Godson Sixty One School Limited v Symbion Kenya Limited (Civil Appeal 158, 159 & 160 of 2020 (Consolidated)) [2023] KECA 900 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KECA 900 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 158, 159 & 160 OF 2020 (CONSOLIDATED)

DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA

JULY 24, 2023

BETWEEN

GODSON SIXTY ONE SCHOOL LIMITED ..... APPELLANT

AND

SYMBION KENYA LIMITED ..... RESPONDENT

(Appeals from the rulings/orders of the High Court of Kenya at Nairobi Commercial and Admiralty Division (Mwongo, J.) dated 2nd May, 2017, 13th April, 2018, (Tuiyott, J.) and 7th December, 2018 (Tuiyott, J.inNairobi HC Comm. Misc. Civil Cause No.131 of 2016))

JUDGMENT

1. This judgment determines three consolidated appeals, namely, Civil Appeal Nos. 158 of 2020, 159 of 2020 and 160 of 2020. The common thread in the three appeals is that they all arise from three separate rulings delivered in the same suit, which is Nairobi High Court Miscellaneous Civil Cause No 131 of 2016 (Commercial Division). Specifically, Civil Appeal No. 158 of 2020 is against a ruling delivered on 2nd May, 2017 (Mwongo, J.) Civil Appeal No. 159 of 2020 seeks to overturn a ruling delivered on 13th April 2018 (Tuiyott, J.) (as he then was), while Civil Appeal No. 160 of 2020 is against a ruling also delivered on 7th December, 2018, by Tuiyott, J.

2. In order to put this protracted litigation into a proper perspective, a brief account of its genesis is useful. The foundation of the dispute is a written agreement entered into between the parties herein in 2011. Under the said contract, the appellant contracted the respondent, who is an Architect, to design and construct a high-end school in Karen area. The agreement contained a dispute resolution clause which provided that in the event of a dispute, controversy or claim out of or related to the contract or breach thereof, and the parties are unable to settle it through good faith negotiations as therein provided, the dispute shall be referred to arbitration in conformity with the said clause.

3. A dispute arose between the parties relating to the respondent's payment. In conformity with the arbitration clause, sometimes in March, 2013, the dispute was referred to a sole arbitrator, Mr Paul Ngotho. On 2nd June, 2015, the appellant filed a challenge before the arbitrator seeking the arbitrator's disqualification. However, the said challenge was dismissed. On 3rd February, 2016, while the parties were waiting for the final award, the appellant filed another challenge before the arbitrator seeking his disqualification, accusing him of failure to disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence. By a ruling published on 25th February, 2016, the arbitrator dismissed the challenge. On the same day, the arbitrator published the final award and costs of the award, ultimately concluding the arbitration.

4. *Vide* an e-mail application dated 29th February, 2016; the appellant's counsel requested the tribunal to note that he was not acting for the respondent in the arbitral proceedings. On 5th March, 2016, the arbitrator delivered two rulings. One on additional award and the other dismissing the said e-mail application.

5. Aggrieved by the arbitrator's ruling dated 25th February, 2016, dismissing the challenge, the appellant approached the High Court by an application dated 23rd March, 2016, beseeching the court to:

   (a) Uphold the challenge seeking the arbitrator's removal from the proceedings and declare the arbitral proceedings a nullity.

   (b) Declare the final award and costs award dated 25thFebruary 2016 and all other rulings, orders and awards issued by the arbitrator void and,

   (e) the arbitral proceedings to start de novo before a new arbitrator appointed by the parties, and in the event of not agreeing, by the court.

6. In a ruling dated October 6, 2016, Ochieng, J. (as he then was), made a pertinent comment on the timing of the application. He stated:

> "22. 1n determining this application, the court first reminds itself that the arbitrator did deliver his final arbitral award and his costs award on 25th February 2016.
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> 24. 1 am unable to appreciate how the disqualification or the removal of the arbitrator, after the arbitrator had delivered his final arbitral award, would have any bearing on the proceedings, which had been concluded. In my considered opinion, the applicant may have moved the court a little too late in the day."

