National Agricultural Export Development Board v Cargil Kenya Limited (Civil Appeal 60 of 2014) [2023] KECA 484 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 484 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 60 OF 2014

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

MAY 12, 2023

BETWEEN

NATIONAL AGRICULTURAL EXPORT DEVELOPMENT BOARD ..... APPELLANT

AND

CARGIL KENYA LIMITED ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenyan Mombasa- Hon. Justice Mary Kasango dated and delivered on 15th May, 2014 at Mombasa in Misc. Civil Application No. 390 of 2012)

JUDGMENT

1. The appellant and the Respondent entered into a bailment agreement dated 22nd January, 2004. As a result of an alleged breach of the bailment agreement, the Appellant referred the dispute to Mr. Steve Gatembu Kairu (as he then was), sole arbitrator as per clause 23.3 of the said agreement. In the course of the arbitral proceedings, the Respondent filed an application dated 8th June, 2012 seeking that the Appellant furnishes security for costs of the arbitration which it estimated at Kshs. 3,407,500.00. Similarly, the Appellant filed an application dated 12th July, 2012 seeking for the deposit of the amount sought in the claim being the sum of US $ 1,175 383.84 as well as security for its costs which it estimated at Kshs. 4,000,000.00. Vide a consolidated ruling dated 25th September, 2012 the arbitrator dismissed the Appellant's Application and allowed the Respondent's Application. The Appellant was directed to secure the Respondent's costs in the sum of Kshs. 2,500 000.00 by depositing the same in a joint interest account within 15 days.

2. Aggrieved by the said decision, the Appellant filed *Mombasa High Court Misc. Civil Application No. 390 of 2012* seeking that the said decision be set aside. The Respondent herein took a preliminary objection dated 13th December, 2012 against the said application on the ground that the application

amounted to an appeal against the decision of the Arbitrator; that the Court had no jurisdiction to entertain an appeal or any challenge to the said decision; and that the application offended the provisions of section 10 of the *Arbitration Act*, 1995. That preliminary objection was dismissed by Muya, J. on 4th November, 2013. In arriving at that decision, the learned Judge held that it was upon the Judge hearing the application to determine the said objections.

3. On 15th May, 2014, the said application was dismissed. In dismissing the said application, the learned Judge of the High Court (Kasango, J) found that the decision of the arbitrator was not an award and could not be challenged under the *Arbitration Act*. Accordingly, there was no provision in the Act for challenging before the Court a ruling under section 18 of the *Act* under which the application before the Arbitrator was brought. While appreciating that a ruling must measure up to the constitutional standards, the Learned Judge proceeded to find that the Appellant did not specify the constitutional provision that the decision violated. She also found that the Appellant failed to state why the Court should supervise the Arbitrator under article 165(6) of the *Constitution*. The Learned Judge found that whereas the Learned Arbitrator was alive to the fact that the Appellant was a foreign entity, he clarified that that fact was not the basis of his decision but rather that the Appellant did not show that it had the means to meet an award of costs since it did not disclose what assets, if any, it had either in Kenya or in Rwanda. Accordingly, the Learned Judge found no basis for interfering with the exercise of the discretion by the Learned Arbitrator. Having found that the Court can only intervene in arbitral process as provided under the Act, the Court declined to reconsider or re-evaluate the evidence submitted before the Learned Arbitrator.

4. Aggrieved by the said decision, the Appellant has moved this Court impeaching the said decision based on 5 grounds of appeal.

5. Before us, an objection was taken by the Respondent vide the application dated 19th May, 2015 regarding the jurisdiction of this court to hear and determine this appeal. It was contended that first, the Appeal was filed out of time and no application for extension of time has been filed to date; and secondly, the Appeal does not fall within the narrow and circumscribed jurisdiction of the Court as laid down by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Limited and another* [2019] eKLR.

6. It was submitted on behalf of the Appellant that the appeal is principally challenging the finding by the Learned Judge that the ruling of the arbitrator did not amount to an award capable of challenge before the High Court. In support of the Appellant's view that this Court has the jurisdiction to entertain this appeal, the Appellant relied on the Supreme Court decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR as holding that where a statute is silent with regard to the right of appeal, it is deemed that the statute confers a right of appeal. Consequently, it was submitted that this court has jurisdiction to hear and determine this appeal.

