreeing to arbitration, the parties limit interference by courts to the grounds set out in Section 35 of the *Act*. By necessary implication they waive the right to rely on any further grounds of review, 'common law' or otherwise. Section 35 (1) of the *Act* provides that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsection (2). However, the *Act* limits the time frames within which a disgruntled party may lodge his application with the High Court for setting aside an arbitral award. In this regard, Section 35(3) provides that where three months have lapsed since the award was entered, the court will not entertain an application to set the award aside. This limitation may serve to prevent applications made in bad faith and also to

ensure that such decided matters are put to rest. This was the holding by this Court in *Nancy Nyamira & Another v Archer Dramond Morgan Ltd*, (2012) eKLR that:

> "...Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the *Act*."

12. The enforcement of an arbitral award is a streamlined procedure that is supposed to be completed in a short period of time. This is because all the parties' rights, obligations, claims, and defenses are deemed to have been evaluated and unequivocally resolved by the arbitral tribunal in a final award. Accordingly, the Act clearly restricts the grounds upon which the enforcement actions may be resisted or challenged by a losing party, and the requirements that a court must evaluate before an award is accepted, enforced, or refused by a losing party.

13. It is common ground that the applicant before us did not apply to set aside the arbitral award within the 90 days provided under section 35 (3) of the *Act*. The respondent applied for enforcement and recognition of the award under Section 36 of the *Act*. Confronted with the application for enforcement and recognition of the award, the applicant filed an application dated 17th May, 2021, seeking to set aside the award citing grounds provided under section 37 of the *Act*. To counter the said application, the respondent filed a notice of a preliminary objection dated 18th May, 2021, stating inter alia that the application was time barred by dint of section 35 (3) of the Act. The learned judge (Mabeya, J.) upheld the preliminary objection and dismissed the applicant's application for being incurably time barred. Also, the learned judge held that the arbitral award was final and binding upon the parties to it under section 32A of the *Act* which provides as follows:

> 32 A. Effect of award
>
> Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this *Act*

14. The applicant argues that the High Court failed to appreciate that the grounds under Section 35 substantially mirror those set out in section 35 (1) (2) and that under section 37, a court may refuse to recognize or enforce an award. Understandably, a proceeding to enforce or confirm an arbitral award is summary in nature. Section 37 permits only restrictive attack against an arbitral award. The rationale for limiting the grounds to oppose enforcement proceedings is because enforcement or confirmation proceedings of an award is tantamount to a post-judgment proceeding that does not require trial or evidentiary hearing. It is assumed to be brief in character as all the rights, obligations, claims, and defenses are deemed to have all been reviewed and resolved by the arbitral tribunal in a final award. Hence, seeking the confirmation or enforcement of the award is expected to be summarily decided. It is for the above reason that Parliament specifically circumscribed the grounds upon which the enforcement proceedings may be opposed by a losing party or conditions the court would consider before the award is recognized, enforced, or refused.

15. Having been caught up by the stringent timelines under Section 35 (3), the applicant approached the court under section 37 of the *Act* which provides the grounds on which the High Court may refuse to recognize an arbitral award irrespective of the state in which it was made. However, the learned judge struck out the application for being incurably time barred. In the application before us, the applicant cites *inter alia* Rule 39 of this *Court's Rules* (now Rule 40) which provides for an application for leave to be made where the Superior Court has refused such leave to be granted to the applicant. The motion

has also been brought under section 39(3) (b) of the *Act* which deals with questions of law arising in domestic arbitration. The section provides as follows:

(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—

a. if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or

b. the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).

16. Our reading of section 39(3) (b) of the *Act* leaves us with no doubt that an appeal under this section can only lie to this Court from the decision of the High Court in the exercise of its jurisdiction under section 39 (2) if this Court is satisfied that a point of law of general importance is involved, the determination of which will affect the rights of one or more of the parties and grant leave to appeal. It is noteworthy that in rendering the impugned ruling, the High Court was exercising its jurisdiction under Sections 35, 36 and 37 and not Section 39 of the *Act* which provides:

39. Questions of law arising in domestic arbitration Where in the case of a domestic arbitration, the parties have agreed that—

a. an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

b. an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

2. On an application or appeal being made to it under subsection (1) the High Court shall—

a. determine the question of law arising;

b. confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re- consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

17. There was no prior agreement between the parties as provided under the above provision. This Court in *Kenyatta International Convention Centre v Congress Rental South Africa* (2020) eKLR stated:

> " 40. In the absence of such an agreement, where no application or appeal was made to the High Court under section 39 (1) and/or (2), can an application for leave to appeal to this Court be grounded on the provisions of section 39 (3) (b) of the *Act*? We think that an appeal under this section can only lie to this Court from the decision of the High Court in the exercise of its jurisdiction under section 39 (2) if this Court is satisfied that a point of law of general importance is involved the determination of which will affect the rights of one or more of the parties and grants leave to appeal. But as earlier stated, in the ruling sought to be appealed from, the High Court was exercising its jurisdiction under section 35 (2) of the *Act*, not section 39 of the *Act*.
>
> ...