7. The learned judge examined the provisions of section 14 of the *Arbitration Act* (the Act) and observed that since the appellant's challenge before the arbitrator was rejected, under section 14(5) of the Act, it ought to have challenged the decision in the High Court. The learned judge dismissed the application stating:

   (a) the arbitrator had already given the final award and an award for costs;

   (b) the arbitrator could not be condemned without being heard because the applicant did not make him a party to the application.

8. Aggrieved by the above ruling, the appellant moved the High Court by an application dated 15th November, 2016, brought under Articles 50 (1) and 159 of the *Constitution*, section 14 of the Act, sections 1A, 1B, 3, 3A and 80 of the *Civil Procedure Act*, and Order 45 of the *Civil Procedure Rules*. In the main, the appellant prayed that the Court reviews and/or sets aside the orders issued by Ochieng,

J. on 6th March, 2016, and in place grant the orders sought in the application dated 23rd March, 2016. The appellant also prayed for costs. In the same application, the appellant also prayed for recusal of Ochieng, J. from the case and that the matter be heard by a bench (sic). However, during the hearing, the parties by consent agreed that the application proceeds before Mwongo, J.

9. In his ruling dated 2nd May, 2017, the subject of Civil Appeal No. 158 of 2020, Mwongo, J. underscored the finality of High Court decisions made under sections 14 (5) & (6) of the Act. The learned judge stated as follows:

> 23. "..., the primeval and enduring fundamental principles of arbitration, accepted and practiced worldwide over numerous centuries, hold that non mandatory arbitration is, firstly, an inherently complete mechanism of dispute resolution alternative to the state court litigation system; therefore, secondly, that intervention by courts in the arbitral process is extremely limited except where parties agree or the law so stipulates; thirdly, that its essence involves party autonomy, namely, that parties in appropriate cases can choose or ask someone to choose an independent third person or persons to arbitrate or adjudicate over their dispute using a process they mutually agree to; fourthly, that the parties agree that the decision of the third person(s) is binding on them; and finally, that the arbitrator is not bound by complex court litigation procedures and processes or the strict laws of evidence."

10. Further, the learned judge stated as follows:

> " 36. The intent of arbitration under the Act is further that the arbitration award is final and binding on the parties, unless the parties agree otherwise (see section 32A). Accordingly, in the majority of limited occasions where the court is entitled under the Act to intervene in arbitration – through an application made to court – and to make a decision in respect of such application, by and large the court's decision is generally stated as final and not subject to appeal (see for example sections 12(8), 14(6), 15(3), 16A(3), 17(7) and section 32B(6))."

11. Further, the learned judge dissected the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rules (1) & (2) of the Civil Procedure Rules and ruled out the applicability of the said provisions to decisions made under section 14 of the Act. He stated:

> " 40. It is clear that the sort of review contemplated under the CPA must be a review in respect of which the CPA itself allows an appeal but where one has not been preferred, or where the CPA itself does not allow an appeal. Unless either of these two conditions can be shown in respect of the review sought by the applicant, review cannot be available. In the present case, the applicant has not referred to any provision of the CPA which either allows or prohibits an appeal from the decision of the court in respect of a challenge under section 14 of the Arbitration Act. On the contrary, what we have is a provision prohibiting appeal in the Arbitration Act and absence of a provision allowing review."
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> 53. In light of all the foregoing, I am not persuaded that the review provisions under Section 80 of the CPA and under Order 45 of the CPR apply for review in respect of the court's decision under section 14 of the *Arbitration Act*. I so find and hold and, accordingly, the application for review herein fails."

12. In summation, the learned judge was clear that the section 14 of the Act had no provision for review and that the application lacked merits. He concluded:

> "71. The upshot of my determination herein is that on the question whether a review of the learned judge's ruling lies, I find and hold that there is no provision for review of a judge's ruling under section 14 of the *Arbitration Act*.
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> 72. Further, even had review been an available option, and having analyzed the Learned judge's ruling, I do find on the merits of the application that the review is unsuccessful."