7. The Appellant further relied on article 50 of the *Constitution* which provides for the right to a fair hearing which according to it includes the right of appeal if one is aggrieved by a decision of a lower court. According to the Appellant the right to be heard and the right to appeal to this Court are one of the rights that cannot be limited as provided for under article 24 of the *Constitution*. Based on Article 164(3) of the *Constitution*, it was submitted that a right of appeal lies in the Court of Appeal from any decision made by the High Court, and that it does not lie in any organ of the Constitution to impose limitations on the will of the Kenyan people. In support of this position, reliance was placed on *DHL Excel Supply Chain Kenya Limited v. Tilton Investment Limited* [2017] eKLR and *Inco Europe Ltd v. First Choice Distribution* [2000] LLR Vol. 1 that the right to appeal to the Court of Appeal from a decision of the High Court can only be restricted by express statutory terms.

8. It was submitted that since clause 23.3 of the said agreement provided in the event of the failure by the East Africa Tea Trade Association, the same would be referred to arbitration "under the Laws of Kenya prior to any litigation in the High Court, as a Civil Matter", the parties intended to involve the court in every stage of their dispute where the arbitrator made a decision. It was therefore contended that the parties agreed that if any of them was dissatisfied by any decision made by the arbitrator, that party had a right to approach the court. The Court was therefore urged to uphold the mutual agreement between the parties and determine this appeal.

9. It was submitted that the Appellant and the Respondent chose arbitration as a mode of resolving their dispute but also reserved their rights to approach the High Court on the matter as a normal civil matter. Based on *Kenya Oil Company Limited & another v. Kenya Pipeline Company*, Civil Appeal No. 102 of 2012, it was the Appellant's contention that the parties envisioned that there might be need, in the course of arbitration, to refer determinations made therefrom to the High Court and to appeal the decisions made by the High Court to the Court of Appeal in light of the supervisory jurisdiction in article 165(6) and (7) of the *Constitution*. In this case, it was submitted that since the parties intended to refer matters to the High Court as a normal civil matter, the High Court erred in holding that it did not have jurisdiction to entertain the application filed by the Appellant.

10. It was further submitted that from the definition of an arbitral award in section 3(1) of the *Arbitration Act*, which includes an interim arbitral award as well as the definition of the word interim is in the *Black's Law Dictionary*, 8th Edition, an award can be contained in a ruling since to enforce it, the Respondent has to apply to the court for it to be adopted as an order of the court. It was therefore submitted that the High Court has jurisdiction, by virtue of section 35 of the *Arbitration Act*, to entertain an application for setting aside an arbitral award, upon proof of the specific instances stipulated thereon.

11. According to the Appellant, the application for security of costs filed by the Respondent before the arbitrator was solely anchored on the basis that the Appellant is a government entity in Rwanda which has no assets in Kenya and therefore, the Respondent will not be able to recover any costs from the Appellant which argument was accepted by the Learned Arbitrator. It was the Appellant's contention that this order is against the public policy of Kenya since the Respondent would have no difficulty in enforcing the award in Rwanda, which has a reciprocal status with Kenya under the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap 44 Laws of Kenya and Rwanda being part of the East Africa Community would honour any award against it as is subject to the East Africa Court of Justice (EACJ).

12. It was further submitted that the order made by the arbitrator would impede and infringe upon the Appellant's right under article 48 and 50 of the *Constitution of Kenya* as the order is an impediment to the Appellant's pursuit of justice in Kenya and that no such obstacle should be put on the Appellant's way. It was contended that by condemning the Appellant to pay security for costs simply because it is government entity in Rwanda is against the principles in article 10 of the *Constitution* and the High Court was therefore under a duty to set aside the ruling made by the arbitrator.

13. It was submitted that assuming that the High Court was right in dismissing the Appellant's application on the ground that it had no jurisdiction to interfere with the decision made by the arbitrator as the same did not amount to an award, the High Court was still entitled to determine the said application under section 7 of the *Arbitration Act* which empowers the Court to entertain a request for an interim measure of protection. According to the Appellant, under the said section, the High Court was only to treat the facts contained in the ruling as conclusive but determine the issues of law on the merits. However, the High Court held that it could only interfere with the arbitrator's findings of law if the

Appellant had appealed. Bearing in mind the finding by the High Court that the ruling made by the arbitrator was not an award, it was submitted that the decision made by the High Court is contra the provisions section 7 (2) of the *Arbitration Act* and that this fact alone is sufficient to warrant setting aside of the Judgment made by the High Court.

14. Consequently, this Court was urged to allow the appeal with costs of the appeal and those of the application before the High Court.

15. On behalf of the Respondent, it was submitted that the Appeal herein is incompetent for having been filed out of time without extension of time having sought and that there is no right to appeal hence the Court had no jurisdiction to hear the appeal.

16. According to the Respondent, the Judgment appealed against was delivered on 15th May, 2014 and according to the certificate of delay, the Appellant applied for typed proceedings on 23rd May, 2014 and the proceedings were supplied on 14th October, 2014. Though the period between 23rd May, 2014 and 14th October, 2014 was excluded in computing time, this Appeal was filed on 15th December, 2014 which was 10 days out of time i.e. 8 days between 15th May, 2014 and 23rd May, 2014 and 62 days between 14th October, 2014 and 15th December, 2014.