> In view of the foregoing, we find and hold that no appeal lies to this Court because the High Court did not make any determination under section 39 (2). The application before us is therefore incompetent. But even if we are wrong in that finding, we would still have to determine whether the threshold for granting leave under section 39 has been met by considering whether a point of law of general importance is involved in the intended appeal, the determination of which will substantially affect the rights of one or more of the parties, as held in both the Nyutu appeal and the Synergy Industrial appeal by the Supreme Court." (Emphasis added)

18. We are also guided by the *dictum* in *Okeno & Sons Building Contractors v Bukura Agricultural College* (2018) eKLR that:

> "(17) It is clear from Section 39 of the *Act* that an appeal to the High Court is allowed on questions arising from the award and only if the parties have agreed that such an appeal could be made.
>
> It is also clear from Section 39(3) of the *Act* an appeal lies to the Court of Appeal from the decision of the High Court exercising jurisdiction under Section 39(2) on a point of law of general importance and with the leave of the Court of Appeal.
>
> The application of Section 39 was considered by this Court in *Anne Mumbi Hinga* (*supra*) and in *Nyutu Agrovet Limited* (*supra*).
>
> (18) This appeal relates to the exercising of the jurisdiction by the High Court to set aside the arbitral award under Section 35 of the *Act*.
>
> In setting aside part of the arbitral award, the High Court was not exercising appellate jurisdiction under Section 39(2) of the *Act*. It follows that the jurisdiction of this Court under Section 39(3) cannot be invoked."

19. In dismissing the applicant's application for setting aside the arbitral award, and in allowing the enforcement the arbitral award, the High Court was not exercising appellate jurisdiction under section 39(2), therefore, the jurisdiction of this Court under section 39(3) (b) cannot be invoked.

20. Having found that the learned trial judge was exercising his jurisdiction under section 35 of the *Act*, we are guided by the Supreme Court decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators- Kenya Branch (Interested Party)* (2019) eKLR that judicial intervention in matters not specifically provided by the Act can only be countenanced in exceptional instances. 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 added)

21. The Supreme Court in the *Nyutu case* at paragraph 57 of the judgment stated that Section 10 of the *Act* was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. Under section 35(1), recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This implies that the court will not act in such matters unless an aggrieved party invites it to do so. Section 37 of the *Act* only provides grounds for refusal of recognition or enforcement of an award, therefore, the applicant could not properly by pass the provisions of section 35 and purport to circumvent its failure by seeking refuge in section 37 of the *Act*.

22. Similarly, in *Synergy Industrial Credit Limited v Cape Holdings Limited* (2019) eKLR, which was delivered by the Supreme Court on the same day as the *Nyutu decision*, the Supreme Court after considering comparative jurisprudence stated:

> "(86) For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the *Arbitration Act*, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the *Act* for interfering with an arbitral award."

23. Flowing from the authorities cited above and our conclusion that the jurisdiction of this Court under Section 39(3) (b) cannot be properly invoked in the circumstances of this case, we find and hold that the applicant's plea for leave to appeal fails.

24. The other ground upon which the application for leave to appeal collapses is that a reading of the applicant's notice of appeal dated 8th December, 2022, shows that the applicant is not appealing against the part allowing the enforcement of the award but it only against part of the ruling disallowing its application to set aside the award. The import of the foregoing is that there is no appeal against the order allowing the recognition and enforcement of the award.

25. The prayer for leave having failed, we find and hold that it will serve no utilitarian value to address the prayer for stay for the simple reason that this Court cannot properly exercise its discretion under Rule 5(2) (b) because there is no appeal before it against the dismissal of the applicant's application. The upshot is that the applicant's Notice of Motion dated 9th December 2022 is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.**

**HANNAH OKWENGU**

**.....**

**JUDGE OF APPEAL**

**ALI-ARONI**

**.....**

**JUDGE OF APPEAL**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**