13. Aggrieved by the above decision, the appellant lodged Civil Appeal No. 158 of 2020 citing a whopping 15 grounds of appeal, which are essentially repetitive and narrative. In summation, the appellant's grounds are:

    (a) the decision sanctioned violation of its right to a fair trial and breach of natural justice.

    (b) the learned judge erred in holding that the High Court had no jurisdiction to entertain a matter determined under section 14 of the Act and by determining the matter on merit despite finding that he had no jurisdiction and by limiting the jurisdiction of the High Court.

    (c) the learned judge failed to consider that Ochieng, J. did not consider the arbitrator's failure to disclose conflict of interest.

    (d) the learned judge failed to consider that the arbitrator had refused to participate in the proceedings.

    (e) the decision was not based on law or the facts, and that the judge misinterpreted the law.

14. Based on the foregoing grounds, the appellant prays that:

    (a) the appeal be allowed with costs to the appellant;

    (b) the review application be granted as prayed; and this Court grants such further or other orders it deems fit.

15. In Civil Appeal No. 159 of 2020, the appellant seeks to upset a ruling delivered by Tuiyott, J. on 13th April, 2018, dismissing its application dated 23rd May, 2016. The application was anchored on the provisions of Articles 50 (1) and 159 of the *Constitution*, sections 19 and 35 of the *Arbitration Act*, sections lA, lB, 3 and 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules* 2010 and all other enabling provisions of law. The appellant prayed:

    a. That this Court be pleased to set aside the final arbitral award and Costs Award made in the arbitral proceedings dated 25th February, 2016;

    b. That this Court be pleased to set aside any and all rulings and awards and set aside and/or vacate any orders made in the arbitral proceedings;

    c. That this Court be pleased to declare the arbitral proceedings a nullity;

    d. That this Court be pleased to direct that arbitral proceedings commence de novo between the parties with a new arbitrator to be appointed by the agreement of the parties within such period as the Court shall specify;

e. That failing such agreement between the parties as to the appointment of an arbitrator this Court be pleased to appoint a new arbitrator to arbitrate the dispute between the parties;

f. That costs of this application be provided for.

16. We note that prayers (c) to (e) above are a replication of the prayers sought in the application dated 23rd March, 2016, which was considered and dismissed by Mwongo, J. in a ruling dated 2nd May, 2017, the subject of Civil Appeal No. 158 of 2020. It will suffice for us at this stage to mention that it was not open for the appellant to seek the same prayers, which had been considered and declined in a previous application in the same suit between the same parties involving the same dispute.

17. In his ruling dated 13th April, 2018, the subject of this appeal, Tuiyott, J. found no merit in the application dated 23rd May, 2016, and dismissed it. Aggrieved by the said decision, the appellant instituted Civil Appeal No. 159 of 2020 citing the following grounds:

(a) the decision deprived the appellant its constitutional right to a fair hearing.

(b) the appellant had no reasonable opportunity to appoint counsel of its choice or prepare his case.

(c) the appellant was unable to present its case.

(d) the decision is not based on law or facts presented to the court.

(e) the judge failed to consider and make a finding on the arbitrator's lack of impartiality, independence and professional misconduct.

(f) the judge failed to consider the interests of justice and the appellant's rights.

18. In the instant appeal, the appellant prays that:

a. The appeal be allowed;

b. The final arbitral award and costs award made in the arbitral proceedings dated 25th February 2016 be set aside;

c. Any and all rulings and awards and/or any orders made in the arbitral proceedings be set aside and/or vacated;

d. The arbitral proceedings be declared a nullity;

e. The arbitral proceedings commence de novo between the parties with a new arbitrator to be appointed by the agreement of the parties within such period as the Court shall specify;

f. Failing agreement between the parties as to the appointment of an arbitrator the matter be remitted to the High Court to give directions as to the appointment a new arbitrator to arbitrate the dispute between the parties;

g. The respondent bears the costs of this appeal;

h. The respondent bears the costs of the arbitration;

i. The respondent bears the costs of all the High Court proceedings related to the Arbitration;

j. Such further or other consequential orders as this Court deems fit.