17. Based on the decision of the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute ofArbitrators-Kenya Branch (Interested Party)* [2019] eKLR it was submitted that this Appeal obviously falls outside of this Court's jurisdiction since the High Court did not set aside any Arbitral Award and that the jurisdiction of this Court does not arise where the High Court has merely upheld an Arbitral Award or decision. It was therefore submitted where a party who is unhappy with an Arbitral Award has had recourse to the High Court and the High Court has disagreed with him and upheld the Award, it would be contrary to law to allow this Court to reconsider the Arbitral Award.

18. It was submitted that the High Court did not rely on grounds outside section 35 of the *Act* in order to set aside an Arbitral decision. According to the Respondent, in its Application before the High Court, the Appellant went outside section 35 of the *Act* and cited alleged breaches of the *Constitution* which the learned Judge considered and found unmerited. In the Respondent's view, had the Appellant succeeded in relying on such grounds to upset the Award, the Respondent might have had a fight to appeal to this Court, but not the other way round.

19. The Respondent contended that the Judgment of the High Court cannot be termed as being grave or manifestly wrong. Bearing in mind that this Appeal is only in respect of the Applications for security of costs and security for the Appellant's claim which Claim is yet to be heard, it was submitted that no door of justice is closed merely because the Appellant is required to secure the Respondent's costs in the sum of Kshs. 2,500,000.00. It was contended that contrary to the Appellant's position, the learned Judge considered all the constitutional issues raised by the Appellant and found them not to have any merit. It the Appellant's view the holding by the learned Judge that the Arbitration Act did not foresee a situation where a decision of the Arbitrator on an Application for security for the Claim of for Security for Costs could be challenged as if it was an Arbitral Award remains correct in law and is in sync with the letter and spirit of the Arbitration Act aimed at ensuring that Arbitrations are concluded expeditiously. It was submitted that though the Appellant cited articles 159(3) and 165(6) of the *Constitution*, it did not demonstrate how the same were violated. According to the Respondent, the Appellant neither showed how the Arbitrator's Ruling is repugnant to justice nor did it demonstrate what wrong the Arbitrator did to attract the supervisory jurisdiction of the High Court. It was submitted that though the Supreme Court in the *Nyutu Agrovet Case* (*supra*) held that alleged breaches of the constitution cannot be raised in an Application for setting aside an Arbitral

Award under section 35 of the *Arbitration Act*, the High Court gave the Appellant more latitude than it deserved in considering all the allegations of breach of the Constitution.

20. According to the Respondent, Muya, J did not deal with the jurisdictional issues raised and reserved them for determination by the trial Court which eventually resolved them and by doing so, Kasango, J did not seek to overturn the decision made by Muya, J. It was further submitted that the Learned Judge correctly interpreted that the sections 10 and 35 of the *Arbitration Act* as having the effect of narrowing and circumscribing the jurisdiction of the High Court in considering Applications to set aside Awards. According to the Respondent, the Superior Court could not declare such sections as null and void when there was no such prayer before the Court and the Court was not addressed on such a prayer and in any event such decision could not be made where the Attorney General was not made a party.

21. Since the Learned Judge was not sitting on appeal against the decision of the Learned Arbitrator, she cannot be accused of having failed to consider whether the Arbitrator erred in his appreciation of facts and law relating to Applications for security for costs and security for claim under section 18 of the *Arbitration Act*. It was in any case submitted that it is not true that the High Court failed to Consider the said matters.

22. The Respondent also took issue with some prayers in the memorandum of appeal and submitted that the prayer for the declaration of unconstitutionality of sections 10 and 35 of the *Arbitration Act* is not available to the Appellant, the same having been raised for the first time on Appeal and without any basis. It was similarly submitted that the argument that the Arbitration Clause between the parties allowed the parties to approach the Courts and the Arbitral Tribunal simultaneously or concurrently was being raised for the first time before this Court and only in the final Submissions. The said issue was neither raised before the High Court nor was it raised in the grounds of appeal hence the Appellant cannot be allowed to advance such a ground at this stage as that would be immensely prejudicial to the Respondent. It was contended that this line of submission has no merit since there is no way parties could intend to have parallel jurisdictions so that one issue can be interrogated by either the Arbitral Tribunal or the High Court or both. If that were allowed to happen, it was contended, an arbitration would never come to an end. In the Respondent's view, the law does not allow parties to make such a liberal choice of jurisdiction and that the law does not allow arbitration to be used merely as a precursor to litigation in the manner the Appellant is suggesting.