19. In Civil Appeal No.160 of 2020, the appellant seeks to overturn a ruling delivered by Tuiyott, J. dated 7th December, 2018, in which the learned judge allowed the respondent's application dated 16th March, 2016, seeking recognition and enforcement of the award. The bulk of the grounds of appeal are a replication of the grounds cited in the above 2 appeals. It will add no value to rehash them here. The appellant also avers that the learned judge erred in law by holding that the issues before the Court were *res judicata*;

20. The appellant prays that the appeal be allowed, the recognition and enforcement application be dismissed with costs, the respondent bears the costs of the appeal, the arbitration, and the High Court proceedings and such further orders as this court may deem fit.

21. When this matter came up for virtual hearing before us on 28th March, 2023, Mr Misaro, advocate holding brief for Mr Amin, the appellant's counsel applied for an adjournment on grounds that Mr Amin who had the conduct of this matter was out of the country attending his father-in-law's funeral. However, the respondent's counsel Mr Kiplangat, strenuously opposed the adjournment citing the long history of this dispute and the fact that he had notified the appellant's counsel that he would be opposing the adjournment, counsel had ample time to make alternative arrangements. The Court refused the adjournment and ordered the hearing to proceed as scheduled. Mr Misaro and Mr Kiplangat adopted their written submissions and left it to the Court to render its judgment.

22. We have considered the record of appeal, the parties' submissions in support of their respective positions and the authorities cited.

23. The bulk of the issues involved cut across the three appeals, understandably because the impugned rulings arise from the same dispute and the facts and circumstances are closely inter-connected. However, where we find issues specific to a particular appeal, we shall say so. For example, specific to Civil Appeal number 158 of 2020 is an observation by Ochieng, J. in the ruling dated 6th October, 2016, that the appellant filed its application dated 23rd March, 2016, challenging the arbitrator's decision dismissing its application seeking the disqualification of the arbitrator after the arbitrator had rendered the final award.

24. The above observation brings into fore a pertinent question of law, which is whether the plea beseeching the High Court to uphold the appellant's challenge to the arbitrator was already moot. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. This is because the matter will have been rendered purely academic. Repeatedly, courts have stated that a court of law should not knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose.

25. The question here is the timing of the application. It is common ground that after dismissing the appellant's challenge, the arbitrator rendered the final award and award on costs. Section 14 (1) and (2) of the Act provides as follows:

    1. Subject to sub section (3), the parties are free to agree on a procedure for challenging an arbitrator.

    2. Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being

challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

26. The phrase "unless the arbitrator who is being challenged withdraws from office..." in the above section implies that the provision contemplates a situation whereby the arbitrator is in office. Clearly, the above section provides for the removal of an arbitrator from office, not after he has become functus officio. Once an arbitrator delivers the final award, he ceases to be in office for the purposes of sections 13 and 14 of the Act. It follows that the prayer seeking to remove the arbitrator from office after he had rendered the final award was moot and an academic exercise.

27. Our above view is reinforced by section 32A of the Act which underscores the effect of an award as follows:

> 32A. 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.

28. In terms of the above provision, an award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act. The parties before us had not agreed otherwise, so, the appellant could not benefit from the above exception. The import of the above provision is that the award could only be set aside in the manner provided under the Act. The grounds for setting aside an award are provided under section 35 of the Act, which is the exclusive recourse to a court against an arbitral award. Accordingly, purporting to review the decision and seeking to substitute the award with an order setting aside the award in a manner not contemplated by section 35 is an illegality. This is because the procedure adopted and the prayers sought offended the clear provisions of sections 10, 32A and 35 of the Act.

29. The other issue specific to Civil Appeal No. 158 of 2020 is that the appellant in its application dated 15th November, 2016, invoked the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules* in seeking to review the ruling delivered by Ochieng, J. on 6th October, 2016. Defending the choice of the *Civil Procedure Act* and Rules, the appellant's counsel argued that even though section 14 of the Act does not permit an appeal, it does not exclude a review. On his part, the respondent's counsel submitted that as provided in section 10 of the Act, the Act is a self-contained statute and that there is no jurisdiction to look outside the Act.

30. In our respectful view, the appellant may have confused arbitration under the *Arbitration Act* (which is consensual, and Court intervention is limited except in circumstances permitted under the Act) on one hand, and arbitration under section 59 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, 2010, which permits the court a higher latitude to intervene.

31. In the ruling dated 2nd May, 2017, the subject of Civil Appeal No. 158 of 2020, Mwongo, J. addressed his mind on the applicability of the *Civil Procedure Act* and the Civil Procedure Rules in arbitration matters as follows:

> " 30. What do the statutes say" First, it is important to note that in Kenya, there are two substantive routes under which arbitration may generally be commenced and employed as a dispute resolution mechanism. The first is arbitration through court as court ordered or court referred arbitration. It is commenced under Part VI, "Special Proceedings" of the *Civil Procedure Act* in Section 59 and Order 46 of the *Civil Procedure Rules*. Section 59 CPA provides: "All

references to arbitration by an order in a suit and all proceedings thereunder shall be governed in such manner as may be prescribed by rules" And Order 46 of the relevant rules, the Civil Procedure Rules provides: "Where in any suit the parties ...agree that any matter in difference between them shall in such suit be referred to arbitration, they may at any time before judgment is pronounced apply to the court for an order of reference.

31. This is the contextual framework of arbitration in Kenya by court order as stated by the Court of Appeal in *Kenya Shell Limited v Kobil Petroleum Limited*, Civil Appeal (Nairobi) No 57 of 2006 where the court said: -

> "Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the *Civil Procedure Rules* or provide for it in contractual obligations, in which event the A*rbitration Act*, No 4 of 1995 (the Act) would apply and the courts take a back seat."

32. For ease of characterization, it may thus be safe to refer to arbitration when conducted under the provisions of special proceedings of court as court-annexed arbitration. In this type of arbitration under Order 46, the court has a more extensive involvement in the arbitral process, for example, setting the time for making the award (see rule 3(1)), issuing directions on the statement of a special case for the opinion of the court (see rule 12), and the court superseding the arbitration where the award is set aside (see rule 16(3)).

33. On the contrary, arbitration that is wholly consensual at inception proceeds under the *Arbitration Act*. Such arbitration emanates from an arbitration agreement entered into in a contract or other writing by the parties in terms of section 4, signifying the clear intent of the parties'(sic) to resolve their dispute through arbitration. It also signifies the parties' intent that should any legal proceedings be commenced in court by any of the parties the proceedings should be stayed by the court to enable arbitration to proceed as provided under Section 6 of the Act. The Act provides for both the substantive and procedural law for the arbitration. Further, section 10 has the all- important provision that: "Except as provided in this Act, no court shall intervene in matters governed by this Act." The clear intention of the statute is that the court is to be involved in a consensual arbitration only under the limited circumstances prescribed in the Act or the Rules made under the Act.

34. The similar provision in the Model Law to section 10 of the *Arbitration Act* on the extent of court intervention, is Article 5 which states as follows: "In matters governed by this Law, no court shall intervene except where so provided in this Law." (emphasis added)

32. The scheme of section 14 must be read in the context of the substratal legislative policy of minimizing judicial intervention in arbitral proceedings. In terms of section 10 of the Act, no judicial authority would intervene in arbitral proceedings except where it is so provided. The legislative intent is clear that the arbitral proceedings are not to be impeded except as provided under the Act. Therefore, the invocation of the *Civil Procedure Rules* and the *Civil Procedure Act* was an impermissible way of circumventing clear statutory edicts under the Act limiting court intervention.

33. In any event, by agreeing to arbitration, parties to a dispute necessarily agree that the provisions of the Act and nothing else will determine the fairness of the hearing. Typically, they agree to waive the right of appeal or review, which in context means that they waive the right to have the merits of their dispute re-litigated or re-considered. 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 ground of appeal, review and common law or otherwise. Accordingly, we entirely agree with the learned judge that the appellant improperly invoked the provisions of the *Civil Procedure Rules* and the *Civil Procedure Act* by seeking to review the said decision.

34. We now address the aspects that touch on the three appeals. Notably, the appellant's submissions in support of the three appeals are substantially a regurgitation of the grounds of appeal cited in the three appeals. Therefore, it will add no value to rehash them here. The key highlights of the appellant's submissions are that the learned judges perpetuated the injustice caused to the appellant by the arbitrator by violating the appellant's right to a fair hearing under Article 50(1) of the *Constitution*. The appellant argued that the judge failed to properly consider the relevant provisions of law, that he misinterpreted the law and the facts, and he failed to take into account all the facts. According to the appellant, the learned judge failed to appreciate that the rulings failed to address the undisclosed conflict of interest on the part of the arbitrator due to his close relationship with the respondent's counsel. The appellant also accused the judge of not considering the arbitrator's misconduct and manifest bias against the appellant. The appellant accused the learned judge of favoring the respondent and improperly exercising his discretion and violating the rules of natural justice. It was the appellant's submission that the learned judge failed to consider its arguments.

35. It was also argued that the learned judge erred in not appreciating that Article 165 of the *Constitution* vests the High Court with supervisory jurisdiction. It contended that the learned judge elevated the Act above the Constitution by holding that the *Civil Procedure Act* does not apply to arbitration proceedings thereby disregarding rule 11 of the Arbitration Rules, 1997. Further, the learned judge was faulted for holding that the time for challenging the arbitrator had lapsed, and for holding that the issues relating to the challenge of the arbitrator and the enforcement of the award were res judicata.

36. In addition, in Civil Appeal No. 158 of 2020, the appellant faulted the learned judge for proceeding to determine the application on merit despite finding that he had no jurisdiction. In the three appeals, the faulted the Court for failing to set aside the award on grounds of bias on the part of the arbitrator and failing to grant the appellant the opportunity to engage counsel. The appellant faulted the judges for exercising their discretion improperly. Specific to Civil Appeal No. 160 of 2020, the trial Court was faulted for not citing any authorities or legal principles in support of his legal reasoning.

37. In support of the three appeals, the appellant's counsel provided a long list of decided cases and statutes, though many of them were not referred to in the submissions. We have taken time and considered the cited decisions and the law.

38. Addressing Civil Appeal No. 158 of 2020, Dr. Kiplagat, the respondent's counsel, submitted that section 14 of the Act expressly prohibits an appeal. Counsel argued that even if this Court was to assume jurisdiction, the appeal has no merits because no Notice of Appeal was filed against the substantive ruling rendered on 6th October 2016. Counsel submitted that a review or appeal is not available where there is no right of appeal. He maintained that the Act expressly limits periods for challenging objections against the arbitrator, so the appellant's objections are out of time. Counsel argued that sections 13 and 14 of the Act bar an appeal to the Court of Appeal.

39. Dr. Kiplagat pointed out that the 14 days allowed for lodging a Notice of Appeal expired on 21st October, 2016. As a result, he urged this Court to down its tools and cited *Owners of the Motor Vessel*

"Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, and *Yu Sung Construction Limited v The AG of Southern Sudan & 2 Others*, Civil Appeal Appl. No. E074 /2021. Counsel maintained that the exception created by the Supreme Court decisions in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*, [2019] eKLR and *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR is not available where there is an express statutory bar, as in this case. Further, he submitted that leave to appeal was not obtained and cited the Supreme Court in *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR.

40. Dr. Kiplagat described the application in Civil Appeal No. 158 of 2020 as an appeal disguised as a review, which he submitted is impermissible. He relied on *Serephen Nyasani Menge v Rispah Onsase*, Kisii High Court Misc. Appl. No. 5 of 2018 and *Mary Njuguna v William Ole Nabala & 9 Others*, Malindi Civil Appeal No. 100 of 2016.

41. Answering the appellant's submission that the learned judge erred in determining the merits of the application, counsel submitted that there is no jurisdictional bar to a judge addressing and determining alternative reliefs.

42. He submitted that the appeals do not meet the tests laid down by the Apex Court in the *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), (*supra*) and *Synergy Industrial Credit Limited v Cape Holdings Limited*(*supra*) . He submitted that the window of appeal in arbitration cases created by the Supreme Court in the above cases is not as open as the appellant seems to suggest, nor did the Apex Court eliminate the requirement for leave to appeal to the Court of Appeal in arbitration decisions. Counsel submitted that a party must satisfy the tests laid down by the Supreme Court to merit leave to appeal to the Court of Appeal.

43. Counsel argued that even if this Court were to entertain the appeal, a second appeal cannot entertain the issues of facts presented before the arbitrator as urged in these appeals. Counsel cited the Court of Appeal decision in *Synergy Industrial Credit Limited v Cape Holdings Limited Synergy* (2020) eKLR in support of the finding that an erroneous finding of law or fact is not a ground upon which a court may set aside an award because courts cannot consider merits of an award. Counsel submitted that the grounds cited by the appellant are an invitation to this Court to consider the merits of the three decisions. He also submitted that a misinterpretation of statute or facts cannot be said to be against public policy and relied on the *High Court decision in Christ For All Nations v Apollo Insurance Co. Ltd* [2002] 2 EA.

44. From the parties' diametrically opposed positions, we gather two germane issues, which are preliminary in nature, thus requiring to be disposed first. These are-

    (a) whether failure by the appellant to seek and obtain leave to appeal to this Court renders these consolidated appeals incompetent.

    (b) whether the three appeals fall within the ambit of exceptional circumstances contemplated by the Supreme Court in the *Nyutu case*. Dr. Kiplagat urged this Court to find that it has no jurisdiction and down its tools. On his part, the appellant's counsel argued that Article 165 of the *Constitution* vests this Court with immense jurisdiction to address these appeals. He faulted Mwongo, J. for elevating the provisions of the Act above the Constitution.

45. Undeniably, for a long time, the issue whether a right of appeal accrues automatically from decisions of the High Court under section 35 of the Act remained contentious and unsettled by our courts. Section 35 provides that recourse to the High Court against an arbitral award is through an application for setting aside the award. Upon such an application, the High Court may set aside the award if any of the grounds listed in section 35 (2) (a) of the Act are proved. The grounds are:

(a) a party to the arbitration agreement was under some incapacity;

(b) the arbitration agreement is not valid under the law to which the parties have subjected it or the laws of Kenya.

(c) the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings.

(d) the arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration.

(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the making of the award was induced or affected by fraud, bribery, undue influence or corruption.

46. Under section 35 (2) (b), the High Court may also set aside the award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya or the award is in conflict with the public policy of Kenya.

47. The question whether a right of appeal under section 35 of the Act exists was accorded prominence by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* (*supra*). In the said case, the Apex Court decided that an appeal may lie to the Court of Appeal against a decision of the High Court made pursuant to section 35 of the Act upon grant of leave in exceptional cases.

48. Unequivocally, the majority of the Supreme Court stated:

> "(71) We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the *Constitution* 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus, our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And, hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.
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> (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."
>
> "[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction." (Emphasis added)

49. From the above jurisprudence, it is correct to say that the law is settled that leave to appeal to this Court in decisions under section 35 of the Act is a requirement. The appellant never sought and obtained leave either from the High Court or from this Court. On this ground, Civil Appeal No. 159 of 2020 collapses.

50. The other important point to emphasize is that not every decision of the High Court in matters governed by the Act is appealable to the Court of Appeal. The Apex Court in *Synergy Industrial Credit Limited v Cape Holdings Limited* (*supra*) clarified that a decision not anchored on section 35 of the Act is not appealable to the Court of Appeal. It stated as follows:

> "(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."(Emphassis added).

51. The foregoing being the position, it follows that Civil Appeal numbers 158 of 2020 and 160 of 2020 which are not anchored on section 35 fall for dismissal.

52. Notwithstanding our findings, we shall proceed to address the question whether the grounds cited in the appeals fall within the ambit of the exceptional circumstances contemplated in the *Nyutu* case. In that matter, the Supreme Court was emphatic that the jurisdiction to entertain appeals in arbitration matters should be exercised carefully so as not to open a floodgate of appeals thus undermining the very essence of arbitration. It stated that such circumscribed appeals may only be allowed to address process failures as opposed to the merits of the arbitral award itself. We have already held that the arguments mounted by the appellant in support of Civil Appeal No. 158 of 2020 cannot surmount the finality clause in section 14 (6) of the Act. Further, in *Synergy Industrial Credit Limited v Cape Holdings Limited* (*supra*) the Supreme Court held that a decision not anchored on section 35 of the Act is not appealable to the Court of Appeal. The test in this decision renders Civil Appeal Numbers 158 of 2020 and 160 of 2020 unsustainable.

53. The only ground that comes close to process failure is the argument that the impugned ruling(s) violated the appellant's Article 50 rights and the principles of natural justice. However, the record

shows that in all the proceedings leading to the three appeals, the appellant was heard before the arbitrator and before the High Court.

54. In all fairness, we find no violation of the Constitution or the appellant's constitutional rights as claimed. Courts abhor the practice of parties converting every issue into a constitutional question and filing suits or framing grounds of appeal disguised as constitutional issues when in fact they do no not fall anywhere close to violation of constitutional rights or the Constitution. The learned judge(s) simply upheld the provisions of the Act after according both parties a hearing. Accordingly, the attempt to seek refuge in the circumscribed window opened by the Apex Court in the *Nyutu* case fails.

55. It is also important to mention that none of the three appeals fall 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).

56. An appeal 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 this Court grants leave to appeal. In rendering the impugned rulings, the High Court was exercising its jurisdiction under sections 14 (5) and (6), 35, 36 and 37 and not section 39 (1) & (2) of the Act.

57. There was no prior agreement between the parties as provided under the above section, nor was such an argument urged before us. (See this Court's decision in Kenyatta International Convention Centre v Congress Rental South Africa (2020) eKLR and Okeno & Sons Building Contractors v Bukura Agricultural College (2018) eKLR.)

58. Having found that the learned judges were exercising their jurisdiction under sections 14 (5) and (6), 35, 36 and 37 and not section 39 (1) & (2) of the Act, we are guided by the Supreme Court decision in Nyutu case that judicial intervention in matters not specifically provided by the Act can only be countenanced in exceptional instances.

59. In conclusion, the issues discussed above, namely, the question of leave, and the absence of a right to appeal in matters governed by the Act touch on the competence of the three consolidated appeals and this Court's jurisdiction to entertain the appeal. Having found that leave was not sought and obtained as required; that the appeals do not meet the narrow test allowed by the Apex Court in the Nyutu Case; and, that the appeals do not fall under section 39 of the Act, the only order available from this Court is to dismiss these three appeals, which we hereby do. Having so decided, we find no reason to delve into the merits of the appeals. The appellant shall pay to the respondent the costs of the consolidated appeals, the costs of the proceedings in the High Court and the arbitral proceedings.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

D. K. MUSINGA, (P)

.....

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