23. It was the Respondent's case that the suggestion that the High Court should have considered the Application before it as if it was an Application for interim measures of protection under section 7 of the *Arbitration Act* is a brand new argument that was not presented before the High Court, hence cannot be used to reverse the decision of the High Court. In any event, security for costs and for a claim is not one of the interim measures of protection contemplated under section 7 of the *Act* since applications for Security for Costs and for Claim are governed by a different section, namely, section 18 of the *Act* which does not provide for recourse to the High Court against the decision of the Arbitrator. In any event, the Appellant sought to overturn the Arbitrator's findings of facts, a course expressly prohibited under section 7 of the *Act*.

24. In conclusion it was urged that the Appeal herein has no merit, and ought to be dismissed with costs.

Analysis and Determination

25. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "... to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

26. Since the issue of jurisdiction has been raised, this Court is enjoined to deal with the same before dealing with the merits of the appeal. That is in line with the decision of this Court in *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1 in which Nyarangi, JA expressed himself as follows:

> "...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

27. See also *Owners and Masters of the Motor Vessel "Joey" v Owners and Masters of the Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 and the supreme court decision in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others*, Civil Appl. No. 2 of 2011.

28. In this case, the Appellant has relied on the decision of the supreme court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [20191 eKLR as the authority for submitting that this Court has the jurisdiction to entertain this appeal. According to the Appellant the said decision now opens the way to parties to appeal against the decisions of the High Court arising from its powers under section 35 thereof. The Appellant has further contended that article 164(3) of the *Constitution* grants to this Court, the jurisdiction to entertain appeals from the High Court without restrictions. However, in *Nyutu's Case*, the supreme court was categorical that the said article does not confer a right of appeal to any litigant. According to the said Court:

> "It only particularises the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate Court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal. There is thus no direct access to the Court of Appeal by all and sundry. As such, article 164(3) defines the extent of the powers of the Court of Appeal but does not grant a litigant an unfettered access to the Court of Appeal."

29. The Court went on to hold, on the authority of section 3(1) of the *Appellate Jurisdiction Act* that jurisdiction and the right of appeal are clearly delineated to the extent that jurisdiction is only exercised where the right of appeal exists. The supreme court agreed with the opinion of Mwera, JA in the decision that gave rise to the appeal before it that a party who desires his appeal to be heard before the Court of Appeal has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal but that such leave does not constitute the right of appeal which must precede leave. The supreme court, while appreciating that unhindered access to courts is one of the key components of access to justice, opined that statutory limitations on appeals does not necessarily infringe on that right and that each case must be considered on its

own circumstances. The Court therefore found that sections 10 and 35 of the *Arbitration Act* are not unconstitutional on that score. It was also the Court's view that alleged breaches of the *Constitution* cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of the *Constitution* are properly governed by articles 165(3) and 258 of the said *Constitution* and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the *Arbitration Act*.

30. The supreme court then held 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, a circumscribed and narrow jurisdiction which should be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.

31. In our view the decision of the supreme court in the above matter substantially disposes of the Appellant's contentions as addressed in their submissions. In the matter before us, the High Court did not set aside an arbitral award. In fact, it was the Court's view that there was no award in the first place. Having not set aside the decision of the Learned Arbitrator, it follows that the case did not fall within the narrow limits identified by the supreme court under which a person may appeal to this court from the decision of the high court made pursuant to section 35 of the *Arbitration Act*.

32. We agree with the Respondent that the issues such as whether or not there was a consent by the parties to resort to court process; whether the Learned Judge ought to have considered the matter before her as an Application for interim measures of protection under section 7 of the *Arbitration Act*; and the constitutionality of sections 10 and 35 of the *Arbitration Act* were new arguments that were not presented before the High Court. We also find that the issue of Kasango, J sitting on appeal against the decision of Muya, J was not sufficiently covered before us. In any case, we agree with the Learned Judge (Kasango, J) that Muya, J did not determine the jurisdictional issues that were raised before him but left the same to be determined by the Judge who would eventually hear the matter. Although there was an allusion to breach of the articles of the *Constitution*, again this point was not nor properly expounded before the Learned Judge or before us. In any case, the holding by the supreme court in *Nyutu's Case* (supra) that an application for setting aside an arbitral award is not the right forum to raise constitutional matters.

33. In light of our findings above, we do not consider it necessary to determine whether or not the ruling by the Learned Arbitrator was an award for the purposes of an application for setting aside under section 35 of the *Arbitration Act.* Suffice it to say that the matter before us does not fall within narrow strictures identified by the supreme court under which an appeal to this court is permissible.

34. Consequently, we find no merit in this appeal which we hereby dismiss with costs to the Respondent.

35. It is so ordered.

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

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR